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[1953] I M.L.J.
January—June.

PUBLISHED BY
MR. N. RAMARATNAM, M.A., B.L.
AND
PRINTED AT THE MADRAS LAW JOURNAL PRESS,
MYLAPORE, MADRAS 4.

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1953.

JUDGES OF THE HIGH COURT.

JANUARY—JUNE, 1953.

Chief Justice.

The Hon'ble Mr. P. V. Rajamannar, B.A., B.L.

Puisne Judges.

The Hon'ble Mr. Justice P. Satyanarayana Rao, M.A., M.L.
" " " P. Govinda Menon, B.A., B.L.
" " " K. Subba Rao, B.A., B.L.
" " " P. Rajagopalan, I.C.S.
" " " Ch. Raghava Rao, M.A., B.L. (Leave from 16th February, 1953, to 11th April, 1953.)
" " " E. E. Mack, I.C.S.
" " " N. Somasundaram, B.A., B.L.
" " " A. S. Panchapakesa Ayyar, M.A., I.C.S.
" " " P. V. Balakrishna Ayyar, I.C.S.
" " " W. S. Krishnaswami Nayudu, B.A., B.L.
" " " Basheer Ahmed Sayeed, M.A., B.L.
" " " P. Chandra Reddi, B.A., B.L.
" " " T. L. Venkatarama Ayyar, B.A., B.L.
" " " P. N. Ramaswami, M.A., I.C.S.
" " " K. Ramaswami Gounder, B.A., B.L.

The Advocate-General.

V. K. Thiruvenkatachari, M.A., B.L.

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Chandra Reddi, J. Sethurama Thevar *v.* Kampetha Rowther.
17th March, 1953. A.A.O. No. 91 of 1951.

Madras Agriculturists' Relief Act (IV of 1938), *section* 23-A—*Applicability—Conditions for—Sales confirmed long before the amending Act—If affected—Amending Act XXIII of* 1948—*Effect of.*

The clause 'may apply to the Court within 90 days of such amendment or of the confirmation of the sale, whichever is later' in section 23-A of the Madras Act IV of 1938 as amended by Act XXIII of 1948 has reference only to the two conditions laid down earlier in the section, namely, where the confirmation had not taken place or where it had taken place within ninety days of the commencement of the amending Act. The expression 'whichever is later' means only 'whichever is the case'. In other words this section applies only to sales whose confirmation had not yet taken place at the commencement of the amending Act or which have been confirmed within 90 days of the commencement of the Act. The section does not touch sales which have been confirmed more than 90 days before the coming into force of the amending Act.

V. Meenakshisundaram for Appellant.

R. Kesava Ayyangar and *K. Parasaran* for Respondents.

R.M.

Rajamannar, C.J., and Venkatarama Ayyar, J. Sabella Sahaba Reddy *v.*
17th March, 1953. Karri Venkata Reddy.
S.R. No. 11015 of 1953.

Constitution of India (1950), *Article* 227 (1)—*Powers of Superintendence of High Court—Scope of.*

Article 227 (1) of the Constitution of India (which is a substantial re-enactment of section 107 of the Government of India Act, 1915 and section 15 of the earlier Charter Act) has never been understood to confer a right on the High Court as such to interfere with the judicial orders and judgments made and passed by individual Judges or Division Benches of the High Court. It cannot be said that a Judge of the High Court disposing of a Civil Miscellaneous Appeal is a Court within the meaning of Art. 227 (1) of the Constitution and that the High Court has power of superintendence over him so that it could interfere with his judgments. The power of the High Court under Art. 227 (1) is confined to subordinate Courts and judicial and quasi-judicial tribunals which are also subordinate to it. A Judge of the High Court is not as such subordinate to the High Court.

O. Chinnappa Reddy for Appellant.

R.M. *Memorandum of Appeal dismissed.*

Somasundaram, J. Rananath Bholgothra, *In re.*
17th March, 1932. Crl. Rev. Case No. 206 of 1953.

Criminal Procedure Code (V of 1898), *section* 93-*A*—*Warrants from External Courts—Executability—Scope—Court—Commissioner of Police, Madras, if a Court.*

Though the Commissioner of Police, Madras, may have the powers of Presidency Magistrates by virtue of section 7, Criminal Procedure Code, they are not Courts of Presidency Magistrates under the Code. In the Code wherever there is a reference to the Presidency Magistrate it could only mean and refer to the Presidency Magistrates appointed under section 18 of the Code. There is no definition of Court in any of the Acts and certainly there is none in the Criminal Procedure Code. But a Court is ordinarily understood as 'a place where Justice is judicially administered.

Unless there is a special provision making section 93-A applicable to the Commissioner of Police, it will fall within the general prohibition that the Code will not apply to the Commissioner of Police.

V. V. Srinivasa Ayyangar and *M. V. Ganapathy* for Petitioner.

The State Prosecutor (*S. Govind Swaminathan*) on behalf of the State.

R.M. *Revision allowed.*

Panchapagesa Ayyar, J. The State of Madras *v.* Abdul Kadir
17th March, 1953. Tharanganar Firm.
C.M.A. No. 583 of 1950.

Madras General Sales Tax Act (IX of 1939), section 18—Suit to recover money collected illegally as tax—If barred under section 18—Limitation Act—Article 16 or 62—Applicability.

A suit to recover a sum of money said to have been collected illegally from the plaintiff as sales tax by the State of Madras can be brought within three years under Article 62 of the Limitation Act.

Neither section 18 of the Madras General Sales Tax Act nor Article 16 of the Limitation Act would have any application in such cases.

(1939) 1 M.L.J. 588 : I.L.R. (1939) Mad. 566 (F.B.) and (1951) 2 M.L.J. 340, followed.

The Government Pleader (*P. Satyanarayana Raju*) for Appellant.

T. R. Sangameswara Ayyar for Respondent.

R.M. ——— *Appeal dismissed.*

Rajamannar, C.J. Hanumanthiah *v.* Thimmiah.
18th March, 1953. S.A. Nos. 1178 and 1179 of 1949.

Oil Seeds (Forward Contract Prohibition) Order (1943), section 2 (ii)—Meaning of Forward Contract—If assignable.

The phrase "at some future date" in section 2 (ii) of the Order of 1943 is not the same as 'on a future date'. It only means at some time in future. A contract to sell goods is assignable by a seller and equally a contract to buy goods is assignable by the buyer. Hence it could not be said that a forward contract cannot be assigned as it is an executory contract.

S. Venkatesa Ayyangar for Appellant.

R. Swaminatha Ayyar and *C. K. Venkatanarasimhan* for Respondents.

R.M. ——— *Appeal dismissed.*

Govinda Menon and Basheer Ahmed Sayeed, JJ. Balarami Reddi *v.*
18th March, 1953. Shaik Masthan Saheb.
C.M.P. No. 1440 of 1953.

Constitution of India (1950), Article 133, clause (1) (b)—Leave to appeal to Supreme Court.

Where in a suit or appeal the real relief asked for is with respect to a trusteeship which is not capable of valuation as such, paragraph (1) of section 110, Civil Procedure Code and clause (1) (*a*) of Article 133 of the Constitution cannot in strict terms apply. Clause (1) (*b*) of Article 133 of the Constitution is in *pari materia* with the second paragraph of section 110, Civil Procedure Code. That paragraph applies to cases where the decree awards a particular sum or property of a particular value or refuses that relief, that is, where the subject-matter of the dispute is of a particular value. If it is impossible to estimate in money or by any pecuniary standard, the loss or detriment which the applicant has suffered by the passing of the decree from which it is sought to obtain leave to appeal then section 110, Civil Procedure Code, would not apply.

The subject-matter of the dispute, in the instant case, being the trusteeship and not any property, section 110 (1), Civil Procedure Code or Article 133 (1) of the Constitution would not apply.

O. Chinnappa Reddy for Appellant.

Alladi Kuppuswami for Respondent.

R.M. ——— *Petition dismissed.*

Venkatarama Ayyar, J. Narasimhalu *v.* Narasimham.
20th March, 1953. Writ Petition No. 920 of 1952.

Madras District Municipalities Act (V of 1920)—Election Rules—Rule 27-A (1) (a) and rule 10 (a)—Violation of—When invalidates an election.

A mere violation of rule 27-A (1) (*a*) of the Election Rules under Madras Act V of 1920 is not sufficient to invalidate an election and it must further be shown

that the result of the election has been affected thereby. Rule 27-A (1) (*a*) requires that the ballot papers marked in such a manner as to disclose the identity of the elector should be rejected. If all the ballot papers are marked so as to violate rule 27-A (1) (*a*), all of them will have to be rejected and the result is there is no person who can be said to have been elected.

Quaere.—Can it be said that in a case where all ballot papers have been so marked as to violate the secrecy of the ballot, there had been no election by ballot under the Act?

P. Ram Reddy and *V. Venkataramana Reddy* for Appellant.

Row and Reddy and *Mohankumaramangalam* for Respondents.

R.M. ——— *Petition dismissed.*

Ramaswami, J. Danda Reddi *v.* Rami Reddi.
24th March, 1953. C.R.P. No. 121 of 1951.

Madras Agriculturist's Relief Act (*IV of* 1938), *sections* 19 *and* 25-*A*—*Application for scaling down*—*Order by Court of Small Causes*—*If appealable.*

An application under section 19 of the Madras Act IV of 1938 to a Court of Small Causes is not appealable under section 25-A of the said Act inasmuch as the scaling down is of a decree passed by a Small Cause Court and any decree passed by a Small Cause Court is only revisable by the High Court and cannot be appealed against to the Court having appellate jurisdiction ordinarily.

O. Chinnappa Reddi and *P. R. Ramakrishna* for Petitioner.

A. V. Krishna Rao for Respondent.

R.M. ——— *Revision allowed.*

Ramaswami, J. Gulab Chand Danraj *v.* Anandan.
26th March, 1953. C.R.P. No. 1381 of 1952.

Practice—*Parties agreeing as to place where Courts will have jurisdiction to try disputes*—*Courts of other places*—*If competent to decide such disputes*—*Decision of Court of incompetent jurisdiction*—*If* res judicata.

Where in a contract both the parties have entered into a covenant that all causes of action arising between them relating to the transactions between them should be agitated only in a particular place, the Courts in other places have no jurisdiction to entertain the suit at all and any decision of such Courts should be considered a decision of a Court of incompetent jurisdiction and therefore such a decision of that Court could not be *res judicata* to shut out the party from the proper Court which has jurisdiction as per the covenant.

A. Achuthan Nambiar for Appellant.

N. R. Sesha Ayyar for Respondent.

R.M. ——— *Revision dismissed.*

Somasundaram, J. Thattayya *v.* Basavayya.
26th March, 1953. Crl. Rev. Case Nos. 195 and 208 of 1953.

Criminal Procedure Code (*V of* 1898), *sections* 195 (5) *and* 144—*Orders under*—*If Judicial*—*Additional First Class Magistrate*—*If subordinate to Additional District Magistrate.*

The fact that under certain circumstances and for certain purposes mentioned in clause (3) of section 10 an Additional District Magistrate is considered as a subordinate to the District Magistrate clearly shows that the Additional District Magistrate does not enjoy the same status as that of a District Magistrate and by virtue of section 17 all Magistrates are subordinate to the District Magistrates.

It cannot now be disputed that the orders under section 144, Criminal Procedure Code are subject to the revisional jurisdiction of the High Court. I.L.R. 42 Mad. 64 : 35 M.L.J. 454, approved. 1923 M.W.N. 240 held to be not good law now.

If the order under section 144 is passed by an authority it must be treated as a Court when it sanctions prosecutions also. It is clear from the repeal of clause (3) of section 435, Criminal Procedure Code, that orders under section 144 is not only judicial but that the authority must be deemed to be acting as a Court.

T. Veerabhadrayya for Appellant.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) and *Adavi Rama Rao* for Respondents in Crl. R.C. No. 195 of 1953.

Adavi Rama Rao for Appellant.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) and *T. Veerabhadrayya* for Respondent in Crl. R.C. No. 298 of 1953.

R.M. ——— *Revision allowed.*

Krishnaswami Nayudu, J. 27*th March*, 1953.

S. N. VR. Lakshmanan Chettiar *v.* Periappan.
A.A.O. Nos. 585 and 588 of 1949.

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 53—*Practice—Execution of decree by attachment of another decree—Original decree time barred subsequent to attachment—If decree-holder entitled to proceed to excute the attached decree.*

The fact that the decree which is sought to be executed by attachment of another decree becomes time barred after attachment of the decree, does not take away the rights of the attaching decree-holder to execute the attached decree, apart from the provisions of Order 21, rule 53 (3), Civil Procedure Code. Where an application for the execution of a decree has been made within the statutory period of limitation by the attachment of a decree the application for the execution of the attached decree can be made even after the expiry of the period of limitation for the execution of the decree in which such attachment was made.

N. G. Krishna Ayyangar for Appellant in C.M.A. No. 585 of 1949 and the Respondent in C.M.A. No. 588 of 1949.

K. S. Desikan and *K. Raman* for Appellant in C.M.A. No. 588 of 1949.

R.M. ——— *Appeal dismissed.*

Rajamannar, C.J. and Venkatarama Ayyar, J. 31*st March*, 1953.

S. K. Sambandam *v.* Election Tribunal, Madras.
W.P. No. 869 of 1952 and W.P. No. 72 of 1953.

Representation of the People Act (*XLIII of* 1951), *section* 39 (4)—*Object of—Rules for counting of votes—If affects substantive rights.*

It has often been observed that section 33 (6) and section 39 (4) proviso of the Representation of the People Act and similar provisions in Statutes in *pari materia* enact a rule of evidence and that their object is to enable the Returning Officer to satisfy himself as provided in section 33 (5) of the Act. The proviso to section 39 (4) therefore is not to prescribe ordeals for the intending candidates to undergo but to provide guides to the Returning Officer in deciding on the identity of the candidates and of the proposer and seconder.

A rule providing for a method of counting of the votes is *prima facie* procedural and they do not affect or impair any substantive rights. They only regulate the mode of its exercise. It may be that in certain cases changes in Rules, though they may ostensibly relate to matters of procedure, might in effect affect substantive rights.

T. Lakshmiah, K. Srinivasamurthi, K. Pandurangam and *B. Lakshminarayana Reddi* for Appellants in both petitions.

The Government Pleader (*P. Satyanarayana Raju*) and *K. Srinivasa Rao* and *M. G. Kamath* for Respondents.

R.M. ——— *Petitions dismissed.*

Chandra Reddy, J. The Pie Money Bank, Ltd. *v.* Ruddramma.
12th March, 1953. A.A.O. No. 39 of 1951.

Madras Aliyasantana Act (IX of 1949)—*Section* 35—*Scope of—Right of an individual member to sue for partition.*

The partition referred to in section 35 of Madras Act IX of 1949 is that of a branch or kavaru and an individual member who does not constitute a kavaru within the meaning of the proviso cannot ask for partition. The only right that is given by section 35 of the Act to the common ancestress by virtue of her position is to ask for a partition on behalf of the branch and not to claim her individual share in the family properties.

Section 38 of the Marumakathayam Act (Act XXII of 1933) concedes a right of partition to individual members who constituted a thavazhi. Where a member has the right to claim partition, his share or interest could be seized and sold in execution of a decree. It follows that if such right does not vest in the judgment-debtor the decree-holder cannot attach the interest of a member in the family.

(1890) I.L.R. 18 Cal. 157, followed ; (1938) 1 M.L.J. 710, distinguished.

K. Vittal Rao for Appellant.

K. Srinivasa Rao for Respondent.

R.M. *Appeal dismissed. No leave.*

Rajamannar, C.J. and Venkatarama Ayyar, J. Simrathmull *v.* Jugrej.
17th March, 1953. O.S.A. No. 40 of 1952.

Letters Patent (Madras)—Clause 15—*Summary suit—High Court Original Side rules —Decision whether a particular suit would fall within the class of suits included under Order VII—Whether appealable under Clause* 15 *of the Letters Patent—Judgment within Clause* 15 *—What is.*

If the effect of an order, whatever its form may be, and whatever may be the nature of the application in which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, the adjudication is a judgment within the meaning of clause 15 of the Letters Patent.

An order by the Judge in chambers, allowing an appeal from an order of the Master that a suit is properly instituted under Order 7 of the Original Side Rules is not an order which puts an end to the suit or proceeding though the party aggrieved by the order did suffer an injury for the time. It cannot be treated either as an order on an independent proceeding ancillary to the suit such as, for example, an order on an application for interim injunction or for the appointment of a receiver, which might be a judgment within the meaning of the clause.

An order which regulates the procedure according to which the suit is to be tried does not in any way affect the merits of the questions at issue between the parties by determining some right or liability.

(1901) 1 Q.B.D. 7, distinguished.

(1938) 2 K.B. 637, referred.

(1910) 21 M.L.J. 1 : I.L.R. 35 Madras 1 (F.B.) ; (1924) 27 Bom. L.R. 99 followed.

But a party aggrieved by such an order will be entitled to canvass the correctness of the order in an appeal against the decree.

I.L.R. 13 Rang. 239 ; 32 Bom. L.R. 660, followed.

V. S. Rangachari for Appellant.

M. S. Venkatarama Ayyar and *N. C. Rangaswamy* for Respondents.

R.M. *Preliminary objection upheld.*

Mack and Krishnaswami Nayudu, JJ.
25*th March*, 1953.

Janaki Rama Ayyar *v.*
Nilakanta Ayyar.
Appeal Nos. 720 and 731 of 1949 and 21 of 1950.

Trust Act (II of 1882)—Sections 48 and 52—Trustees if can delegate their powers—Number of trustees—If majority of them could represent the trust—Trustees—Duties of—Trustee prohibited absolutely from getting an interest in the Trust properties.

The Trust Act does not empower the trustees to delegate their power and the Act has also given specific instances where one trustee out of two or more trustees can act so as to bind the entire trust; none of these provisions confer powers on the majority to deal with trust property by transferring them.

Under section 48 of the Indian Trusts Act where there are several trustees the property is vested in all the trustees and cannot be legally divested by only a majority of the trustees executing a document of transfer of trust property.

42 Ch.D. 23: (1945) 1 M.L.J. 97, followed. Lewin on Trusts 15th, Edn., page 190, referred.

Even in the absence of any statutory prohibition the right course for a trustee should be, not to obtain any sale of trust property in his favour or in favour of any member of his family or an agent on his behalf however much the transaction might initially be considered to be a fair and reasonable bargain entered into in the interests of the *cestui que trust*. In any event, a trustee should not buy trust property, however much he may be authorised under the trust deed unless he has made an attempt to sell the estate to third parties and failed in the attempt and the only course open to him to carry out his obligation was to sell to himself.

The words ' No trustee may buy trust property, in section 52 of the Indian Trust Act does not give a discretion to the trustee but amounts to a positive prohibition.

Case-law discussed.

It is a well established principle in the Law of Trust that a trustee is under a disability to purchase trust property and this is incorporated in sections 52 and 53 of the Indian Trust Act.

K. Bhashyam, K. Venkateswaran, C. R. Pattabiraman and *R. Ramasubba Ayyar* for Appellants.

K. V. Venkatasubramania Ayyar, T. P. Gopalakrishnan and *T. R. Venkataraman* for Respondent.

R.M. ——— *Decree modified. Appeals dismissed.*

Subba Rao and Somasundaram, JJ.
25*th March*, 1953.

S. Pl. P. Narayana Chettiar *v.*
M. AR. Annamalai Chettiar.
C.M.P. No. 6577 of 1952.

Madras Agriculturists' Relief Act (IV of 1938)—Amending Act XXIII of 1948—Section 16—Scope—Party when barred from claiming the benefit of section 19.

Section 16 (1) of the Amending Act XXIII of 1948 applies to suits instituted after the commencement of the Act; clause (ii), to suits or proceedings instituted before the commencement of the Act in which no decree or order has been passed which has become final and clause (iii) to suits or proceedings in which the decree or order passed has not been executed in full before the commencement of this Act. A combined reading of the three provisions indicates that clause (ii) will apply if the decree or order had not become final before the Act and clause (iii) if the decree or order, though became final, was not satisfied before the commencement of the Act. (1952) 1 M.L.J. 264 (F.B.), followed.

A party who had an opportunity to raise a plea but did not raise the plea is precluded by the principles of *res judicata* from raising the plea over again at a subsequent stage. The scope of section 19 (2) of the Madras Agriculturists' Relief Act is itself limited by the provisions in section 16 of the Amending Act XXIII of 1948.

P. S. Panchaksharam for Petitioner.

S. Thyagaraja Ayyar for Respondent.

R.M. ——— *Petition dismissed.*

Ramaswami, J.
24th February, 1953.

Mohideen Bawa *v.* Hajee Julaka Bivi.
S.A. No. 683 of 1949.

Pardanashin *lady—Who is—Execution of a document by* pardanashin *lady*—Onus *of proof as to voluntary nature—Presumption as to validity—Scope of.*

A *pardanashin* lady has been defined by the Privy Council as a woman of rank, Hindu or Muhammadan, who lives in seclusion, shut in the *zenana*, and having no communication except from behind the *parda* or screen with any male person save a few privileged relations or dependants. To be entitled to the protection of the rules which apply to *pardanashins*, a woman need not necessarily be a 'woman of rank'; the rules are equally applicable to poor women who are illiterate and ignorant even if not *pardanashin.* Mere execution by a *pardanashin* lady, although unaccompanied by duress, protest, or obvious signs of misunderstanding or want of comprehension, is in itself no real proof of a true understanding mind in the executant. In the case of a deed executed by a *pardanashin* the question is not whether she knew what she was doing, had done, or proposed to do, but how her intention to act was produced ; and the *onus* is cast on the person relying on the disposition, to establish that the transaction is one which the disponent thoroughly comprehended, and deliberately and of her own free will carried out. The mere declaration of the executant subsequently made, that she had not understood what she was doing, is not in itself conclusive. If, having regard to the proved personality of the executant, the nature of the deed, the circumstances under which it was executed, and the whole history of the parties, it is reasonably established that the deed executed was the free and intelligent act of the executant, the *onus* which rests upon the party relying on the deed is discharged.

R. Gopalaswami Ayyangar for Appellant.

K. Bashyam, T. Srinivasan and *K. Soundararajulu Naidu* for Respondents.

R.M. *Appeal dismissed. No leave.*

Ramaswami, J.
26th February, 1953.

Subbamma *v.* Narasayya.
S. A. No. 1387 of 1949.

Transfer of Property Act (IV of 1882), *section* 53-*A—Applicability—Contract and instrument of transfer—Tests.*

The case of an instrument of transfer is put in the alternative in section 53-A of the Transfer of Property Act. Consequently, the section applies not only to contracts of transfer as such but also to instruments of transfer. The words "not contemplated in the manner prescribed by law" have the effect of superseding the provisions not only of the Registration Act but also of the Transfer of Property Act as to registration and attestation. But the section would not apply if the instrument could not be proved for some other reason, for example, if the original is unstamped and lost so that secondary evidence becomes inadmissible.

An unregistered sale-deed which is a document in writing and which contains all the terms enabling acts of part performance unequivocally referable to it and which has changed the relative positions of the parties as to the subject-matter of the contract and which is much more than an act preparatory to the completion of a contract is certainly an instrument of transfer as contemplated in the latter portion of section 53-A.

P. V. Chalapathi Rao for Appellant.

M. Subramanya Sarma for Respondents.

R.M. *Appeal dismissed.*

Mack, J. Chinna Narasamma *v.* Venkata Narasi Reddi.
5*th March*, 1953. A.A.O. Nos. 604 of 1949 and 96 of 1950.

Hindu Law—Joint family—Partition—Evidence of—Effect—Reunion—How proved—Acquisition of property by joint family manager—Presumption as to self-acquisition.

It is well settled law that an agreement between the members of a Hindu joint family whereby they appoint arbitrators to divide the joint family property among them, amounts to a severance of the joint status of the family from the date of the agreement. The legal effect of such a document cannot be controlled or altered by evidence of subsequent conduct of the parties who may after severance make physical division of the property or may decide to live together and enjoy the property in common. Once there is a division in a joint Hindu family, whether, of status or property, there is no means of avoiding the result except by a reunion, for which an agreement express or implied, is always required.

(1938) 2 M.L.J. 234 (P.C.) and (1948) 2 M.L.J. 331, followed.

When a joint family representative dies it becomes a question of pure fact as to whether he represented the joint family in a partnership business venture or embarked on it in his individual capacity. If for the purposes of starting a trade a member of a Hindu joint family got assistance by way of a contribution from the joint family funds without any further assistance from the joint family it is reasonable to extend the principle of the Hindu Gains of Learning Act to such a case. On principle there is no reason why a manager of a Hindu joint family, whether he be the eldest son or the *de facto* manager, should be placed under a strong disability (as compared with his urban counterpart or an educated man who leaves his village and lives in a town) as regards his right to regard the property he acquired by his own exertions, initiative and enterprise as his self-acquired property.

T. M. Krishnaswami Ayyar, A. Balasubramanyam and *M. Natesan* for Appellant.

V. Tyagarajan and *J. V. Srinivasa Rao* for Respondents.

Appeals allowed.
R.M. *Case remanded. No leave.*

Govinda Menon and *Basheer Ahmed Sayeed, JJ.* Satyanarayanamurthi *v.*
10*th March*, 1953. Venkatasubbamma.
A.A.O. No. 193 of 1949.

Madras Agriculturists' Relief Act (*IV of* 1938) (*amending Act XXIII of* 1948), *section* 23 (*A*)—"*Entitled to the benefit of the Act*"—*Meaning of—Section* 19—*Rights under—If purely procedural.*

The Madras Agriculturists' Relief Act is intended to help the agriculturists and therefore the expression " entitled to the benefits of the Act " should be given a liberal interpretation. It cannot be restricted to the benefits conferred under sections 8, 9 and 9-A alone. Section 19 of the Act was introduced by section 10 of the Madras Act XXIII of 1948 in order to obviate certain hardships which arose out of the decisions which held that an agriculturist cannot get the decree scaled down if he has not asked for the benefits under the Act before the decree was passed. The result of introduction of section 19 is that even though the debtor did not invoke the provisions of the Act before the decree was passed it was open to him to have the decree scaled down thereafter if he is an agriculturist. It is difficult to say that the right to get the decree reduced is only a matter of procedure. The intention is to give the benefit to such of those agriculturist-debtors who out of ignorance or for some other reason were not able to have the decree subsequently reopened and amended in view of section 19 (2). If section 19 (2) of the Act is not interpreted as granting the benefit to the agriculturists then the entire purpose and object of the Act would be nullified. The right of getting a decree amended and scaled down even after it had become final is a substantive right, and is not a procedural right.

P. Ramachandra Rao for Appellants.

D. Narasaraju, D. S. Krishnamurthy and *K. B. Krishnamurthi* for Respondents.

R.M. *Appeal allowed. Case remanded.*

Ramaswami, J. Doraiswami *v.* Varadappa Chetti.
13th March, 1953. S.A. No. 477 of 1949.

Adverse possession—Property of tenants in common in possession of one co-tenant—When adverse to others—Proof.

Although as a general rule a possession of one co-tenant is not deemed adverse to the other co-tenants, the existence of the relation of co-tenancy does not preclude one co-tenant from establishing an adverse possession in fact as against the other co-tenants. But the burden of proving the adverse nature of his possession lies on him who sets up the title by adverse possession and the evidence with regard to that point must be viewed from that standpoint. Every case of adverse possession by a co-sharer must be considered on its own facts and the principle that the possession of one co-sharer is in law the possession of all should not be pressed too far. The true owner must be equally vigilant and it does not prevent time running if he could have obtained but did not actually obtain knowledge of the adequate, continuous and exclusive adverse possession of others.

D. Ramaswami Aiyangar and *S. Kuppuswami* for Appellant.

N. Appu Rao and *P. S. Srinivasa Desikan* for Respondents.

R.M. ——— *Appeal dismissed. No leave.*

Govinda Menon and *Basheer Ahmed Sayeed, JJ.* Bashyam Reddiar *v.* Paramasiva Mudaliar.
13th March, 1953. A.A.O. Nos. 568, 569 and 570 of 1948.

Madras Agriculturists' Relief Act (IV of 1938), *sections* 7 (2), 8 (2) (3)—' *Has paid* ' *and* ' *sums repaid* '—*Meaning of—Payment of interest by transfer of assets—Validity—Prohibition of execution under section* 7 (2)—*Scope.*

The words ' has paid ' in section 8 (2) and the words ' sums repaid ' in section 8 (3) must be construed to mean ' treated as having been paid to the decree-holder.' There is, of course, no doubt that a liability to pay interest, like a liability to make any other payment, may be satisfied by a transference of assets other than cash and that a receipt in kind may be receipt of interest. Section 7 (2) of the Agriculturists' Relief Act does not prevent the decree being executed in so far as the decree is valid against the judgment-debtor. The prohibition under section 7 (2), seems to be only to the execution of the decree in excess of the scaled down debt.

S. Tyagaraja Aiyar for Appellant.

R. Gopalaswami Aiyangar for Respondent.

R.M. ——— *Case remanded.*

Rajagopalan, J. Komaraswami Pillai *v.* Ratnasabapathi Pillai.
25th March, 1953. Appeal No. 149 of 1948.

Societies Registration Act (XXI of 1860), *sections* 6 *and* 7—*Person entitled to sue—Who is—Right of a member to sue or continue proceedings.*

Under section 6 of the Societies Registration Act the only person that can sue or be sued in the name of the society is the person appointed by the Governing Body for the occasion. In the absence of such appointment a member of the club cannot invoke the benefit of section 7 of the Act to continue the proceedings.

S. Ramachandra Ayyar and *R. S. Venkatachari* for Appellant.

S. Jagadisa Ayyar and *S. Tyagaraja Ayyar* for Respondents.

R.M. ——— *Appeal dismissed.*

Govinda Menon and *Basheer Ahmed Sayeed, JJ.* Rayulu Iyer Nagaswami Iyer & Co. *v.* Chockanarayanan Chettiar.
30th March, 1953. A.A.O. No. 536 of 1949.

Practice—Execution of a decree against a major wrongly described as minor—No notice to the judgment-debtor as major—Validity.

If a person, who was a major at the time of the commencement of a proceeding, was throughout the proceedings wrongly described as a minor and notice was never

sent to him as a major, the result would be that the entire proceedings were without notice to him. A sale held in the course of such execution proceedings certainly cannot bind him. Strictly speaking, such a person cannot be deemed in law to have been a party at all to the proceedings.

C. S. Rama Rao Sahib for Appellant.

K. S. Ramabhadra Ayyar for Respondent.

R.M. ——— *Appeal allowed. Case remanded.*

Ramaswami, J. Kesaviah *v.* Venkayamma.
1st April, 1953. C.R.P. Nos. 1987 and 880 of 1952.

Civil Procedure Code (V of 1908), Order 17, rule 1—Scope of.

The principle underlying rule 1 of order 17 of the Civil Procedure Code is that a party who is ready to proceed with the suit should be awarded such costs as can be held to be "occasioned by the adjournment," and this can be made reasonable compensation for the expenses incurred by reason of the adjournment. "Occasioned by the adjournment" is deliberately used in order that the discretion of the Court should not be restricted to the taxable costs of the day. Of course the condition imposed should not be in the nature of a penalty or punishment to the party asking for adjournment and hence the costs awarded should in no case exceed the sum necessary for the expenses which in the opinion of the Court the party ready to proceed with the suit reasonably incurs as a result of the adjournment. Sufficient opportunity should also be given to the party to obey the order. The payment of costs may be made as a condition precedent to the adjournment.

M. Bhujanga Rao for Petitioner.

C. Kondiah for Respondent.

R.M. ——— *Petition dismissed.*

Ramaswami, J. Rangaswami Pillai *v.* Srirangam Municipal Council.
1st April, 1953. C.R.Ps. Nos. 1348 to 1375 of 1949.

Contract Act (IX of 1872), section 72—Coercion—Meaning of.

It is well settled that the term 'coercion' in section 72 of the Indian Contract Act is used in its general and ordinary sense, its meaning not being controlled by the definition given in section 15 of the Act. If it had been intended that the definition of the term for the purpose of section 72, should be found in section 15, it might be reasonable to expect that the definition should find a place in section 2, which is the interpretation clause.

K. Srinivasan for Appellant.

T. R. Srinivasan for Respondent.

R.M. ——— *Petitions dismissed.*

[F. B.]

Satyanarayana Rao, Rajagopalan and *Balakrishna Ayyar, JJ.* Mahadeva Rao *v.* Surya Rao.
2nd April, 1953. W. P. Nos. 632 of 1951 and 79 of 1952.

Madras Co-operative Societies Act (VI of 1932), section 51 (1)—Scope of the words 'touching the business of the Society'—Submitting to the jurisdiction of the Registrar—If jurisdiction of the Registrar can be questioned later.

Every activity of a Co-operative Society within the ambit of the sections of the Co-operative Societies Act, the rules and the bye-laws of the Society would be a matter 'touching the business of the Society.' If a bye-law not being *ultra vires* empowers a Society to do a particular act that act would be the business of the Society. Therefore the adjudication of the Deputy Registrar setting aside the election of the petitioners as directors of a Society which is provided for in the bye-laws is a decision within the jurisdiction of the Deputy Registrar.

The fact that the petitioners did not object to the jurisdiction of the Deputy Registrar before the Deputy Registrar or by carrying of the matter in revision to the Registrar does not preclude the petitioners from questioning the jurisdiction of the Deputy Registrar if it is a case of total want of jurisdiction going to the root of the matter.

Case-law reviewed and discussed.

D. Narasaraju and *K. B. Krishnamurthi* for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*), the Government Pleader (*P. Satyanarayana Raju*), *J. V. Suryanarayana Rao, M. S. Ramachandra Rao* and *M. Krishna Rao* for Respondents.

V.P.S. — *Petitions dismissed.*

Ramaswami, J. Nagappa Chetty *v.* Rangaswami Chetti.
7th April, 1953. C. R. P. No. 795 of 1950.

Limitation Act (IX of 1908), *Article* 164—*Scope and applicability—Knowledge of decree—When material—Substituted service—If due service.*

Under Article 164 of the Indian Limitation Act time runs from the date of the decree or where the summons was not duly served when the applicant had knowledge of the decree. It will be noticed that time will run from the date of knowledge only where the summons is not duly served. Where summons is duly served the date of the applicant's knowledge of the decree is immaterial and it may still run from the date of the decree. The summons cannot be stated to be duly served for the purposes of this article where it has been served on the defendant too late and it did not afford him an opportunity to appear at the hearing of the suit. In other words "duly served" means effective service. Substituted service will be equally a due service for the purposes of Article 164 of the Limitation Act so long as that substituted service has been effective.

R. Thirumalaiswami Naidu for Petitioner.

P. S. Kothandapani for Respondent.

R.M. — *Petition dismissed.*

Balakrishna Aiyar and *Chandra Reddi, JJ.* Public Prosecutor *v.* K. G. Sivaswami.
9th April, 1953. Crl. Appeal No. 896 of 1951.

Police Act (V of 1861), *section* 30 (1) *and* (2)—*Scope of—"Thoroughfare"—Meaning of—"As occasion requires"—Scope of—Power of the police officer to pass a general prohibitory order for a remote possibility.*

The mere existence of factions and the coming into being of a protracted state of what may be called cold war between factions would not come within the meaning of "occasion" under sub-section (1) of section 30 of the Police Act. Sub-section (1) is not intended to control every contingency.

Every public place will not necessarily become a thoroughfare unless that place is used as a passage for the people to pass through. In order to constitute a thoroughfare it is not essential that the public should have a right to ride or drive over it. It is enough if they have a right to walk across, but the right to pass and repass is essential.

The clause "which would, in the judgment of the Magistrate of the district, or of the sub-division of a district, if uncontrolled, be likely to cause a breach of the peace" in sub-section (2) of section 30 covers both the word "procession" and the word "assembly." In so far as it is likely to obstruct the traffic, sufficient provision exists in sub-section (1) of section 30 in the Act to exercise control. Sub-section (2) of section 30 of the Act does not contemplate a general order over a prolonged stretch of time so as to take in "assemblies" or "processions" which at the time the order is issued nobody has even thought of collecting or forming. What the sub-section visualises is something proximate, something concrete, some

particular assembly or assemblies, some particular procession or processions. But it does not empower the Superintendent to lay down a general interdict.

I.L.R. 57 All. 790 and I.L.R. 51 All. 485, followed. I.L.R. 27 Pat. 134, dissented from.

Per *Chandra Reddi, J.*—" It looks to me that the condition precedent to the promulgation of the order under sub-section (2) of section 30 of the Police Act is a meeting or a procession in contemplation. It is something immediate or in prospect that is envisaged in the sub-section and not what is remote or something likely to happen in the distant future. Under section 30 (2) it is utterly beyond the power of the District or Assistant District Superintendent of Police to pass an order which can be in operation for a particular period.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

C. R. Pattabhiraman for 1st Accused.

R.M. *Appeal dismissed.*

Ramaswami, J. Kuthomalu Kovilla *v.* Syed Ali.
10*th April*, 1953. C. R. P. No. 886 of 1951.

Malabar Law—Purankanom deed may be considered as part of a kamartham deed—Liability to be scaled down under Madras Agriculturist's Relief Act (IV of 1938)—*When applies.*

It is no doubt true that a fixed proposition of law that where there is a purankanom it must be considered to be a separate and distinct one, cannot be advanced. If the terms of the purankanom deed are such as may be considered as part of the kamartham it can be so construed. If a purankanom deed does not form part of kamartham it can be scaled down. I.L.R. 23 Mad. 105 and (1942) 2 M.L.J. 422, followed.

V. P. Gopalan Nambiar and *K. Sridhara Menon* for Petitioner.

S. R. Subramaniam for Respondents.

R.M. *Case remanded.*

Rajamannar, C.J. and *Venkatarama Ayyar, J.* Ratna Mudaliar, *In re.*
21*st April*, 1953. S.R. No. 19279 of 1953.

Letters Patent (Madras), clause 15—*Judgment—Meaning of.*

Neither an order refusing to transfer a suit from the file of the City Civil Court to the High Court nor an order staying a suit pending in the High Court is a 'judgment' within the meaning of clause 15 of the Letters Patent.

I.L.R. 51 Mad. 330, followed; (1953) S.C.J. 300, referred; 45 M.L.J. 153 held not good law.

S. G. Rangaramanujam for Appellant.

R.M. *Appeal held not maintainable.*

Chandra Reddy, J. *In re* Kasi Viswanathan.
22*nd April*, 1953. Crl. R. C. No. 590 of 1952.

Motor Vehicles Act (IV of 1939), *section* 82—*Prohibition against riding on the running board of a motor vehicle—Scope.*

What is prohibited under section 82 of the Motor Vehicles Act is the allowing or carrying of any person on the running board of a vehicle and it is provided that all persons should be carried only within the body of the vehicle. The prohibition is not against a person driving or in charge of the motor vehicle but only against others, that is, persons other than the person driving or other than the person in charge of the motor vehicle. The person referred to is a person other than the person driving or the person in charge of the motor vehicle.

N. R. Govindachari for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

R.M. *Revision allowed.*

[END OF (1953) I M.L.J.]

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MARCH OF LAW : 1952

During the year that has just come to a close a number of decisions have been rendered illumining many dark corners of the different branches of law. The mills of the judiciary may grind slowly but they do it none the less steadily. An attempt is made here to review the more important of the decisions given during 1952 and reported in the columns of this Journal.

HIGH COURT : POWERS AND JURISDICTION.—In its decision in *Ponnuswami* v. *Returning Officer, Namakkal*[1], the Supreme Court makes it clear that the High Court has no jurisdiction under Article 226 of the Constitution in respect of matters provided for in Article 329 which covers all " electoral matters." In *Veerappa Pillai* v. *Raman and Raman*[2], the Supreme Court points out that however extensive may be the High Court's jurisdiction under Article 226, it is not extensive enough to enable the High Court to convert itself into a Court of appeal and examine for itself the correctness of the decision impugned and decide what is the proper view to be taken. *Cosmopolitan Club* v. *Deputy Commercial Tax Officer*[3], recognises that the High Court's power to issue directions or writs under Article 226 does not require that the petitioner should be confined or restricted to a particular writ on English precedents and a petition for *certiorari* cannot be dismissed on the ground that the correct remedy would be by way of *mandamus* or prohibition. *Chandra* v. *Madras State*[4] holds that where a suit is the proper remedy the High Court will not ordinarily grant an order under Article 226. *Chenchanna Naidu* v. *Praja Seva Transports, Ltd.*,[5] lays down that where the High Court's civil jurisdiction is invoked under Article 226, the Civil Procedure Code becomes applicable to the proceedings. In *Subbiah* v. *Raghavalu*[6], it is decided that the High Court cannot interfere under Article 226 with executive direction by a magistrate to the police to take a particular action under section 107, Criminal Procedure Code. In *Ramakrishna Reddy* v. *State of Madras*[7], the Supreme Court takes the view that section 2 (3) of the Contempt of Courts Act excludes the High Court's jurisdiction only in cases where the acts alleged to constitute contempt of a subordinate court are punishable as contempt under specific provisions of the Penal Code, but not where the acts merely amount to offences of other descriptions for which punishment has been provided for in the Penal Code.

CONSTITUTIONAL LAW : In *Lotus Industrials* v. *State of Madras*[8], it is held that the Constitution does not preclude classification even by bodies other than the Legislature and that the division of consumers of yarn into " consumer quota holders " and others and the preferential treatment accorded to them by clause 30 of the Cotton Textiles Control Order cannot be held to be discriminatory and in contra-

1. (1952) 1 M.L.J. 775 (S.C.).
2. (1952) 1 M.L.J. 806 (S.C.).
3. (1952) 1 M.L.J. 401.
4. (1952) 1 M.L.J. 206.
5. (1952) 1 M.L.J. 448.
6. (1952) 1 M.L.J. 471.
7. (1952) 1 M.L.J. 736 (S.C.).
8. (1952) 1 M.L.J. 532.

vention of Article 14 of the Constitution. *Thamsi Goundan* v. *Kanni Ammal*[1], takes the view that there is no infringement of Article 14 by reason of the classification in section 488, Criminal Procedure Code, in favour of women more particularly wives and that too deserted by their husbands, without a similar provision in favour of men. An interesting decision on Article 14 is that in *Rajah of Bobbili* v. *State of Madras*[2], which holds that the Madras Estates Land (Reduction of Rent) Act, 1947, does not make any distinction between one landholder and another or one tenant and another and is only an illustration of the constitutional practice of classification which is reasonable and permissible. *Ramakrishniah* v. *President, District Board, Nellore*[3], decides that the exercise of any of the fundamental rights like the right of free speech or freedom of association cannot be made subject to the discretionary control of administrative or executive authority and Madras G.O. No. 416, Education, dated 24th February, 1939, empowering the Director of Public Instruction to forbid the existence of and dissolve any Teachers' Union not conforming to the rules and comeplling teachers in Local Board or Municipal service to obtain permission of the Board or Council concerned before forming unions, etc., is void as opposed to Article 19 (1) of the Constitution. In *Shamdasani* v. *The Central Bank of India*[4], the Supreme Court points out that Article 19 is intended to protect the fundamental freedoms assured to the citizen by clause 1 against State action other than the legitimate exercise of its powers to regulate private rights in the public interest and is not intended to prevent wrongful individual acts or to provide protection against merely private conduct. The decision in *Rajah of Bobbili* v. *State of Madras*[2], holds that there is no inviolable and absolute right in the landholder to collect any particular rent, that the Legislature could always provide for the ascertainment of a fair and proper rent notwithstanding any contract or usage and there is nothing in the Madras Estates Land (Reduction of Rent) Act, 1947, inconsistent with the provisions of Article 19(1) (*f*) read with Article 19 (5). *Vallinayagam Pillai* v. *State of Madras*[5], takes the view that the right of a citizen under Article 19 (1) (*g*) to carry on any business should be read with Article 19 (6) which contemplates that the State may impose reasonable restrictions in the interests of the general public, and the refusal of license to a touring cinema on ground of instructions from local government is no violation of fundamental rights. The same view is taken in *Sheik Abdul Khadir & Co.* v. *Subramania Pillai*[6]. The decision in *Indian Metal & Metallurgical Corporation* v. *Industrial Tribunal, Madras*[7], makes it clear that the right conferred by Article 19 (1) (g) to carry on any business is not absolute, that the State has the right to regulate any business and it is not confined to public utility business only : but, if a citizen has a right to carry on a business it must follow he must have the liberty not to carry it on if he so chooses and hence an award of an Industrial Tribunal directing a person to continue to carry on a business is void as inconsistent with the Constitution. *Anantakrishnan* v. *State of Madras*[8], holds that even if the right to act and plead is to be deemed comprised in the right to practise the profession guaranteed under Article 19 (1) (*g*) there is nothing in the Constitution to exempt such right wholly from the taxing power of the State, and the proper way to reconcile the rights guaranteed under Article 19 and the power to tax contained in the several provisions of the Constitution is that if the taxation is for legitimate revenue purposes then it is not invalid merely because it may adversely affect any of the fundamental rights. In *State of Bihar* v. *Sailabala Devi*[9], the Supreme Court decides that the restrictions imposed by section 4 (1) (*a*) of the Indian Press (Emergency Powers) Act on freedom of speech and expression are solely directed against the undermining of the security of the State or the overthrow of it and are within the ambit of Article 19 (2) of the Constitution. *Balakrishna* v. *State of Madras*[10], points out that the "total" prohibition of the exercise of any right cannot be justified as a "reasonable"

1. (1952) 1 M.L.J. 68.
2. (1952) 1 M.L.J. 174.
3. (1952) 1 M.L.J. 38.
4. (1952) 1 M.L.J. 423 (S.C.).
5. (1952) 1 M.L.J. 279.
6. (1952) 1 M.L.J. 284.
7. (1952) 1 M.L.J. 481.
8. (1952) 1 M.L.J. 208.
9. (1952) 2 M.L.J. 323 (S.C.),
10. (1952) 1 M.L.J. 514.

restriction within the meaning of the expression as it occurs in Article 19 (5) and (6), and will be invalid unless it is for a short and prescribed time; consequently, it is doubtful whether the prohibition of acquisition and installation of new looms imposed in terms by clause 12 (4) of the Cotton Textile (Control) Order, 1948, is valid having regard to the rights conferred on the citizen by Article 19 (1) (*f*) and (*g*). In *Devanugraham*, In re[1], it is held that Article 20 (2) does not take away the right to institute a second prosecution when the first is found to be a nullity by reason of want of necessary sanction. *Satyavathi* v. *State of Madras*[2], lays down that acquisition of lands for providing house-sites for Adi-Andhras would be a public purpose within the meaning of Article 31. *Shamdasani* v. *Central Bank of India*[3] lays down that the words "save by authority of law" in Article 31 show that it is a prohibition of unauthorised governmental action against private property and is not intended to prevent wrongful individual acts. In *Janaki* v. *Srirangammal*[4], it is pointed out that an order of the High Court rejecting an application under Order 41, rule 19, of the Civil Procedure Code, to restore and rehear an appeal dismissed for default of appearance is neither a judgment, nor a decree, nor a final order, and is a matter of procedure only, and no appeal will lie to the Supreme Court under Article 133 of the Constitution. The decision of the Supreme Court in *State of Bombay* v. *P.J. Naick*[5], makes it clear that Article 166 (1) does not require a magic incantation which can only be expressed in a set formula of words and what is to be looked at is whether the substance of the requirements is there. *Ramamurthi*, In re[6], emphasises that the right which is the foundation of a petition under Article 226 is a personal and individual right and the High Court's power can only be invoked at the instance of a person who has a personal grievance against an act of the State, in its executive capacity, which inflicts a legal injury on him; and the nomination of a member to the Legislative Council by the Governor does not infringe the personal right of any elected member, even indirectly, so as to entitle him to sustain an application for the issue of a writ of *certiorari*. In *Chakkarai Chettiar*, In re[7], it is held that a writ of *quo warranto* also cannot be issued unless there is infraction of a personal right and the words "and for any other purpose" in Article 226 do not mean a purpose other than the protection of the legal rights of a person. *Anandan Nambiar*, In re[8], takes the view that it is only in exceptional cases that writs under the wide powers—"for any other purpose"—in Article 226 can be issued, such as for instance, where there has been a clear violation of statutory law, or when principles of natural justice have been violated, or perhaps where there has been *mala fide* discrimination against an individual to the detriment of his rights. It is further held that a member of the Legislative Assembly lawfully detained, though without trial under the Preventive Detention Act cannot be permitted to attend the sittings of the House, though during such period he will have the right to correspond with the Speaker and Chairman of the Committee of Privileges of the House. In *Veerappa Pillai*, v. *Raman and Raman*[9], the Supreme Court expresses the view that writs under Article 226 are intended to be issued by the High Court in grave cases where the subordinate tribunals, bodies, or officers act wholly without jurisdiction or in excess of it or in violation of principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is an error apparent on the face of the record and such act, error, omission, or excess has resulted in manifest injustice; but however extensive that jurisdiction may be the High Court cannot act as a Court of appeal and thus it cannot give a direction to the Regional Transport Authority to grant permits to a particular party. *Cosmopolitan Club* v. *Deputy Commercial Tax Officer*[10], points out that the maintainability of writ petitions under Article 226 was impossible to circumscribe, define or restrict and the writs are all discretionary, dependent on the facts of each case and the nature of the illegality or wrong alleged.

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1. (1952) 1 M.L.J. 550.
2. (1952) 1 M.L.J. 42.
3. (1952) 1 M.L.J. 423 (S.C.).
4. (1952) 2 M.L.J. 197.
5. (1952) 2 M.L.J. 338 (S.C.).
6. (1952) 2 M.L.J. 671.
7. (1952) 2 M.L.J. 779.
8. (1952) 1 M.L.J. 1.
9. (1952) 1 M.L.J. 806.
10. (1952) 1 M.L.J. 401.

Chandra v. *Madras State*[1], expresses the view that where a suit is the proper and adequate remedy an order under Article 226 will not ordinarily be made. In *Sambandam* v. *The General Manager, S.I.R.*[2], it is stated that the rule that the Court will not ordinarily interfere under Article 226 with an order where there is another adequate remedy available to the party is a rule of discretion only, for the guidance of the Court and not a limitation on its power. *A. K. Gopalan*, In re[3], stresses the principle that the Constitution does not allow reasons of state to influence the judgment of the Court and where an impugned order is vitiated by an intention on the part of the Government to evade a judgment of the High Court setting free a person under detention, somehow or other, the order cannot be upheld notwithstanding any belief on the part of government that the judgment of the High Court was erroneous. In *Ponnuswami* v. *Returning Officer, Namakkal*[4], the Supreme Court holds that jurisdiction under Article 226 stands excluded in all matters provided for in Article 329 which covers all "electoral matters." *Chenchanna Naidu* v. *Praja Seva Transports, Ltd.*[5], rules that where the High Court's civil jurisdiction under Article 226 is invoked the provisions of the Civil Procedure Code will be attracted to the proceeding. *Rajaram Reddi*, In re[6], holds that a subordinate Court should only make a reference to the High Court when it is satisfied that a case pending before it involves a real or substantial question as to the validity of an Act and a mere plea that an Act is *ultra vires* will not suffice. *Govindarajulu Naidu* v. *State of Madras*[7], is an important decision holding that Article 286 (1) (*b*) is limited to the period covered by the actual exportation or importation of goods and the power of the State to impose tax at any stage before or after is not affected, and further both in Article 286 (1) (*b*) and 286 (2) the State's power to tax export or import or inter-state trade is taken away only in respect of sales or purchases made directly in relation to the goods which are the subject-matter of the transportation, either in inter-state or international commerce, whether such sales take place prior to the commencement of the transport or during its progress. *Sambandam* v. *General Manager, S.I.R.*[2], points out that the rule that civil posts under the Government are held at pleasure is subject to the principles in Article 310 (2) as to payment of compensation, competency of the authority terminating the service, etc. *Michael* v. *Venkateswaran*[8], holds that the Constitution (Scheduled Castes) Order, 1950, is valid and within the powers conferred on the President by Article 341 (1) of the Constitution.

CONTRACTS: In *Firm of T. N. Rao* v. *Ramakrishnayya*[9], it is pointed out that when a contract in writing is signed by the parties, they are bound by the terms contained therein whether they take the trouble of reading them or not, and the principle extends to cases where the contract does not actually contain the terms but a reference is made to another document or contract where those terms are to be found. *Official Assignee of Madras* v. *Narayana Mudaliar*[10], recognises that insolvency is not a disqualification preventing a person from entering into a contract within the meaning of section 11 of the Contract Act and there is nothing in law which prevents an insolvent who has not yet obtained his discharge from borrowing or making himself liable financially. *Nagappa Chettiar* v. *Veeyares & Co.*,[11] holds that *budla* or forward contracts in shares are not void as opposed to section 23. In *Kedar Lal Seal* v. *Hari Lal Seal*[12], the Supreme Court makes it clear that section 43 dealing with contribution will stand excluded by section 82 of the Transfer of Property Act where the right to contribution arises out of a mortgage. The doctrine of frustration is considered in *Narasu* v. *P. S. V. Iyer*,[13] and it is held that it applies where there is implied in the contracts a condition that they will cease to be operative if the basis on which they rest disappears or becomes fundamentally altered;

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1. (1952) 1 M.L.J. 206.
2. (1952) 1 M.L.J. 540.
3. (1952) 2 M.L.J. 690.
4. (1952) 1 M.L.J. 775 (S.C.).
5. (1952) 1 M.L.J. 448.
6. (1952) 1 M.L.J. 468.
7. (1952) 2 M.L.J. 614.
8. (1952) 1 M.L.J. 239.
9. (1952) 2 M.L.J. 662.
10. (1952) 1 M.L.J. 662.
11. (1952) 2 M.L.J. 797.
12. (1952) 1 M.L.J. 431.
13. (1952) 2 M.L.J. 832.

but, this is only a rule of construction which must yield if the agreement discloses a contrary intention ; and, the fact that the contract is a continuing one extending over a period fixed or indeterminate does not exclude the application of the doctrine of frustration ; and, the nature of the trade is a material element in determining whether the events which happened merely suspended the performance under the a contract or put an end to it. *Lakshmana Prasad & Sons* v. *Achuthan Nair*[1], takes the view that a contract for purchase of a motor-car from a dealer must be deemed to be one to sell it at the controlled price inasmuch as the vendors are not expected to commit an offence by selling it at any other price, that when it is discovered later that the transaction has not taken place on that basis, the vendors are bound to return the difference in price as due to a mistake of fact, under section 72, and the purchaser is not bound to rescind the contract and return the vehicle. *Kumaraswami* v. *Karuppaswami*[2], holds that the principle that it is open to one party to keep the contract alive can have application only when the contract is executory or where there is still something to be performed under the contract and can have no application where time for performance has arrived and there has been a breach. In *S. Subba Rao* v. *P. K. Ginning and Pressing Factory*[3], it is stated that where goods are sold by sample and the goods supplied do not conform to it, the proper forum for recovery of damages is the Court of the place of contract and not the Court in the place to which subsequently the consignment may be sent at the instance of the buyer.

Specific Relief Act : It is pointed out in *Sankaralinga Nadar* v. *Ramaswami Nadar*[4], that specific performance of a transaction which was for proper consideration when it was entered into could not be refused on the ground that at the time of the suit the value of the property had considerably risen ; that with reference to section 22 (2) of the Specific Relief Act, the hardship should be one collateral to the contract and not in relation to a term of the contract, such as the quantum of consideration ; and, the discretion exercisable under the section is one to be exercised on judicial principles and capable of correction by a Court of appeal. *Sanaga Thevar* v. *Thanukodi Ammal*[5], mentions that under section 27 (*b*) the conditions to be satisfied are that the plaintiff must prove that the subsequent purchaser was not a purchaser for value, that he had not purchased in good faith, and that he had notice of the original contract.

Company Law : *Narayanan Chettiar* v. *Kaleswarar Mills, Ltd.*,[6] elucidates a number of points concerning the position of the chairman of a meeting of shareholders. It holds that it is not open to a chairman to stop the meeting and dissolve it before the business is finished ; it is the right of the shareholders assembled at the meeting to decide whether they should continue the business of the meeting on that day or adjourn it to a subsequent date ; if the chairman without the consent of the shareholders stops the meeting and declares it dissolved, the meeting may elect another chairman and conduct the remaining business. In *Public Prosecutor* v. *Ustepalle Swami Chetty*[7], it is stated that with regard to offences under the Companies Act there is no provision that an offence should be taken cognizance of only on complaint and hence any person may set the criminal law in motion. *Associated Industrial Engineers* v. *Jabbar Sahib*[8], expresses the view that where a managing agency agreement provides both for an office allowance and a remuneration, it cannot be said that the amount expressly said to be payable as office allowance is in the nature of a minimum payment as remuneration within the meaning of section 87-C of the Companies Act, and the minimum payment contemplated in section 270 (1) is something different from the office allowance. *Gangipati Appayya, In re*[9], holds that it is not open to an accused to plead in answer to a charge under section 133 (3) his prior default in respect of calling of the general body meeting.

1. (1952) 1 M.L.J. 705.
2. (1952) 2 M.L.J. 785.
3. (1952) 1 M.L.J. 548.
4. (1952) 1 M.L.J. 44.
5. (1952) 1 M.L.J. 620.
6. (1952) 1 M.L.J. 18.
7. (1952) 2 M.L.J. 184.
8. (1952) 2 M.L.J. 378.
9. (1952) 1 M.L.J. 608.

PROPERTY LAW: *Appa Rao* v. *Veeranna*[1], states that an agreement to sell immoveable property does not create any interest in the said property unless a conveyance is executed; that the title of a subsequent purchaser with notice is subject to the obligation in section 91 of the Trusts Act and the liability under section 27, Specific Relief Act, to be compelled to execute a sale deed to the person in whose favour there is the prior agreement to sell; but, till such sale deed is executed the latter does not acquire any title to the same; and, the execution of a sale deed by the original owner without the subsequent purchaser joining the sale is of no avail. In *Venkataperumal Naidu* v. *Ratnasabapathy Chettiar*[2], it is ruled that the vendor's lien for purchase money will not entitle the vendor to remain in possession till the entire purchase money was paid and a mortgagee from the vendor has therefore no such right. *Ammenumma* v. *Beeviumma*[3], takes the view that a mortgagee has a right under section 67, Transfer of Property Act, to file a suit for sale, subject only to the condition prescribed therein and such a suit will not be barred under the Civil Procedure Code by reason of a decree for sale passed on the same mortgage in a prior suit and under section 100 of the Transfer of Property Act the same principle applies to a second suit for sale to enforce a charge. *Kedar Lal Seal* v. *Hari Lal Seal*[4], expresses the view that where the right to contribution arises out of a mortgage, section 82, Transfer of Property Act, excludes section 43, Contract Act and since the whole law of mortgages is now statutory the Court cannot have recourse to equitable principles however fair they may appear to be at first sight. *Rahimansa* v. *Madras Islamia Educational Institution*[5], points out that the co-mortgagor redeeming is only an instance of subrogation; that the redeeming mortgagor has not merely a charge but the mortgage as to his share is extinguished; and, as to the shares of the other mortgagors he stands in the shoes of the mortgagee and that when a co-mortgagor redeems the whole property, his right as a mortgagee, relates back to the date of the mortgage which he has redeemed the benefit of priority over the subsequent mortgagees. In *Arunachalam Iyer* v. *Lingiah*[6], it is held that a purchaser of properties subject to a charge created by a compromise decree, the satisfaction or discharge of which has not been obtained or has not become barred by limitation, does not get any assistance from the proviso to section 100 of the Transfer of Property Act even though he is a purchaser for value without notice of the charge. The decision in *Bahayya* v. *Venkataratnam*[7] points out that the terms of the notice contained in an expired lease should not be held to be terms of the lease arising by holding over under section 116, and that section 106 does not in terms apply to agricultural leases, and that the requirements as to notice terminating the tenancy are satisfied if in fact there is reasonable notice. In *President, C. P. C. C. Society* v. *K. B. Haji*[8], the view is taken that when once a proper notice has been given by the tenant and the tenancy has been properly terminated the landlord's right would be not to question the notice of termination of the tenancy but to sue for recovery of damages caused to the property.

HINDU LAW.—*Aravamudha Iyengar* v. *Ramaswami Bhattar*[9] rules that adoption is both a religious as well as a secular act and as such can be done only by a major; that minority in Hindu law comes to an end only on the completion of the 16th year and the rule applies equally to males and females, to the act of adoption as well as to an authority empowering the widow to make an adoption. In *Sri Hari Rao* v. *Venkiah*[10], it is pointed out that where a power of adoption is limited to adopting a specified boy, the adoption of any other boy would be invalid; that where the power is general and no special directions have been given, successive adoptions would be valid; and that where the power is general and special directions have been attached such directions must be strictly followed; but, if those directions become impossible of observance, then an adoption can validly be made in exercise of the general power. The subject of maternal affiliation

1. (1952) 2 M.L.J. 166.
2. (1952) 2 M.L.J. 241.
3. (1952) 2 M.L.J. 421.
4. (1952) 1 M.L.J. 431 (S.C.).
5. (1952) 2 M.L.J. 404.
6. (1952) 2 M.L.J. 347.
7. (1952) 1 M.L.J. 427.
8. (1952) 1 M.L.J. 459.
9. (1952) 1 M.L.J. 251.
10. (1952) 2 M.L.J. 392.

in adoption is considered in *Thirumaleshwara Bhatta* v. *Ganappayya*[1], where it is ruled that an adoptive father has no right to name a non-existent deceased wife in preference to the existing living wife as the mother of the boy so as to entitle him to succeed to the estate of such predeceased wife's father. *Thiruvathammal* v. *Vagunathan*[2], decides that the father is under a legal obligation to meet the marriage expenses of his daughter if there is joint family property, that the obligation will be only moral in the absence of such property, and where the mother has incurred the expenses of the marriage she can recover the same from her husband if he has joint family property. In *Munuswami Naidu* v. *Swaminatha Naidu*[3], it is recognised that an illegitimate son of a Sudra is not a member of the coparcenary and has no right by birth or right to partition or joint possession and if he has been in possession of any items of property for over the statutory period the coparceners of the putative father cannot claim partition of such property. In *Gur Narain Das* v. *Gur Tahal Das*[4], the Supreme Court points out that on the putative father's death, the illegitimate son succeeds as a coparcener to the separate estate of his father along with the legitimate son with a right of survivorship and is entitled to enforce partition against the legitimate son and unless exclusion and ouster are pleaded and proved he is entitled to partition though he is not in possession. The decision in *Annamalai Ammal* v. *Sundarathammal*[5], holds that a father may make a gift of immovable property of the joint family to his daughter within reasonable limits, and it cannot be questioned by the sons though such a gift was made before marriage, and where it is so made it may be assumed that it was meant as a marriage portion. It is pointed out in *Pundarikakshudu* v. *Venkiah*[6], that an alienation of ancestral property to purchase lands elsewhere, if not speculative and risky but beneficial to the family, will be binding on the family. The decision of the Full Bench of five Judges in *Peramanayakam Pillai* v. *Sivaraman*[7], holds that section 44 of the Transfer of Property Act does not affect the Hindu Law and entitle an alienee from a coparcener to claim joint possession of the alienor's share as a tenant-in-common; that neither the alienation of his share by a coparcener nor his insolvency operates to bring about a division in status; and that the alienee's interest is to be determined with reference to the date of the alienation and not with reference to the date of the suit for partition. The decision also indicates the principles which should guide the adjustment of equities between the alienee and the non-alienating coparceners whether the suit is one by the alienee for partition or by the coparceners for avoidance of the alienation. In *Subramanian* v. *Kalyanarama Iyer*[8], it is held that the share obtained by a father at a partition is the separate property of the father in which his widow will be entitled to a share. In *Chinnathayi* v. *K. P. Naicker*[9], the Supreme Court recognises that a member of a joint family owning an impartible estate can on behalf of himself and his heirs renounce his right of succession but any such relinquishment must operate in favour of all the branches of the family or in favour of the head of the family as representing all its members. *Punna Lal* v. *Mt. Naraini*[10], is an instructive decision of the Supreme Court on the liability of sons for a pre-partition debt of the father. It rules that a son is liable even after partition for the pre-partition debts of his father which are not illegal or immoral and for the payment of which no arrangement was made at the partition; that whether any arrangement made in that behalf is a proper arrangement or not will have to be decidied on the facts of each case; that a decree obtained against the father alone after partition in respect of such a debt cannot be executed against the property allotted to the son at the partition because the separated share of the son cannot be said to belong to the father nor has he any disposing power over it or its profits which he can exercise for his benefit; but the position will be materially different if the sons are made parties to the suit as legal representatives of the father and a decree is passed against them limited to—

1. (1952) 2 M.L.J. 716.
2. (1952) 1 M.L.J. 268.
3. (1952) 2 M.L.J. 239.
4. (1952) 2 M.L.J. 251 (S.C.).
5. (1952) 2 M.L.J. 782.
6. (1952) 2 M.L.J. 484.
7. (1952) 1 M.L.J. 308 (F.B.).
8. (1952) 2 M.L.J. 575.
9. (1952) 1 M.L.J. 292 (S.C.).
10. (1952) 2 M.L.J. 83 (S.C.).

the assets of the deceased defendant. In *Ratna Raja Kumar v. Narayaa Rao*[1], the Supreme Court holds that the principal factor to be considered in awarding maintenance to an illegitimate son is the exact income from the properties of the putative father ; that the death of the father *pendente lite* and the adopted son's being entitled to enjoy the property is hardly a relevant consideration ; but the Court must not overlook the losses of the father in business transactions and the fact of the illegitimate son being an able-bodied person with earning capacity. *Veerraju* v. *Narayanamma*[2] points out that the quantum of maintenance claimable by the widow of a coparcener is bound up with the fortunes of the family and if the income of the family decreases she must submit to a reduction of her maintenance. In *Muthalammal* v. *Veeraraghavulu Nayudu*[3], it is held that a widow's right to maintenance against her husband's estate in the hands of his coparcener is one which cannot be transferred or assigned when it is an inchoate right which has not crystallised into a definite sum. In *Annagouda Nathgouda* v. *Court of Wards, Satara*[4], the Supreme Court has ruled that the Hindu Law of Inheritance (Amendment) Act, 1929, has a limited scope and applies only to the separate property of a Hindu male who dies intestate and therefore the stridhana heirs of a maiden have to be ascertained with reference to the general provisions of the Hindu law of inheritance ignoring the statutory heirs who have been introduced by the Act. The decision in *Krishnamachariar* v. *Ramabhadran*[5], states that it is within the competence of a limited owner to incur expenditure in connection with a kanyadhana as an act of piety calculated to promote the spiritual bliss of her husband and the fact of the relationship of the kanya to the holder of the estate as daughter or grand-daughter or the fact of the indigence or affluence of the girl's father does not affect the question. *Ratnam Pillai* v. *Subramania Aiyar*[6] expresses the view that whether an alienation by a widow is for necessity or benefit of the estate ought to be judged by the condition in which the estate and the widow stood at the time of the alienation and not by reference to the possibility of sales of small lots of property out of the whole estate, and an alienation of the whole corpus making the bulk of the consideration a fund to be kept for her future maintenance purposes will not be valid. In *Nagi Reddi* v. *Durairaja Naidu*[7], the Supreme Court explains the basic principles of surrender and holds that a release by a widow in favour of the next heir and a stranger (the daughter and her husband) is wholly void and will not operate as a surrender of the whole estate to the next heir and a transfer of half share in it to the stranger. In *Mt. Phool Kuer* v. *Mt. Prem Kuer*[8], the Supreme Court reaffirms the requisites of a surrender and points out that where the surrender of the totality of the interest of the widow was not made in favour of the next heir, it cannot operate as a valid surrender, and succession to the estate will open on the death of the widow. *Arunachala Moopanar* v. *Arumugha Moopanar*[9], expresses the view that when a widow alienates a part of her husband's estate and then makes an unconditional surrender of the entire estate in favour of the nearest reversioner, it is not open to the surrenderee to recover possession and dispossess the alienee form the widow until the widow dies and the position is the same where the widow has voluntarily made a gift of a portion of the estate in favour of a donee.

MUHAMMADAN LAW.—The decision in *Ayisumma* v. *Mayomootty Umma*[10] holds that intestate succession of property belonging to Mappillas after 1937 could not be governed by any other law except that of the Muslim Personal Law (Shariat) Application Act governing the Muslims. *Masum Vali Saheb* v. *Illuri Moidin Sahib*[11] expresses the view that a transfer by a Muhammadan to his wife of immovable property in satisfaction of her dower debt is a sale and where the property is over hundred rupees in value the transaction will not be valid in the absence of a registered instrument. In *Abdul Kadir* v. *Mahlarathul Kadiria Sabha*[12], it is pointed out that the sanction of the kazi to alienation of wakf property was only by way of

1. (1952) 2 M.L.J. 342 (S.C.).
2. (1952) 2 M.L.J. 734 (F.B.).
3. (1952) 2 M.L.J. 344.
4. (1952) 1 M.L.J. 414 (S.C.).
5. (1952) 1 M.L.J. 665.
6. (1952) 2 M.L.J. 679.
7. (1952) 1 M.L.J. 746 (S.C.).
8. (1952) 1 M.L.J. 823 (S.C.).
9. (1952) 2 M.L.J. 280.
10. (1952) 2 M.L.J. 933.
11. (1952) 1 M.L.J. 611.
12. (1952) 2 M.L.J. 657.

safeguard against improper alienations, and that purpose will be amply served by insisting on sanction of it either previous or subsequent, so long as there is an assurance that the transaction would be examined on its merits and there is an inquiry whether it is supported by legal necessity or benefit to the trust.

INSOLVENCY LAW.—The decision in *Chandramouleswaran* v. *Krishnaswami Naidu*[1] suggests that it may be difficult under the rules for the court to give any specific notice to the other creditors when a compromise is sought to be entered into between the petitioning creditors and the debtors; but, that difficulty may be obviated by court notice being put up on the notice board of the court that the petitioning creditor is seeking to settle the matter between himself and the debtor and that the other creditors who are interested and are already on record or not may take the necessary steps to safeguard their interests. *Thirumaleshwara Bhatta* v. *Govinda Bhatta*[2] points out that on adjudication of the father as insolvent not only the share of the father but also his power to dispose of his son's share would vest in the Official Receiver under section 28 of the Provincial Insolvency Act and that fact alone would not by itself convey to the auction purchaser the share of the son unless there is indication in the document or in the sale proceedings that the Official Receiver in fact purported to exercise that power of sale and did sell the son's share as well, and where prior to the sale the son sends a notice demanding partition there will be a division in status preventing the Official Receiver from exercising the power of sale. *Nallaperumal* v. *Singaravelu*[3] expresses the view that it is not incumbent on a creditor to satisfy the requirements of section 9 in asking for readjudication after the annulment of the original adjudication consequent on the failure of a composition scheme which intervened. In *Mohammad Hussain Sahib* v. *Syed Mohammad Rowther*[4] it is pointed out that by reason of the fact that when insolvency proceedings are annulled all proceedings taken during such period and all actions done during such period also get annulled, proceedings by which certain transactions were declared void will also get annulled. *Venkateswar Chetty* v. *Ganapathia Pillai*[5] holds that in regard to the starting point of limitation for an appeal on an order of adjudication the counting of the 30 days under section 75 (4) is in the case of parties to the proceeding from the date of the order of adjudication and in the case of third parties from the date of its notification in the gazette, and in so counting the period the time taken for obtaining a copy of the order of adjudication must be excluded under section 12 of the Limitation Act.

MADRAS AGRICULTURISTS RELIEF ACT.—In *Venkatasubbayya* v. *Mallappa*[6] it is pointed out that to give exemption under section 4 (*d*) of Madras Act IV of 1938 the property must be a "house" and where on the date of incurring the debt the house was not in existence there is no exemption afforded and the debt is liable to be scaled down. *Subbarayulu Seth* v. *Venkataramanamma*[7] holds that a debt contracted on the security of three houses and an independent vacant site in a Union which later on became a Panchayat, the debt cannot be regarded as a debt contracted on the security of house property alone and therefore it is liable to be scaled down. *Janakiramayya* v. *Ranganayakamma*[8] states that two tests are intended by section 4 (*h*) for the application of the exemption, namely, (i) whether the debt is due to a woman, and (ii) whether the value of the property owned by her, either as life estate holder or as absolute owner did not exceed Rs. 6,000. *Chozhi* v. *Lakshmi*[9] recognises that a party to a suit or proceeding can acquire a new right by reason of an Amending Act; but a debtor who has already obtained relief under sections 8 and 9 on the basis that the transaction was not an usufructuary mortgage as defined under section 10 (2) cannot claim relief under section 9-A conferred by the Amending Act of 1948 on the basis that the suit document is an usufructuary mortgage. *Krishnayya* v. *Venkatasubbarayudu*[10] takes the view that even after the Amending Act XXIII of

1. (1952) 2 M.L.J. 148.
2. (1952) 1 M.L.J. 681.
3. (1952) 2 M.L.J. 681.
4. (1952) 2 M.L.J. 823.
5. (1952) 1 M.L.J. 765.
6. (1952) 2 M.L.J. 471.
7. (1952) 2 M.L.J. 880.
8. (1952) 2 M.L.J. 36.
9. (1952) 1 M.L.J. 834.
10. (1952) 1 M.L.J. 638.

1948 there is no change with respect to the tracing back of a debt under section 9 because in the proviso to that section nothing is said about debts renewed after the Act came into force. *Kumaraswami* v. *Govindaswami*[1] is an interesting decision which holds that when a mortgagee is in possession under a usufructuary mortgage of 1927 containing a condition that in case the debt was not redeemed within five years the mortgagee would become the owner, the condition was a clog on the equity of redemption; and hence the mortgagee's possession after 1932 will only be that of a mortgagee and not that of a vendee; and so section 9-A will directly apply to the case, and the animus of the mortgagee that he remained in possession as vendee is not the decisive factor for the application of the section. In *Bramaramba* v. *Jegannatha Rao*[2], it is held that section 14 is a special provision which applies when there is a debt payable by the members of a family some of whom are agriculturists and some are not, that a substantive application is not necessary for a judgment-debtor to obtain the benefit of section 14 and it is sufficient if the debtor raises the objection based on the section in his counter-affidavit in the execution petition. *Kanakammal* v. *Kathija Beevi*[3] lays down that an application under section 19 is not one which comes under section 47, Civil Procedure Code and therefore the principle of *res judicata* in execution cannot apply. It also holds that it is not the bounden duty of the judgment-debtor when an execution application was pending to raise the question regarding scaling down, and if he failed to do so it is open to him at a later stage to file an application for scaling down. *Jagannadham* v. *Parthasarathy*[4] takes the view that after an application under section 19 has been finally decided it is not open to the judgment-debtor to file a similar application again for taking advantage of certain amendments in the method of scaling down introduced by Act XXIII of 1948 and that neither section 16 of the Amending Act nor Explanation 1 to section 8 of Act IV of 1938 as amended gives retrospective operation to matters decided prior to the date of the amendment. *Narayanan Chettiar* v. *Rathinasami Pillai*[5] points out that a judgment-debtor would not have a right to file successive applications under section 20 or section 19 if the reliefs which he claims are the same in the several applications, but if a subsequent application is based on a provision of law not in existence at the time of a prior application of his, he will not be debarred from filing the later application simply because he had filed a prior application when the state of the law did not entitle him to the relief to which he became entitled by a subsequent change in the law. In *Venkataratnam* v. *Seshamma*[6] it is decided by the Full Bench that clause (ii) of section 16 of the Amending Act of 1948 applies to proceedings instituted before the commencement of the Act but which did not become final before such commencement and that clause (iii) would apply to decrees and orders even if they had become final before the commencement of the Act provided the decrees and orders had not been executed or fully satisfied.

MADRAS ESTATES LAND ACT.—*Butchi Ramayya* v. *Gundu Ramanna*[7] takes the view that lands situated in a zeroyti village forming part of a permanently settled estate do not cease to be such though they were obtained by the landholders in exchange for lands in a presettlement inam and civil courts will have no jurisdiction to entertain a suit to eject tenants from such lands. In *The District Board, Tanjore* v. *Noor Mohamed*[8], the Supreme Court lays down that the burden of proving that certain lands constitute an "estate" within the meaning of section 3 (2) (*d*) of the Estates Land Act is upon the party who sets up the contention. The tests for determining whether land in an estate is private land are dealt with by a Full Bench in *Periannan* v. *A. S. Amman Kovil*[9] which holds *inter alia* that cultivation of the lands or leasing of the lands under short terms may be one mode of proof; an intention to cultivate or resume for cultivation is also a test, but mere proof that the landholder is the owner of both the varams is not sufficient to prove that the land is private

1. (1952) 1 M.L.J. 619.
2. (1952) 2 M.L.J. 655.
3. (1952) 2 M.L.J. 53.
4. (1952) 2 M.L.J. 430.
5. (1952) 2 M.L.J. 859.
6. (1952) 1 M.L.J. 264 (F.B.).
7. (1952) 2 M.L.J. 408.
8. (1952) 2 M.L.J. 586 (S.C.).
9. (1952) 1 M.L.J. 71.

land under section 3 (10). *Zemindar of Ettiapuram* v. *Permmal Reddi*[1] states that a custom in respect of trees which were planted or grew upon the holding subsequent to the passing of the Estates Land Act is invalid and the landlord cannot claim to levy a tax on them. *Chockalingam Chettiar* v. *Sivakolandu Achi*[2] holds that the priority given to a purchaser under section 125 can only enure to him if he is a purchaser of the holding sold for arrears of rent and will not be available to the purchaser of a holding in execution of a rent decree for costs. *Kumaraswami Chetti* v. *Subramania Iyer*[3] points out that Order 21, rule 91, Civil Procedure Code, is not one of the provisions excluded under section 192 (1) of the Estates Land Act. In *Venkatakrishna Reddi Garu* v. *Venkataraju*[4] it is made clear that section 145 (2) will equally apply to a transferee prior to the filing of the application and a transferee subsequent to that date, that once the recognition is made the transferee will become the owner for all purposes of the Act, and therefore a sale deed in execution of a rent decree without issuing notice to the purcaser of the holding is void.

STAMP ACT.—In *Lobo* v. *Marajul Doggu*[5] it is pointed out that a foreign promissory note even though duly stamped according to the Indian Stamp Act, has to be stamped again before the actual endorsement of the note in favour of a person who thereafter filed a suit on the note. *Appalanarasimhalu* v. *Board of Revenue, Madras*[6] explains that the power to make a reference under section 57 is not for the benefit of the revenue authority but is coupled with a duty cast on him to do the right thing and when an important and intricate question of law in respect of the construction of a document arises, it is his duty to make a reference and if he fails to do so the court can direct him to discharge that duty. The power of the State to levy stamp duty under Article 30 of the Stamp Act or under Article 25 of Schedule 1-A of the Act as amended in Madras, as enrolment fee of advocates was considered in *Ananthakrishnan* v. *State of Madras*[7] and the view was expressed that inasmuch as the enrolment fee is not with the object of deliberately abridging or destroying the right to carry on the legal professsion and is not so excessive or oppressive as to virtually abridge or destroy that right, it must be held to be proper and constitutional.

COURT FEES ACT.—*Kothandaraman* v. *Collector of Chingleput*[8] draws attention to the fact that an appeal against the final decree will be superfluous where no new ground could be urged in such appeal which could not be urged in an appeal against the preliminary decree; but, if filed, court-fee will have to be paid. The only exceptions are account suits and mesne profit cases, as in these cases, it is the final decree that settles the actual liabilities and not the preliminary decree and in appeals against both it is only the balance that need be paid to make up in the appeal against the final decree. In all other cases *ad valorem* court-fee will have to be paid in both appeals. *Kalyanakrishna Ayyar* v. *Lakshmi Ammal*[9] holds that in a suit by a succeeding trustee for recovery of possession of properties on the strength of the title of the temple ignoring an invalid alienation by a previous trustee, court-fee need be paid ony for recovery of possession and mesne profits and no more and section 7 (IV) (*a*) will not be attracted. In *Venkataswami Naicker* v. *Chinnayapuram Co-operative Stores*[10] it is held that in a suit for declaration that an award by the Registrar of Co-operative Societies is not valid and for injunction against attachment of plaintiff's properties in execution, court-fee under section 7 (iv-A) need not be paid for the declaration as the award cannot be equated with a decree of a civil or revenue court; nor will court-fee under section 7 (iv) (*c*) fall to be paid on the injunction. The decision in *Pappukannu Anni* v. *Thoppayya Mudaliar*[11] holds that easement suits do not fall under section 7 (iv) (*c*) as no question of title or possession is involved. *Akhandala Kurup* v. *Damodara Kurup*[12] decides that where in a plaint as it stood there was no allegation of any joint possession with other members of the family of at least one item of family property, Court-fee payable in respect of the

1. (1952) 2 M.L.J. 708.
2. (1952) 1 M.L.J. 770.
3. (1952) 2 M.L.J. 827.
4. (1952) 1 M.L.J. 643.
5. (1952) 2 M.L.J. 747.
6. (1952) 1 M.L.J. 641.
7. (1952) 1 M.L.J. 208.
8. (1952) 2 M.L.J. 852.
9. (1952) 2 M.L.J. 38.
10. (1952) 1 M.L.J. 8.
11. (1952) 2 M.L.J. 108.
12. (1952) 2 M.L.J. 145.

general relief of partition and delivery of plaintiff's share will fall under section 7 (iv-A). *Palaniappa Chettiar, In re*[1], takes the view that a person who has been a party to a settlement of accounts evidenced by a document cannot seek to have the accounts reopened having the entire document set aside and so is liable to pay court-fee under section 7 (iv-A). In *Sambiah* v. *Venkata Reddi*[2] it is held that where plaintiffs seek to recover possession of lands in which they claimed occupancy rights and with whose possession they had parted with legally and peacefully and under orders of court in judicial proceedings, and where a declaration of title to the kudivaram was sought and strangers were added, court-fee for recovery of possession will have to be paid under section 7 (iv) (*c*). *Muthu Naicken* v. *Mariappa Pillai*[3] points out that a suit for redemption of a portion or share of hypothecated property must be valued on the same principle as a suit for redemption of the entire mortgage and the valuation would be the share of the mortgage amount as determined by the share in the mortgaged property to which the plaintiff lays claim. *Narayanaswami Ayyar* v. *Kesava Ayyar*[4] expresses the view that where an alienee from a cosharer who got divided in status, alleging in his suit that his vendor has been in joint possession of some of the items of the suit properties as a tenant-in-common with the other cosharers, seeks to convert such constructive joint possession into separate possession, the suit will have to be vauled under Article 17 and section 7 (v) does not apply.

Evidence.—Pointed attention is drawn by the Supreme Court to the rules specially applicable to circumstantial evidence in *Hanumant* v. *State of Madhya Pradesh*[5], where Mahajan, J., observed : " It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hyopthesis of the guilt of the accused ; again, the circumstances should be of a conclusive nature and tendency, and they should be such as to exclude every other hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused ; and it must be such as to show that within all human probability the act must have been done by the accused[6] ". The same decision also points out that it is settled law that an admission made by a person whether amounting to a confession or not cannot be split up and part of it used against him. In *Vokkaligara Yentappa, In re*[6], the view is expressed that sections 25 to 27 of the Evidence Act only prohibit the use of the confession against the accused and there is no prohibition of its use in favour of the accused. It is held in *Vasam Setty Appa Rao, In re*[7] that a statement by an accused to a Prohibition Officer is not a confessional statement as he is not a police officer and hence the rule requiring corroboration of resiled statements before a court could act upon them does not apply to it. *Ramakrishnayya* v. *Achutharamayya*[8] lays down that the evidence of a medical man giving opinion on what he had read but without examining the woman concerned in regard to an alleged period of gestation of over 345 days is of no value whatsoever. An exposition of the law relating to the necessity for corroboration of the complainant's evidence in the case of an offence of rape is made by the Supreme Court in *Rameshwar* v. *State of Rajasthan*[9], where it is pointed out that corroboration is not a pre-requisite to conviction but the necessity therefor as a matter of prudence except where the circumstances make it safe to dispense with it, must be present to the mind of the Judge and in jury cases must find a place in the charge before conviction without corroboration. It is also held that a previous statement of the complainant can be accepted as corroboration provided the conditions prescribed in section 157, that is to say, made at or about the same time, *etc.*, are fulfilled.

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1. (1952) 2 M.L.J. 3.
2. (1952) 1 M.L.J. 632.
3. (1952) 2 M.L.J. 172.
4. (1952) 1 M.L.J. 11.
5. (1952) 2 M.L.J. 631 (S.C.).
6. (1952) 1 M.L.J. 62.
7. (1952) 1 M.L.J. 658.
8. (1952) 2 M.L.J. 515.
9. (1952) 1 M.L.J. 440 (S.C.).

LIMITATION.—In *Venkataswami Chetty* v. *Ganapathia Pillai*[1], it is made clear that sections 5 and 12 of the Limitation Act are applicable to the case of an appeal by a third party against an order of adjudication. *Srinivasa Chettiar* v. *Arunachalam Chettiar*[2] holds that section 13 will apply and save limitation in respect of a suit brought against the manager of a joint Hindu family who had borrowed moneys from time to time and was afterwards away from India, inasmuch as such period of absence might be excluded in computing the period of limitation, and the presence of the junior members cannot operate to deprive the plaintiff of his right to exclude the manager's period of absence in computing limitation. *Shanmughasundaram Mudaliar* v. *Chidambaram Pillai*[3] lays down that where a servant is a domestic servant Article 7 does not apply, but Article 10 applies to a suit for recovery of bonus due under the agreement of employment against his employer. In *Ramaswami Goundar* v. *Marappa Goundar*[4] it is pointed out that an unauthorised alienation by a lawful guardian is only voidable and must be set aside within the time prescribed by Article 44 unlike an alienation by an unauthorised person which is void under the law and does not require to be set aside ; and that where the transfer is operative and the question is whether it is binding on the ward or not it has to be set aside within the time prescribed by Article 44. *Natesa Thevar* v. *Narayanaswami Padayachi*[5] reaffirms the view that Article 134 does not apply to court sales, and that where the mortgagor had knowledge of the fact that the properties as such were sold in court auctions and subsequently by the court auction purchasers in favour of a stranger, a suit for redemption by the purchasers of the equity of redemption from the original mortgagor will fall under Article 144 and if barred under that Article there will be no scope for the applicablity of Article 148. In *Singana Sathiraju* v. *Merla Sathamma*[6] it is held that an order on an execution petition " no instructions, no bids, sale stopped : execution petition closed " is not a 'final order' and a subsequent petition for execution filed after 12 years can be treated as a continuation of the earlier one. *Rambhadra Reddiar* v. *Ramachandra Reddiar*[7] points out that where an unnumbered execution petition returned for filling up certain particulars was re-presented eighteen months later without the requirements being complied with and without any application for excusing the delay, and there was an endorsement that the decree-holder was not pressing the petition and that it might be dismissed, and the court ordered " not pressed ; rejected ", the order must be held to be a final order. *Daivanai Achi* v. *Kannappa Chettiar*[8] lays down that in the case of an instalment decree after a default has occurred in the payment of instalments, an application for execution for the recovery of subsequent instalments is maintainable, where there is nothing to show that the decreeholder had previously sought to enforce the default clause, the application being governed by Article 182 (2) of the Limitation Act.

CIVIL PROCEDURE CODE.—In *Peda Rami Reddi* v. *Bichalu*[9], the view is expressed that the decision in a suit under Order 21, rule 63, Civil Procedure Code, to which the claimant and the judgment-debtor were parties as co-defendants regarding the title to the property in dispute will operate as *res judicata* in a subsequent suit between the claimant and the representative in interest of the judgment-debtor where the title to the same property is in dispute. *Dorayya* v. *Adinarayana*[10] states that the proceedings under the rules under Madras Act IV of 1938 are not of a summary nature and an order holding that the applicant, a mortgagor, was not an agriculturist will operate as *res judicata* and preclude him from raising the plea over again in a suit filed by him for possession of property and declaration that the amount due under the usufructuary mortgage was completely satisfied. *Vittal Shetty* v. *Parameshwari*[11] points out that if the order of the Judge under section 35 is not based on legal principles it can certainly be interfered with by the High

1. (1952) 1 M.L.J. 765.
2. (1952) 2 M.L.J. 66.
3. (1952) 2 M.L.J. 890.
4. (1952) 2 M.L.J. 506.
5. (1952) 2 M.L.J. 77.
6. (1952) 2 M.L.J. 67.
7. (1952) 2 M.L.J. 73.
8. (1952) 2 M.L.J. 464.
9. (1952) 1 M.L.J. 475.
10. (1952) 2 M.L.J. 359.
11. (1952) 2 M.L.J. 932.

Court in appeal. The nature of an order directing a precept under section 46 is considered in *Ramachandrudu* v. *Sait Bakraj Gulabchand Firm*[1] where it is held that such an order is merely one that tends to facilitate the execution of a decree and is not a step in the execution proceeding and as such is not appealable ; nor will an order extending the time for a precept be appealable. The decision of the Supreme Court in *Union of India* v. *Hira Devi*[2] holds that provident fund money is exempt from attachment and alienation and execution cannot be sought against it by way of appointment of a receiver. Also, though salary is not attachable under section 60 except to the extent indicated, there is no such exemption as regards arrears of salary. *Pattabhi Rama Rao* v. *Venkata Subbamma*[3] points out that where a judgment-debtor is dependent on her lands and unable to maintain herself otherwise, the fact that the whole of the cultivation is carried on through paid servants will not make the judgment-debtor any the less an agriculturist within the meaning of section 60 (1) (*c*). *Velayudham* v. *Governor-General in Council*[4] is an interesting decision holding that section 80 can have no application to the continuation of a suit properly instituted, when at the time of the institution the Government was not a necessary party ; the fact that, during the pendency of the suit, the interest of the defendant had devolved on the Government will not attract section 80, and notice to Government in such a case is not necessary. *Palvannam Pillai* v. *Ganapathy Ayyar*[5] expresses the view that a suit to declare the right of the plaintiffs to take out a funeral procession along a public road and to restrain the defendants from interfering is not barred by section 91. The scope and nature of a suit under section 92 is explained in *Mahant Pragdasji* v. *Narsibhai*[6] by the Supreme Court which states that a suit under the section is one of a special nature which presupposes the existence of a public trust of a religious or charitable character and can proceed only on the allegation that there is a breach of a trust or that directions from the Court are necessary for the administration thereof ; but when the case of the plaintiff fails for want of a cause of action there is no warrant for giving him a declaratory relief under section 92. *Kasi Viswanadhan* v. *Rudranna*[7] takes the view that a suit for directing the person in charge of a common fund, for whatever purpose it may be used, of a village, to render an account of the amount falls under section 92, the provisions of which must be complied with. In *Subba Rao* v. *Chalamayya*[8], the Full Bench holds : (i) If a judgment or decree of the High Court varies the decision of the lower Court in respect of a matter in controversy in the proposed appeal to the Supreme Court, then there is a right of appeal not only to the person against whom the variation has been made but even to the party in whose favour it is made, provided the matter in respect of which there has been a variation is the subject-matter of the proposed appeal to the Supreme Court. (ii) If the matter in respect of which there has been a variation is not a subject-matter of the proposed appeal, then, such variation would not confer a right of appeal ; and as regards matters unconnected with the matter in respect of which there has been a variation *ex hypothesi*, this will be the case when the variation has been completely in favour of the applicant. *Paramasivam Pillai* v. *Adilakshmi Ammal*[9] favours a wide and liberal construction of the language of Order 1, rule 10 (2), Civil Procedure Code and suggests that the attempt should be always to make parties all persons who may be necessary in order that there might be a final and complete adjudication of the points involved in the suit, and where in a suit for partition a stranger claims some of the items in his own absolute right he can be added as a party. In *Subba Naicker* v. *Kathiresa Thevar*[10], it is held that claims for rent for successive years arise under the same obligation and there can be no doubt that suits for rent attract the provisions of Order 2, rule 2, and the fact that there is likely to be a variation in the sums claimed by the landholder in the successive years by reason of new cesses being levied by Government will make no difference to the applicability of Order 2, rule 2. *Chalamiah* v. *Rubiah*[11] states

1. (1952) 1 M.L.J. 398.
2. (1952) 2 M.L.J. 265 (S.C.).
3. (1952) 1 M.L.J. 291.
4. (1952) 1 M.L.J. 235.
5. (1952) 2 M.L.J. 552.
6. (1952) 2 M.L.J. 94 (S.C.).
7. (1952) 2 M.L.J. 443.
8. (1952) 1 M.L.J. 365 (F.B.).
9. (1952) 1 M.L.J. 473.
10. (1952) 2 M.L.J. 752.
11. (1952) 2 M.L.J. 944.

that Order 9, rule 13, gives ample discretion to the court to impose terms for setting aside an *ex parte* decree and a direction to the defendant to deposit the costs of the suit before a certain date cannot be said to be unreasonable or punitive. In *Guru-santhayya* v. *Veerayya*[1] it is pointed out that the distinction between rules 2 and 3 of Order 17 is that, in order that rule 2 should apply, a party or his pleader should not be present in court whereas in the case of rule 3, even if the party or his pleader is present in court if there is failure to produce evidence, to cause the attendance of witnesses, or to perform any other act necessary to the further progress of the suit, Order 17, rule 3 applies. A point of nicety is dealt with in *Arunachala Chettiar* v. *Vadla Goundan*[2], where it is ruled that if a judgment-debtor dies after sale and before passing of confirmation order, no order of confirmation can be passed in the absence of the legal representatives of the judgment-debtor ; and, if passed, it will be a nullity. *Jayalakshmi Ammal* v. *Subbaraya Reddiar*[3] states that it cannot be said that Order 21, rule 89, is confined only to judgment-debtors or persons deriving interest from them as that would render nugatory the last alternative category of persons entitled to apply under Order 21, rule 89 (1), that is, persons holding an interest in the property such as mortgage decree-holders, charge-holders, etc., and so a decree-holder who has a charge on the concerned property can apply to set aside the execution sale. *Viswanadha Sastri* v. *Venkatakrishna Rao*[4] holds that where a decree-holder himself purchases property in execution levied for a much larger amount than what was due and to his knowledge, the sale should not be allowed to stand. The decision in *Kandaswami Nadar* v. *Province of Madras*[5] makes it clear that if a defendant requests the Court to dismiss a suit and grant permission to the plaintiff to file a fresh suit, when such fresh suit is filed he cannot turn round and say that the later suit is not sustainable because of the provisions of Order 23, rule 1. *Vikraman* v. *Krishnan Nair*[6] reaffirms the view that a mere agreement to take the oath on the challenge made by one of the parties and accepted by the other party cannot amount to an adjustment or compromise within the meaning of Order 23, rule 3. In *Abdul Azeez* v. *Pathumma Bi*[7], it is held that on a reading of Order 32, rule 1 and sections 2 (*a*) and 3 of the Indian Majority Act, a Muslim woman who is a major according to her personal law but is a minor according to the Majority Act cannot sue for dissolution of her marriage without being represented by a next friend and where a suit is filed without a next friend the proper course will be to return the plaint as not properly presented and not to dismiss it. *Kalidas* v. *Fakir Mohammad*[8] points out that a puisne mortgagee impleaded in a suit by the first mortgagee and obtaining a preliminary decree can (even if the mortgagor has paid off the first mortgagee) apply for a final decree in the same manner as the plaintiff might have done under Order 34, rule 4 (4) of the Civil Procedure Code. In *Kuttyal* v. *Sanjiva Rao*[9] it is laid down that a decree for rent in respect of a lease back which is part of a usufructuary mortgage is a claim arising under the mortgage and Order 34, rule 14, is a bar to bringing the mortgaged properties to sale in execution of such decree. *Seetharamayya* v. *Anjayya*[10] rules that on application under Order 37, rule 3, for leave to defend, the court can certainly impose conditions when it feels that the defence lacks *bona fides*. In *Travancore Forward Bank Ltd.* v. *Gopalakrishna Chettiar*[11], it is pointed out that in a suit under Order 37 where leave to defend has not been granted, the fee allowable to the advocate shall be half the fee prescribed under rule 31, (*b*) of the Legal Practitioners Rules subject to a maximum of Rs. 500. *Poomalai Ammal* v. *Subbammal*[12] rules that a party who did not choose to file an appeal against the judgment of the trial court and allowed it to become final cannot in a second appeal by the opposite party invoke Order 41, rule 33. *Veerappa Goundan, In re*[13], decides that no appeal lies under Order 43 against an order refusing to set aside an *ex parte* decree under section 5 (7) of the Madras Hindu Bigamous Marriage Prevention and Divorce

1. (1952) 2 M.L.J. 1.
2. (1952) 1 M.L.J. 400.
3. (1952) 2 M.L.J. 439.
4. (1952) 1 M.L.J. 645.
5. (1952) 1 M.L.J. 804.
6. (1952) 1 M.L.J. 452.
7. (1952) 1 M.L.J. 463.
8. (1952) 1 M.L.J. 624.
9. (1952) 2 M.L.J. 675.
10. (1952) 2 M.L.J. 31.
11. (1952) 2 M.L.J. 685.
12. (1952) 2 M.L.J. 884.
13. (1952) 2 M.L.J. 749.

Act, 1949, making interim provision for maintenance and for expenses of the wife who had applied for dissolution of marriage. The decision in *Rajahmundry Electric Supply Corporation* v. *State of Madras*[1] makes it clear that Order 45, rule 13 (2) (*d*), does not enable the High Court to give any direction to the successful party by way of restricting him or preventing him from exercising the rights to which he has become entitled under the final order of the High Court. *Chenchanna Naidu* v. *Praja Seva Transports, Ltd.*[2], states that where the civil jurisdiction of the High Court is invoked under Article 226 of the Constitution the Civil Procedure Code becomes applicable to the proceedings, and if there is an error apparent on the face of the record in the order quashing the proceedings under the Motor Vehicles Act, it can be set right in review under Order 47. In *Fernandez* v. *Ranganayukulu Chetty*[3] the view is expressed that the provisions of Order 47, rule 1, are not applicable where a revision petition under the Madras Buildings (Lease and Rent Control) Act, 1949 has been dismissed. The scope of Order 47, rule 8, is explained in *Subrahmanya Iyer* v. *Govindaswami Moopanar*[4] and it is held that where a Judge after allowing a review petition definitely stated that since the actual working out involved arguments the appeal itself would be reopened and reheard under Order 47, rule 8, there is no limit restricting the scope of the inquiry and the whole case can be reopened.

CRIMINAL LAW.—In *Baluswamy, In re*[5], it is pointed out that sections 85 and 86, Indian Penal Code, crystallise in a tabloid form the law relating to intoxication or drunkenness as a defence or plea in mitigation of a criminal offence; and that the words " state of intoxication " in section 86 mean intoxication rendering a person incapable of knowing the nature of the act in question or that he is doing what is wrong or contrary to law when he commits it; and that it would be extremely dangerous to extend the protection under the section to persons who commit serious offences under the influence of liquor in varying stages and differentiate culpability in their favour as opposed to similar offences by perfectly sober persons. An exposition by the Supreme Court of the right of private defence is contained in *Amjad Khan* v. *The State*[6] where it is observed that the right under section 97 extends not only to the defence of one's own body against any offence affecting the human body but also to defending the body of any other person ; that the right embraces the protection of property whether one's own or another person's against certain specified offences, like theft, robbery, mischief and criminal trespass ; and that the limitations on the right and its scope are to be gathered from the sections that follow. In *Seeni Naicker* v. *The State*[7], it is made clear that offences under sections 147 and 323, Indian Penal Code, are not offences relating to property and fall outside the scope of Chapter XVII of the Penal Code. *Mohiddin, In re*[8], points out that payment of illegal gratification by whatever name called, if taken by an officer for doing a favour or abstaining from doing a disfavour, will fall within section 161, but not mamools, like Pongal, Deepavali, Dasara, or Christmas paid to peons since they are not for showing favour or disfavour in the exercise of official functions. *Narayana Reddiar, In re*[9], holds that under the law, bribe-givers and bribe-takers are on a par and are treated as accomplices of each other and so where it is not shown that the previous statement of a bribe-giver was false or true and when such person is not bound to incriminate himself by sticking to the previous statement a prosecution against him under section 182 for tergiversation is misconceived. In *Chinnathambi, In re*[10], it is held that where the accused hung his wife who had been rendered unconscious by blows believing she was dead and to make it appear to be a case of suicide, and death really resulted not from the blows but under asphyxiation, a charge under section 302 is not sustainable and the conviction could only be under section 325. *Samatham Veerabhadrudu, In re*[11], lays down that where a person is convicted under section 302, the appellate court may

1. (1952) 2 M.L.J. 732.
2. (1952) 1 M.L.J. 448.
3. (1952) 2 M.L.J. 445.
4. (1952) 2 M.L.J. 180.
5. (1952) 1 M.L.J. 772.
6. (1952) 2 M.L.J. 97 (S.C.)
7. (1952) 2 M.L.J. 307.
8. (1952) 2 M.L.J. 11.
9. (1952) 1 M.L.J. 803.
10. (1952) 2 M.L.J. 550.
11. (1952) 2 M.L.J. 288.

where the evidence warrants it, modify the conviction to one under section 201; but where the Sessions Judge had convicted the accused under section 302 and had also found him guilty under section 319 or 411 in the alternative, acquitting him, however, of the charge under section 201, it would not be correct for the appellate court to modify the conviction to one under section 201, without the State filing an appeal against the acquittal. *Govindaswami In re*[1], emphasises that the ordinary penalty for murder is death in the absence of extenuating factors, and neither the fact of the youth of the accused that he is 16 or 17 years old nor the fact that he acted under fear or apprehension of a complaint being made against him for theft will be an extenuating circumstance. In *Bejoy Chand Patra* v. *State of West Bengal*[2], the Supreme Court has held that where an accused was charged under section 307, a conviction under section 326 will not be illegal, if, on the facts, it was open to the Sessions Judge to charge the accused alternatively, under sections 307 and 326 even in the absence of a charge under the latter section. The decision in *Periah* v. *Chandriah*[3] points out that in wrongful restraint there need not be any stoppage of the movement; that neither the physical presence of the obstructor nor an actual assault is necessary and that fear of immediate harm restraining a man out of a place where he wished to be and has a right to be is sufficient to constitute an offence under section 341. The ingredients of the offence of kidnapping under section 363 are brought out in *Abdul Azeez, In re*[4], as being firstly, the kidnapped was a minor; secondly the accused took or induced such person to leave out of lawful keeping; and thirdly the taking was done without the consent of the lawful guardian. In *Ramakrishna Padayachi* v. *The State*[5], it is made clear that the offence under section 426 can be compounded by the person to whom the damage was caused and the offence under section 448 by the person in possession of the property trespassed upon and hence where the compounding was with a careaker the real owner wil not be bound. The decision in *Ramaswami Udayar* v. *Raju Udayar*[6] points out that section 498 is for the protection of the husband and not for the benefit of the wife, so much so, where a woman is unwilling to live with her husband even if it be for good reasons and actually lives with another as husband and wife, the other person must be held to have ' taken ' the wife within the meaning of the section, and the wife's complicity in the transaction is no more material here than it is on a charge of adultery. In *Ramakrishna Reddy* v. *State of Madras*[7] the Supreme Court holds that the fact that a remedy may be open to an aggrieved officer under section 499 will not preclude proceedings under section 2 of the Contempt of Courts Act, where the defamation of a Judge of a subordinate court amounts to contempt of court. *Gopal In re*[8], holds that section 504, requires two essentials : (i) there must be intentional insult of a person and thereby due provocation, and (ii) the person insulting must intend or know it to be likely that such a provocation would cause prejudice to public peace. The mere forbearance of the person insulted is no protection to the offender. In *Ganapathi Udayar* v. *Chinnayya Mudaliar*[9] it is held that endorsement by a debtor on the back of a promissory note of a very much larger sum as paid by him and contending that it was entered as payment constitutes not preparation but a criminal attempt to cheat.

CRIMINAL PROCEDURE CODE.—*Venkatachala Naicken* v. *Panchayat Board, Ethapur*[10] points out that no court has any jurisdiction to compel one accused to produce the other accused in the case. A practice point of interest is dealt with in *Pedda Venkatanna*, In re[11], which holds that in a complaint and counter-complaint arising out of the same transaction when the prosecution proceeds on the basis of the complaint, it is its duty to exhibit the counter-complaint through the police officer who recorded it and also to prove the medical certificates of the persons wounded on the other side and place before the court a definite case for acceptance; the acceptance by the prosecution in such cases *in toto* of one complaint and examining only witnesses

1. (1952) 1 M.L.J. 751.
2. (1952) 1 M.L.J. 411. (S.C.).
3. (1952) 1 M.L.J. 164.
4. (1952) 1 M.L.J. 536.
5. (1952) 1 M.L.J. 649.
6. (1952) 2 M.L.J. 212.
7. (1952) 1 M.L.J. 736 (S.C.).
8. (1952) 2 M.L.J. 470.
9. (1952) 2 M.L.J. 771.
10. (1952) 2 M.L.J. 776.
11. (1952) 1 M.L.J. 244.

who support it and give no explanation to the injuries caused to the other side is to be deprecated. Another practice point is referred to in *Umanatha Rao*, In re[1] and *Innasia Pillai* v. *Perumal Chettiar*[2], where it is observed that in warrant cases the accused persons even before they are charged and put upon their defence anticipate their defence by petitions raising preliminary points upon which the court passes judgment and these are then brought upon revision to the High Court pending which the trial of the case is adjourned, that such a procedure is unwarranted and makes for delay and extra work; and that an accused person has no right to raise a preliminary point before he is charged and he must wait till charged to defend himself and if he is convicted his first remedy is in most cases by way of appeal. In *Hanumant* v. *State of Madhya Pradesh*[3], it is stated that the Supreme Court will not disturb concurrent findings of fact of the courts of first instance and appeal save in most exceptional cases, as for instance, where the finding was based on the sole testimony of an unreliable witness who was himself a party to the preparation of a forged document in the case. The decisions in *Velur Devasthanam* v. *Sambandamurthi*[4], and *Nagi Reddy* v. *Venkatappa*[5] hold that orders under section 145, Criminal Procedure Code, are merely police orders to prevent breaches of the peace and decide no questions of title ; that proceedings under the section should not be continued where there is no longer any apprehension of breach of peace and there is ample time for obtaining a civil remedy, and that the magistrate dropping proceedings does not become *functus officio* but has jurisdiction to pass further orders in the case, for winding up the proceedings. *Latchigouda*, In re[6], holds that the destruction of the notes of "inquest evidence" constitutes a flagrant violation of the provisions of section 162 and raises an inference of prejudice to the accused and he could not be deemed to have had a fair trial. In *Vokkaligara Yengtappa* In re[7], it is held that a statement by an accused recorded in a case diary is inadmissible in evidence under section 162 even if there is something in such a statement in favour of the accused. *Ramana Reddy*, In re[8], lays down that it is sufficient if before recording a confession a magistrate puts the necessary questions required by section 164 to the accused and it is not mandatory that he should keep on repeating these questions to him after every break in the recording of a long confession ; also, it is not necessary for the magistrate to give reasons before beginning to record a confession for his satisfaction that the accused was going to make a voluntary statement. In *Ramaswamy Reddiar*, In re[9], it is held that where a magistrate of the second class not empowered to record a confession under section 164 but with power to hold an inquest under section 176, records a confession made by the accused during the inquest, it cannot be said that such confession is not admissible in evidence. *Vokkaligara Yengtappa*, In re[7], points out that under section 172, a court may use police diaries not as evidence in the case but to aid it in the inquiry or trial and the accused is not entitled to call for such diaries or to see them merely because they are referred to, but if they are used by the police officer to refresh his memory or if the court uses them to contradict a witness, the provisions of section 161 or section 145 of the Evidence Act would apply. In *Molagan*, In re[10], it is declared that though the accused is not entitled to look into the case-diary, the court may in its discretion permit the defence counsel to see any portion of it which the court considers in the interests of justice he should see, and in appropriate cases the committing court can permit defence counsel to look into a case-diary to verify what the accused told the police as recorded before formulating his defence. *Sakuntala Bai* v. *Venkatakrishna Reddi*[11] lays down that a prosecution for an offence arising out of the abuse of official position by an act not purporting to be official does not require sanction under section 197. In *Imam Sahib*, In re[12], it is held that the provisions of section 233 apply to summons cases also. The decision in *Bhagat Singh* v. *The State*[13] points out that a charge which relates to the accused firing at two persons is not a charge with respect to two offences and there is nothing

1. (1952) 2 M.L.J. 400.
2. (1952) 2 M.L.J. 706.
3. (1952) 2 M.L.J. 631 (S.C.).
4. (1952) 1 M.L.J. 161.
5. (1952) 2 M.L.J. 163.
6. (1952) 1 M.L.J. 42.
7. (1952) 1 M.L.J. 62.
8. (1952) 2 M.L.J. 501.
9. (1952) 2 M.L.J. 814.
10. (1952) 2 M.L.J. 186.
11. (1952) 1 M.L.J. 646.
12. (1952) 2 M.L.J. 185.
13. (1952) 1 M.L.J. 420. (S.C.).

wrong in law to regard a single act of firing by the accused as one offence only, though it may be that a single act in some cases may constitute more than one offence. *Krishnan Naidu*, In re[1], expresses the view that no general rule can be laid down as to when different offences may be said to have been committed in the course of the same transaction and the question when it arises must be determined on the facts of the particular case subject only to the requirement that when the trial Court splits up cases reference to it must be made in the judgment. It is pointed out by the Supreme Court in *Bhagwan Singh* v. *The State of Punjab*[2], that where a prosecution witness at the trial gives conflicting versions in chief and in cross-examination the prosecution is entitled to use the former statement of such witness in the committing Court either to contradict what was said in cross-examination or to corroborate what was said in chief and in either event, section 288 could be used to make the former statement substantive evidence. Whether an approver can be released on bail has been considered in *Krishna Reddi*, In re[3], and *Karuppa Servai* v. *Kundaru*[4], and they point out that an approver who was in remand when a pardon was tendered must be detained in custody under section 337 (3) till the termination of the trial of commital ensues, or till termination of the inquiry if committal does not ensue, and that the provisions of the section are mandatory. The scope of section 342 is elucidated by the Supreme Court in *Bejoy Chand Patra* v. *State of West Bengal*[5], and it is observed that to sustain a conviction that the examination of the accused under that section was not proper or adequate it is not sufficient for the accused merely to show he has not been fully examined as required by the section but he must also show that such examination has materially prejudiced him. *Mathali*, In re[6], points out that where in the committal Court all the circumstances appearing against the accused in the evidence given before the committing magistrate were put to the accused by the magistrate and answers obtained, and in the Sessions Court no new circumstance was disclosed in the evidence and the Sessions Judge after reading out to the accused his earlier statement asked him whether he wished to say anything more and the accused said he had nothing to add, it cannot be said that the examination of the accused was not proper, though it is desirable that the Sessions Judge should himself put separate simple questions to the accused so as to enable the demeanour of the accused explaining the incriminating circumstances alleged against him being observed. It is held in *Kathan Maistri* v. *Muthuveera Maistry*[7], that section 347, permits the Magistrate to convert a calendar case into a P. R. case even where during inquiry the evidence discloses an offence exclusively triable by a Sessions Court and it cannot be said that the section applies only to cases which are triable both by the Sessions Court as well as by magistrates and not to cases exclusively triable by the Sessions Court. *Narayanaraju*, In re[8], states that, under section 350, a judgment written by a predecessor while in office can be delivered by his successor and there is nothing illegal or irregular about it. The object of reading over the deposition prescribed in section 360 is explained by the Supreme Court in *Bhagwan Singh* v. *The State of Punjab*[2], as being intended to ensure that the record has faithfully and accurately embodied the gist of what the witness actually said and not to enable the witness to change his story. The decision in *Yalpanathan*, In re[9], is valuable as focussing attention to the hardship likely to be caused to the accused by the dispensing with under section 362 (4) of the framing of charge by a Presidency Magistrate in the city, and to the necessity for legislation to remove distinction and make the procedure the same for the mofussil and city magistrates. The decision in *Ravipati Sitaramayya*, In re[10], reveals different view regarding the scope of a reference to a third Judge under section 378; one of the learned Judges expressing the opinion that no fetter can be placed on the third Judge who will be at liberty to express and act on the opinion he arrives at and pass what in his view will be the appropriate sentence—even a sentence of death—and the other learned Judge stating

1. (1952) 1 M.L.J. 62?.
2. (1952) 1 M.L.J. 816 (S.C.).
3. (1952) 1 M.L.J. 286.
4. (1952) 1 M.L.J. 270.
5. (1952) 1 M.L.J. 411 (S.C.).
6. (1952) 1 M.L.J. 276.
7. (1952) 2 M.L.J. 549.
8. (1952) 2 M.L.J. 141.
9. (1952) 2 M.L.J. 118.
10. (1952) 1 M.L.J. 690.

that the third Judge cannot pass a death sentence in a case where the Judge favouring conviction thinks a sentence of transportation is appropriate, with the other Judge favouring acquittal. It is pointed out in *Devanugraham, In re*[1], that a prosecution launched without a proper sanction is a nullity and section 401 (3) is no bar to the institution of a fresh prosecution against the accused for the same offence on the same facts. The Supreme Court states in *Surajpal Singh* v. *The State*[2], that it is well established that in an appeal under section 417, the High Court has full power to review the evidence upon which the order of acquittal was founded; but it is equally well-settled that the presumption of the innocence of the accused is further reinforced by his acquittal by the trial Court, and that the acquittal can therefore be reversed only for very substantial and compelling reasons. *Narayana Reddi* v. *The State*[3], expresses the view that the High Court can quash a committal to the Sessions under section 437, only on a point of law, and an order of commitment resting upon no acceptable or valid evidence is a point of law on which the commitment can be quashed. In *Kunjikannan* v. *Uthayya*[4], it is pointed out that the powers given to the Sessions Judge and the District Magistrate under section 438, are purely discretionary and the revisional powers must be exercised sparingly. In *Public Prosecutor* v. *Kandaswami Mudali*[5], the opinion is expressed that under section 471, as it now stands it is essential that the accused is detained in a place and not with a person. The provision for maintenance to wives deserted by their husbands contained in section 488 is held in *Thamsi Goundan* v. *Kanni Ammal*[6], not to contravene Article 14 of the Constitution. It is pointed out in *Subbayamma* v. *Venkata Rao*[7], that in a case of maintenance under section 488, where the husband makes allegations about the wife living in adultery and makes that his defence to deny the claim of the wife to maintenance, the husband ought to begin the case and let in evidence of unchastity so that the wife may rebut it. *Sampoornam* v. *Sundaresan*[8] takes the view that section 488 (8) does not refer to a permanent residence, and the term "residence" refers to something more than a brief visit but not to such a continuity as to amount to domicile. *Karuppan Servai* v. *Kundaru*[9] holds that sections 497 and 498 cannot apply to an approver and in *Public Prosecutor* v. *George Williams*[10], it is declared that the provisions of section 497 (5) read with section 561-A, saving the inherent power of the High Court to give effect to an order under the Criminal Procedure Code, or to prevent abuse of the process of any Court, or otherwise to secure the ends of justice, will give it ample powers to deal effectively with accused persons released on bail who by continuing to commit the crimes denied in the appeal memo render themselves liable to rearrest and recommittal to custody. *Ramachari* v. *Ramachari*[11], lays down that where a petition for transfer is found to be absolutely devoid of merits and thoroughly frivolous and vexatious, it is a fit case for the High Court to exercise its power under section 526 (6) to put an end to the petition intended to protract the proceedings and harass the opposite party. *Narayanaraju, In re*[12], takes the view that where an application for adjournment was made after the defence closed its case, the mandatory provision of section 526 (8) does not apply. The decision of the Supreme Court in *Bhagwan Singh* v. *State of Punjab*[13], makes it clear that the Court is not bound to examine a witness called under section 540 itself as a Court witness and it cannot be held that it can never entrust the examination to the prosecuting counsel. The scope of section 540 is explained in *Rengaswami Naicker* v. *Muruga Naicker*[14], where it is stated that the section gives an unrestricted power to the Court to summon a witness, the only restriction being that the power shall not be exercised to save parties from trouble or expense; and it is not only the prerogative but the plain duty of the Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject; and it will not be an improper exercise of the power merely because the evidence taken supports the prosecution case.

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1. (1952) 1 M.L.J. 550.
2. (1952) 1 M.L.J. 426 (S.C.).
3. (1952) 2 M.L.J. 7.
4. (1952) 2 M.L.J. 279.
5. (1952) 1 M.L.J. 607.
6. (1952) 1 M.L.J. 68.
7. (1952) 2 M.L.J. 183.
8. (1952) 2 M.L.J. 573.
9. (1952) 1 M.L.J. 272.
10. (1952) 1 M.L.J. 801.
11. (1952) 1 M.L.J. 166.
12. (1952) 2 M.L.J. 141.
13. (1952) 1 M.L.J. 816 (S.C.).
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THE

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I] JANUARY [1953

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT :—M. PATANJALI SASTRI, *Chief Justice*, B. K. MUKHERJEA, S. R. DAS, VIVIAN BOSE AND GHULAM HASAN, JJ.

The State of Travancore-Cochin and others .. *Appellants**

v.

The Bombay Company, Ltd., Alleppey .. *Respondents*

1. The Union of India
2. The State of Bombay
3. The State of Madras
4. The State of Hyderabad
5. The State of Punjab (1)
6. The State of Mysore
7. The State of Orissa
8. The State of Uttar Pradesh

.. *Interveners.*

Constitution of India (1950), *Article* 286 (1) (*b*)—*Restriction as to imposition of tax on sale or purchase of goods in the course of " import or export "—Scope.*

Interpretation of Statutes—Assembly debates—Value of.

Whatever else may or may not fall within Article 286 (1) (*b*) of the Constitution of India, sales and purchases which themselves occasion the export or import of the goods, as the case may be, out of or into the territory of India come within the exemption. Such sales must of necessity be put through by transporting of goods by rail or ship or both out of the territory of India, that is to say by employing the machinery of export. A sale by export involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated, and the sale and resultant export form parts of a single transaction. Of these two integrated activities, which together constitute an export sale, whichever first occurs can well be regarded as taking place in the course of the other. Assuming that the properties in the goods passed to the foreign buyers and the sales were thus completed within the State before the goods commenced their journey the sales must nevertheless be regarded as having taken place in the course of the export and are therefore exempt under Article 286 (1) (*b*). That clause assumes that the sale has taken place within the limits of the State and exempts it if it takes place in the course of the export of the goods concerned.

The question whether the word "sale" used in the Constitution has the same meaning as in the law relating to the sale of goods or imports a wider concept than the passing of title from the seller to the buyer which under that law is determined by highly technical rules based upon the presumed intention of the parties and liable to be displaced by their expressed intention, was left open. It was assumed for the purposes of these appeals that the word sale used in the Constitution has the same meaning as in the law relating to the sale of goods.

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*Civil Appeals Nos. 25, 28 and 29 of 1952. 16th October, 1952.

Reference to speeches made by members of the Constituent Assembly in the course of the debates on the draft Constitution in interpreting any article of the Constitution is unwarranted.

Gopalan's case, (1950) 2 M.L.J. 42 : 1950 S.C.R. 88: (1950) S.C.J. 174, referred to.

The "import-export" clause found in the American Constitution is widely different in language, scope and purpose and a varying body of doctrines and tests have grown around them interpreting, extending or restricting, from time to time, their operation and application in the context of the expanding American Commerce and Industry and not much help can be derived from them in the solution of the problems arising under Article 286 of the Indian Constitution.

Appeals from the Judgment and Order dated the 10th day of January, 1952, of the High Court of Judicature of Travancore-Cochin at Ernakulam (Kunhiraman, C.J., and Subramania Iyer, J.) in Original Petitions Nos. 4, 23 and 24 of 1951, respectively.

T. N. Subramania Iyer, Advocate-General of Travancore-Cochin (*T. R. Balakrishna Iyer* and *M. R. Krishna Pillai*, Advocates, with him), for the Appellants (in all the Appeals).

N. C. Chatterjee, Senior Advocate (*C. R. Pattabhiraman*, Advocate, with him), for the Respondent in C. A. No. 25 of 1952.

C. R. Pattabhiraman, Advocate, for the respondent in C. A. No. 28 of 1952.

N. C. Chatterjee, Senior Advocate (*Thomas Vellappally*, Advocate, with him), for the re pondent in C. A. No. 29 of 1952.

For the Interveners :

1. *M. C. Setalvad*, Attorney-General for India, and *C. K. Daphtary*, Solicitor-General for India (*G. N. Joshi*, Advocate, with them) for the Union of India.

2. *M. P. Amin*, Advocate-General of Bombay (*M. M. Desai*, Advocate, with him), for the State of Bombay.

3. *V. K. T. Chari*, Advocate-General of Madras (*Alladi Kuppuswamy*, and *V. V. Raghavan*, Advocates, with him), for the State of Madras.

4. *V. Raja Ram Iyer*, Advocate-General of Hyderabad (*B. N. Sastri*, Advocate, with him), for the State of Hyderabad.

5. *S. M. Sikri*, Advocate-General of Punjab (*M. L. Sethi*, Advocate, with him), for the State of Punjab (1).

6. *A. R. Somnath Iyer*, Advocate-General of Mysore (*R. Ganapathy Iyer*, Advocate, with him), for the State of Mysore.

7. *Pitambar Misra*, Advocate-General of Orissa (*Jindra Lal*, Advocate, with him), for the State of Orissa.

8. *K. L. Misra*, Advocate-General of Uttar Pradesh (*Gopalji Mehrotra* and *K. B. Asthana*, Advocates, with him), for the State of Uttar Pradesh.

The Judgment of the Court was delivered by

Patanjali Sastri, C. J.—These are connected appeals from the Judgment and Order of the High Court of Travancore-Cochin quashing the assessments under the United State of Travancore and Cochin Sales Tax Act (No. 11 of 1125 M. E.) (hereinafter referred to as "the Act") on the respondents on the turnover of the sales of the commodities (coir products in C. A. 25, lemon grass oil in C. A. 28 and tea in C. A. 29) in which they respectively deal.

The dealings followed more or less the same pattern in all the cases and consisted of export sales of the respective commodities to foreign buyers on c.i.f. or f.o.b. terms as the case may be.

The respondents in each case claimed exemption from assessment in respect of the sales effected by them on the ground *inter alia*, that such sales took place "in the course of the export of the goods out of the territory of India" within the meaning of Article 286 (1) (*b*) of the Constitution. The Sales Tax Authorities rejected the contention as, in their view, the sales were completed before the goods were shipped and could not, therefore, be considered to have taken place in the course of the export.

Thereupon the respondents by separate petitions applied to the High Court of the United State of Travancore and Cochin (hereinafter referred to as the State) under Article 226 of the Constitution for issue of writs of *certiorari* and prohibition quashing the assessments made on them and prohibiting such assessment in future. The applications were heard along with nine other applications for similar reliefs by dealers in cashew nuts, by a Division Bench (Kunhiraman, C. J., and Subramania Iyer, J.) who upheld the claim of exemption and quashed the assessment orders in respect of the transactions subsequent to the commencement of the Constitution. From that decision the State has preferred appeals in all the cases on a certificate granted by the High Court under Article 132 (1) of the Constitution.

As the appeals involved important questions of law which may have a bearing on the sales tax legislation of the various States in India, this Court directed notice of these proceedings to the Attorney-General for India and the Advocates-General of those States, and they have intervened and participated in the debate at the hearing of these appeals.

When the argument had proceeded for some time, it was discovered that the material facts relating to the course of dealings in cashew nuts, which were more complex in character, had not been clearly ascertained and consequently the relative appeals were remitted to the High Court for findings on certain points agreed upon by the parties. These three appeals were, however, fully heard as they were found to admit of disposal on the materials on record.

Article 286 (1), on which the respondents found their claim to exemption runs thus :

" No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

(*a*) outside the State ; or

(*b*) in the course of the import of the goods into, or export of the goods out of, the territory of India.

Explanation.—For the purposes of sub-clause (*a*), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

On the scope and meaning of cl. (*b*), the learned Judges expressed their view as follows :—

"The words "in the course of" make the scope of this clause very wide. It is not restricted to the point of time at which goods are imported into or exported from India. The series of transactions which necessarily precede export or import of goods will come within the purview of this clause. Therefore, while in the course of that series of transactions the sale has taken place, such a sale is exempted from the levy of sales tax. The sale may have taken place within the boundaries of the State. Even then, sales tax cannot be levied if the sale had taken place while the goods were in the course of import into India or in the course of export out of India. We are stressing this point because both parties in what we may describe as the cashew nut cases entered into lengthy discussion as to the exact point of time when the sale became completed and as to the exact place where the goods were when the sale became a completed transaction."

On this interpretation, local purchases " made for the purpose of export " were held by the learned Judges to be " integral parts of the process of exporting". In support of this construction the learned Judges referred to the debates in the Constituent Assembly on clause 264-A of the Draft Constitution which corresponded to Article 286 and quoted from the speech of one of the members who unsuccessfully moved an amendment defining export as meaning the last transaction and import as meaning the first transaction.

In view of the wide construction thus placed upon cl. (*b*) of Article 286 (1), the arguments before us ranged over a large field, and as many as four different views as to its scope and meaning were pressed upon us for our acceptance.

(1) The exemption is limited to sales by export and purchases by import, that is to say, those sales and purchases which occasion the export or import as the case may be, and extends to no other transactions however directly or imme-

diately connected, in intention or purpose, with such sales or purchases, and wheresoever the property in the goods may pass to the buyer. This is the view put forward on behalf of the State of Madras. The Advocate-General thought that a State could not impose sales-tax though title passed within State limits while the goods were still under transport on the high seas and no question of exemption could therefore arise. He said however, that no such case had actually arisen.

(2) In addition to the sales and purchases of the kind described above, the exemption covers the last purchase by the exporter and the first sale by the importer, if any, so directly and proximately connected with the export, sale or import purchase as to form part of the same transaction. This view was sponsored by the Attorney-General who was also inclined to think, as advised at the moment that sales or purchases made while the goods were on the high seas, would be exempt, but he would prefer not to go into the wider question, because, whatever view was taken, sales such as those involved in the present cases must, in any event, be exempt.

(3) The exemption covers only those sales and purchases under which the property in the goods concerned is transferred from the seller to the buyer during the course of the transit, that is, after the goods begin to move and before they reach their foreign destination. This view is supported by the State of Bombay and certain other States.

(4) The view which found favour with the learned Judges of the High Court in the passage already extracted. It will be seen that the construction first mentioned is the narrowest and the last mentioned the widest.

We are clearly of opinion that the sales here in question, which occasioned the export in each case, fall within the scope of the exemption under Article 286 (1) (*b*). Such sales must of necessity be put through by transporting the goods by rail or ship or both out of the territory of India, that is to say, by employing the machinery of export. A sale by export thus involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated, and the sale and resultant export form parts of a single transaction. Of these two integrated activities, which together constitute an export sale, whichever first occurs can well be regarded as taking place in the course of the other. Assuming without deciding that the property in the goods in the present cases passed to the foreign buyers and the sales were thus completed within the State before the goods commenced their journey as found by the Sales Tax Authorities, the sales must, nevertheless, be regarded as having taken place in the course of the export and are, therefore, exempt, under Article 286 (1) (*b*). That clause, indeed, assumes, that the sale has taken place within the limits of the State and exempts it if it takes place in the course of the export of the goods concerned.

In the foregoing discussion we have assumed that the word " sale " used in the Constitution has the same meaning as in the law relating to the Sale of Goods, but it has been suggested in the course of the argument that it imports a wider concept than the passing of title from the seller to the buyer which under that law is determined by highly technical rules based upon the presumed intention of the parties and liable to be displaced by their expressed intention. We leave the point open as it is unnecessary for the purpose of these appeals to pronounce any opinion upon it.

It was said that, on the construction we have indicated above, a " sale in the course of export " would become practically synonymous with " export ", and would reduce clause (*b*) to a mere redundancy, because Article 246 (1), read with Entry No. 83 of List I of the Seventh Schedule, vests legislative power with respect to " duties of customs including export duties " exclusively in Parliament, and that would be sufficient to preclude State taxation of such transactions. We see no force in this suggestion. It might well be argued, in the absence of a provision

like clause (*b*) prohibiting in terms the levy of tax on the sale or purchase of goods where such sales and purchases are effected through the machinery of export and import, that both the powers of taxation, though exclusively vested in the Union and the States respectively, could be exercised in respect of the same sale by export or purchase by import, the sales tax and the export duty being regarded as essentially of a different character. A similar argument induced the Federal Court to hold in *Province of Madras* v. *Boddu Paidanna and Sons*[1] that both central excise duty and provincial sales tax could be validly imposed on the first sale of groundnut oil and cake by the manufacturer or producer as " the two taxes are economically two separate and distinct imposts ". Lest similar reasoning should lead to the imposition of such cumulative burden on the export-import trade of this country which is of great importance to the nation's economy, the Constitutent Assembly may well have thought it necessary to exempt *in terms* sales by export and purchases by import from Sales Tax by inserting Article 286 (1) (*b*) in the Constitution.

We are not much impressed with the contention that no sale or purchase can be said to take place " in the course of " export or import unless the property in the goods is transferred to the buyer during their actual movement, as for instance, where the shipping documents are indorsed and delivered within the State by the seller to a local agent of the foreign buyer *after* the goods have been actually shipped, or where such documents are cleared on payment or on acceptance by the Indian buyer *before* the arrival of the goods within the State. This view, which lays undue stress on the etymology of the word " course " and formulates a mechanical test for the application of clause (*b*), places, in our opinion, too narrow a construction upon that clause, in so far as it seeks to limit its operation only to sales and purchases effected during the transit of the goods, and would, if accepted, rob the exemption of much of its usefulness.

We accordingly hold that whatever else may or may not fall within Article 286 (1) (*b*), sales and purchases which themselves occasion the export or the import of the goods, as the case may be, out of or into the territory of India come within the exemption and that is enough to dispose of these appeals.

Our attention was called, in the course of the debate, to various American decisions which hold that the power " to regulate " inter-state commerce vested exclusively in the Congress by Article I, section 8 (3) of the American Constitution (the Commerce Clause) excludes by implication the States' power of taxation only when the goods enter " the export stream ", and until then such goods form part of " the general mass of property in the State " subject, as such, to its jurisdiction to tax, and that this principle was also applicable to cases arising under Article I, section 9 (5) and section 10 (2) (the import-export clause), [*see* e.g., *Empresa Siderurgica* v. *Merced Co.*][2]. These clauses are widely different in language, scope and purpose, and a varying body of doctrines and tests have grown around them interpreting, extending or restricting, from time to time, their operation and application in the context of the expanding American commerce and industry, and we are of opinion that not much help can be derived from them in the solution of the problems arising under Article 286 of the Indian Constitution.

It remains only to point out that the use made by the learned Judges below of the speeches made by the members of the Constituent Assembly in the course of the debates on the Draft Constitution is unwarranted. That this form of extrinsic aid to the interpretation of statutes is not admissible has been generally accepted in England, and the same rule has been observed in the construction of Indian statutes—see *Administrator-General of Bengal* v. *Prem Lal Mullick*[3]. The reason behind the rule was explained by one of us in *Gopalan's Case*[4] thus :—

1. (1942) 2 M.L.J. 327 : 1942 F.C.R. 90 : 5 F.L.J. 61.
2. 337 U.S. 154.
3. (1895) 5 M.L.J. 157 : 22 I.A. 107, 118 : I.L.R. 22 Cal. 788 (P.C.).
4. (1950) 2 M.L.J. 42 : (1950) S.C.J. 174 : 1950 S.C.R. 88 (S.C.).

A speech made in the course of the debate on a bill could at best be indicative of the subjective intent of the speaker, but it could not reflect the inarticulate mental process lying behind the majority vote which carried the bill. Nor is it reasonable to assume that the minds of all those legislators were in accord,

or, as it is more tersely put in an American case—

Those who did not speak may not have agreed with those who did ; and those who spoke might differ from each other—*United States* v. *Trans-Missouri Freight Association*[1].

This rule of exclusion has not always been adhered to in America, and sometimes distinction is made between using such material to ascertain the purpose of a statute and using it for ascertaining its meaning. It would seem that the rule is adopted in Canada and Australia—*see* Craies on Statute Law, 5th Edn. p. 122.

In the result, agreeing with the conclusion of the High Court, though on different grounds, we dismiss the appeals with Costs.

Agent for Appellant (in all the Appeals) and Interveners 1 to 7 : *P. A. Mehta.*

Agent for Respondent in C.A. No. 25 of 1952 : *M. S. K. Sastri.*

Agent for Respondent in C.A. No. 28 of 1952 : *Sirdar Bahadur.*

Agent for Respondent in C.A. No. 29 of 1952 : *V. P. K. Nambiyar.*

Agent for Intervener 8 : *C. P. Lal.*

G.R./K.S. *Appeals dismissed.*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT :—MEHRCHAND MAHAJAN, N. CHANDRASEKHARA AIYAR AND N. H. BHAGWATI, JJ.

Mohd. Amin and others .. *Appellants**

v.

Vakil Ahmad and others .. *Respondents.*

Mahomedan Law—Marriage—Presumption of from continuous co-habitation.

*Mahomedan Law—Minor—*De facto *guardian—Has no power to enter into family settlement on behalf of minor.*

Practice—Mesne profits—Cannot be allowed unless demanded.

A minor's brother as a *de facto* guardian under Mahomedan Law has no power to transfer any right or interest in the immoveable property of the minor and such a transfer if made will be void.

A family settlement on behalf of a minor entered into by his *de facto* guardian will be void not only *qua* the minor but would be void altogether *qua* all the parties including those who were *sui juris.*

The presumption in favour of lawful marriage would arise where there was prolonged and continued co-habitation as husband and wife and when there was no insurmountable obstacle to such a marriage, *e.g.*, prohibited relationship between the parties, the woman being an undivorced wife of a husband who was alive and the like. The presumption of lawful marriage would be sufficient to establish that there was a lawful marriage between them, and that the children of such union were legitimate.

A claim for mesne profits cannot be allowed unless there was a demand for it. The claim cannot be included within the expression " awarding possession and occupation of the property aforesaid together with all the rights appertaining thereto."

On appeal from the Judgment and Decree, dated the 11th September, 1945, of the High Court of Judicature at Allahabad (Brand and Waliullah, JJ.) in First Appeal No. 212 of 1942, arising out of Judgment and Decree, dated the 28th February, 1942, of the Court of the Civil Judge of Azamgarh in Original Suit No. 4 of 1941.

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1. 169 U.S. 290, 318.

* Civil Appeal No. 51 of 1951. 22nd October, 1952.

S. P. Sinha, Senior Advocate (*Shaukat Hussain*, Advocate, with him), for Appellants.

C. K. Daphtary, Senior Advocate (*Nuruddin Ahmed*, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

Bhagwati, J.—This is an appeal from the judgment and decree of the High Court of Judicature at Allahabad which set aside a decree passed by the Civil Judge of Azamgarh decreeing the plaintiff's claim.

One Haji Abdur Rahman, hereinafter referred to as "Haji" a Sunni Mohammedan, died on the 26th January, 1940, leaving behind him a large estate. He left him surviving the plaintiffs 1 to 3, his sons, plaintiff 4 his daughter and plaintiff 5, his wife, defendant 6 his sister, defendant 7 his daughter by a pre-deceased wife Batul Bibi and defendants 1 to 4 his nephews and defendant 5 his grand-nephew. Plaintiff's case is that immediately after his death the defendant 1 who was the Chairman, Town Area qasba Mubarakpur and a member of the District Board, Azamgarh and defendant 5 who was an old associate of his started propaganda against them, that they set afloat a rumour to the effect that the plaintiffs 1 to 4 were not the legitimate children of Haji and that the plaintiff 5 was not his lawfully wedded wife, that the defendants 1 to 4 set up an oral gift of one-third of the estate in their favour and defendant 5 set up an oral will bequeathing one-third share of the estate to him and sought to interfere with the possession of the plaintiffs over the estate and nearly stopped all sources of income. It was alleged that under these circumstances a so-called deed of family settlement was executed by and between the parties on the 5th April, 1940, embodying an agreement in regard to the distribution of the properties belonging to the estate, that plaintiff 3 was a minor of the age of about 9 years and he was represented by the plaintiff 1 who acted as his guardian and executed the deed of settlement for and on his behalf. On these allegations the plaintiffs filed on the 25th November, 1940, in the Court of Civil Judge of Azamgarh the suit out of which the present appeal arises against the defendants 1 to 5 and defendants 6 and 7 for a declaration that the deed of settlement, dated 5th April, 1940, be held to be invalid and to establish their claim to their legitimate shares in the estate of Haji under Mohammedan Law. The defendant 8 a daughter of the plaintiff 5 whose paternity was in dispute was added as a party defendant to the suit, the plaintiffs claiming that she was the daughter of the plaintiff 5 by Haji and the defendants 1 to 5 alleging that she was a daughter of the plaintiff 5 by her former husband Alim-ullah.

The only defendants who contested the claim of the plaintiff were the defendants 1 to 5. They denied that the plaintiff 5 was the lawfully wedded wife and the plaintiffs 1 to 4 were the legitimate children of Haji. They also contended that the deed of settlement embodied the terms of a family settlement which had been *bona fide* arrived at between the parties in regard to the disputed claims to the estate of Haji and was binding on the plaintiffs.

It is significant to observe that the defendants 6 and 7 who were the admitted heirs of Haji did not contest the plaintiffs' claim at all.

The two issues which were mainly contested before the trial Court were,

(1) Whether the plaintiffs 1 to 4 are the legitimate issue of and the plaintiff 5 is the wedded wife of Abdul Rahman deceased;

(2) Whether the agreement dated 5th April, 1940, was executed by the plaintiffs after understanding its contents fully or was obtained from them by fraud or undue influence? was the said deed insufficiently stamped? was it beneficial to the minor plaintiffs?

As regards the first issue there was no document evidencing the marriage between the plaintiff 5 and Haji. The plaintiff 5 and Haji had however lived together as man and wife for 23 to 24 years and the plaintiffs 1 to 4 were born of that union. There was thus a strong presumption of the marriage of Haji with

plaintiff 5 having taken place and of the legitimacy of plaintiffs 1 to 4. The trial Court did not attach any importance to the question of onus or presumption, examined the evidence which was led by both the parties with a view to come to a finding in regard to this issue, and found as follows :

"So far as Musammat Rahima's marriage with Alim-ullah or another Abdul Rahman is concerned the evidence of both the parties stands on the same level and is not worthy of much credit. I have, however, not the least hesitation to observe that so far as the oral evidence and the circumstances of the case are concerned, they all favour the plaintiffs. I, however, find it difficult to ignore the testimony of the defendants' witnesses Shah Allaul Haq and Molvi Iqbal Ahmad . . . . . . Owing to the voluminous oral evidence adduced by the plaintiffs and the circumstances that apparently favour them, I gave my best attention to this case, but upon a careful consideration of the whole evidence on the record, I am not prepared to hold that the plaintiffs 1 to 4 are the legitimate issues of the plaintiff No. 5, the lawfully wedded wife of the deceased, Haji Abdul Rahman. I frankly admit that the matter is not free from difficulty and doubt but to my mind the scale leans away from the plaintiffs and I am not satisfied that their version is correct."

On the second issue the learned Trial Judge came to the conclusion that the disputed compromise amounted to a family settlement; that it was beneficial to the interests of the minor plaintiff and that it was made by the parties willingly and without any fraud or undue influence. On these findings the suit was dismissed with costs.

The plaintiffs filed an appeal to the High Court of Judicature at Allahabad. After considering the several authorities on the binding nature of family settlements cited before it, it came to the conclusion that it did not bind the plaintiffs. As regards defendants 1 to 5 it was held that there was no consideration whatsoever which could in any way support the arrangement. Plaintiffs 4 and 5 being purdanashin ladies, it was found that they had no chance at any stage of the transaction of getting independent advice in regard to the contents or the effect of the document which they were executing and that even if the deed were valid otherwise it would not be binding on them. It was further held that the plaintiff 3 who would be about 9 years of age at the time of the execution of the deed was represented in the transaction by his brother who could not be the legal guardian of his property and that the deed in so far as it adversely affected the interest of plaintiff 3 would not be binding on him. On the question of marriage and legitimacy the High Court came to the conclusion that if the trial Court had considered the question of onus in its proper light and given the plaintiffs the benefit of the initial presumption in favour of legitimacy and lawful wedlock under the Mohammedan law he would have recorded a finding in their favour. The defendants 1 to 5 had alleged that at the time of the commencement of sexual relations between the plaintiff 5 and Haji, plaintiff 5 was the wife of one Alim-ullah who was alive and that therefore the connection between the plaintiff 5 and Haji was in its origin illicit and continued as such with the result that the presumption in favour of a marriage between the plaintiff 5 and Haji and in favour of the legitimacy of plaintiffs 1 to 4 would not arise. The learned Trial Judge disbelieved the evidence led by the defendants 1 to 5 in regard to this marriage between the plaintiff 5 and Alim-ullah. The High Court upheld the finding and said :

"All these circumstances, to my mind, strongly militate against the theory of a first marriage of Musammat Rahima Bibi with the man called Alim-ullah. In this state of the evidence one cannot but hold that this story of the marriage with Alim-ullah was purely an after-thought on the part of the defendants 1 to 5 and it was invented only to get rid of the strong presumption under the Mohammedan law in favour of the paternity of plaintiffs 1 to 4 and the lawful wedlock of the plaintiff 5."

Having thus discredited the theory of the first marriage of the plaintiff 5 with Alim-ullah the High Court came to the conclusion that it was fully established that Musammat Rahima Bibi was the lawfully wedded wife and that the plaintiffs 1 to 4 are the legitimate children of Haji. The defendants 1 to 5 obtained leave to appeal to His Majesty in Council and the appeal was admitted on the 10th January, 1947.

Shri S. P. Sinha who appeared for the defendants 1 to 5 before us has urged the self-same two questions, namely : (1) Whether the deed of settlement is

binding on the plaintiffs and (2) Whether the plaintiff 5 was the lawfully wedded wife and the plaintiffs 1 to 4 are the legitimate children of Haji.

In regard to the first question, it is unnecessary to discuss the evidence in regard to fraud, undue influence, want of independent advice, etc., as the question in our opinion is capable of being disposed of on a short point. It is admitted that the plaintiff 3 Ishtiaq Husan was a minor of the age of about 9 years at the date of the deed, and he was not represented as already stated by any legal guardian in this arrangement. The minor's brother had no power to transfer any right or interest in the immoveable property of the minor and such a transfer if made was void. (*See* Mulla's Mahomedan Law, 13th Edition, page 303, section 364.)

Reference may be made to the decision of their Lordships of the Privy Council in *Imambandi* v. *Mutsaddi*[1]. In that case the mother who was neither the legal guardian of her minor children nor had been appointed their guardian under the Guardian and Wards Act had purported to transfer the shares of her minor children in the property inherited by them from their deceased father. Mr. Ameer Ali who delivered the judgment of the Board observed at page 82 as follows :

> " The question how far, or under what circumstances according to Mahomedan law, a mother's dealing with her minor child's property are binding on the infant has been frequently before the Courts in India. The decisions, however, are by no means uniform, and betray two varying tendencies : one set of decisions purports to give such dealings a qualified force ; the other declares them wholly void and ineffective. In the former class of cases the main test for determining the validity of the particular transaction has been the benefit resulting from it to the minor ; in the latter, the admitted absence of authority or power on the part of the mother to alienate or incumber the minor's property."

The test of benefit resulting from the transaction to the minor was negatived by the Privy Council and it was laid down that under the Mahomedan law a person who has charge of the person or property of a minor without being his legal guardian, and who may, therefore, be conveniently called a " *de facto* guardian," has no power to convey to another any right or interest in immoveable property which the transferee can enforce against the infant.

Shri S. P. Sinha relied upon a decision of the Calcutta High Court reported in *Mahamed Keramutullah Miah* v. *Keamutulla*[2], where it was held that there was nothing in the doctrine of family arrangements opposed to the general principle that when it was sought to bind a minor by an agreement entered into on his behalf, it must be shown that the agreement was for the benefit of the minor ; that if improper advantage had been taken of the minor's position, a family arrangement could be set aside on the ground of undue influence or inequality of position or one or other of the grounds which would vitiate such arrangement in the case of adults ; but where there was no defect of this nature, the settlement of a doubtful claim was of as much advantage to a minor as to an adult, and where a genuine dispute had been fairly settled the dispute could not be re-opened solely on the ground that one of the parties to the family arrangement was a minor.

This decision was reached on the 19th July, 1918, *i.e.*, almost 5 months after the decision of their Lordships of the Privy Council but it does not appear that the ruling was brought to the notice of the learned Judges of the Calcutta High Court. The test of the benefit resulting from the transaction to the minor which was negatived by their Lordships of the Privy Council was applied by the learned Judges of the Calcutta High Court in order to determine whether the family arrangement which was the subject-matter of the suit before them was binding on the minor.

Shri S. P. Sinha next relied upon a decision of the Chief Court of Oudh, *Ameer Hasan* v. *Md. Ejaz Husain*[3]. In that case an agreement to refer to arbitration was entered into by the mother for her minor children and an award was made by the arbitrators. The scheme of distribution of properties promulgated in the award was followed without any objection whatever for a long period extending over 14 years

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1. (1918) 35 M.L.J. 422 : L.R. 45 I.A. 73 : I.L.R. 45 Cal. 878 (P.C.).
2. A.I.R. 1919 Cal. 238.
3. A.I.R. 1929 Oudh 134.

and proceedings were taken at the instance of the minors for recovery of possession by actual partition of their shares in the properties. The Court held that the reference to arbitration could not be held binding on the minors and the award could not be held to be an operative document, but if the scheme of distribution promulgated in the award was in no way perverse or unfair or influenced by any corruption or misconduct of the arbitrators and had been followed without any objection whatever for a long period extending over 14 years, it would as well be recognised as a family settlement and the Court would be extremely reluctant to disturb the arrangement arrived at so many years ago. This line of reasoning was deprecated by their Lordships of the Privy Council in *Partap Singh* v. *Sant Kaur*[1], where their Lordships observed :

"It is however argued that the transaction should be upheld, because it was a family settlement. Their Lordships cannot assent to the proposition that a party can, by describing a contract as a family settlement, claim for it an exemption from the law governing the capacity of a person to make a valid contract."

We are therefore unable to accept this case as an authority for the proposition that a deed of settlement which is void by reason of the minor not having been properly represented in the transaction can be rehabilitated by the adoption of any such line of reasoning.

If the deed of settlement was thus void it could not be void only *qua* the minor plaintiff 3 but would be void altogether *qua* all the parties including those who were *sui juris*. This position could not be and was not as a matter of fact contested before us.

The contention of the defendants 1 to 5 in regard to the lawful wedlock between plaintiff 5 and Haji and the legitimacy of the plaintiffs 1 to 4 was equally untenable. The plaintiffs had no doubt to prove that the plaintiff 5 was the lawfully wedded wife and the plaintiffs 1 to 4 were the legitimate children of Haji. Both the Courts found that the factum of the marriage was not proved and the plaintiffs had therefore of necessity to fall back upon the presumption of marriage arising in Mahomedan Law. If that presumption of marriage arose, there would be no difficulty in establishing the status of the plaintiffs 1 to 4 as the legitimate children of Haji because they were admittedly born by the plaintiff 5 to Haji. The presumption of marriage arises in Mahomedan Law in the absence of direct proof from a prolonged and continual co-habitation as husband and wife. It will be apposite in this connection to refer to a passage from the judgment of their Lordships of the Privy Council in *Khajah Hidayut Oollah* v. *Rai Jan Khanum*[2]. Their Lordships there quoted a passage from Macnaughten's Principles of Mahomedan Law :—

" The Mahomedan lawyers carry this disinclination (that is against bastardizing) much further ; they consider it the legitimate of reasoning to infer the existence of marriage from the proof of co-habitation . . . . . None but children who are in the strictest sense of the word spurious are considered incapable of inheriting the estate of their putative father. The evidence of persons who would, in other cases, be considered incompetent witnesses is admitted to prove wedlock, and, in short, where by any possibility a marriage may be presumed, the law will rather do so than bastardize the issue, and whether a marriage be simply voidable or void *ab initio* the offspring of it will be deemed legitimate . . . . . . This, I apprehend, with all due deference, is carrying the doctrine to an extent unwarranted by law ; for where children are not born of women proved to be married to their fathers, or of female slaves to their fathers, some kind of evidence (however slight) is requisite to form a presumption of matrimony . . . . The mere fact of casual concubinage is not sufficient to establish legitimacy : and if there be proved to have existed any insurmountable obstacle to the marriage of their putative father with their mother, the children, though not born of common women, will be considered bastards to all intents and purposes."

Their Lordships deduced from this passage the principle that where a child had been born to a father of a mother where there had been not a mere casual concubinage, but a more permanent connection, and where there was no insurmountable obstacle to such a marriage, then according to the Mahomedan Law, the presumption was in favour of such marriage having taken place.

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1. (1938) 2 M.L.J. 962 : L.R. 65 I.A. 213 : I.L.R. (1938) Lah. 313 at 317 (P.C.).
2. (1844) 3 M.I.A. 295 at 317.

The presumption in favour of a lawful marriage would thus arise where there was prolonged and continued co-habitation as husband and wife and where there was no insurmountable obstacle to such a marriage, *e.g.*, prohibited relationship between the parties, the woman being an undivorced wife of a husband who was alive and the like. Further illustrations are to be found in the decisions of their Lordships of the Privy Council in *Abdool Razack* v. *Aga Mohamed Jaffar Bindaneem*[1] and *Ghazaffar Ali Khan* v. *Mt. Khaniz Fatima*[2], where it was laid down that the presumption does not apply if the conduct of the parties was incompatible with the existence of the relation of husband and wife nor did it apply if the woman was admittedly a prostitute before she was brought to the man's house (*see* Mulla's Mahomedan Law, p. 238, section 268). If therefore there was no insurmountable obstacle to such a marriage and the man and woman had co-habited with each other continuously and for a prolonged period the presumption of lawful marriage would arise and it would be sufficient to establish that there was a lawful marriage between them.

The plaintiff 5 and Haji had been living as man and wife for 23 to 24 years openly and to the knowledge of all their relations and friends. The plaintiffs 1 to 4 were the children born to them. The plaintiff 5, Haji and the children were all staying in the family house and all the relations including the defendant 1 himself treated the plaintiff 5 as a wife of Haji and the plaintiffs 1 to 4 as his children. There was thus sufficient evidence of habit and repute. Haji moreover purchased a house and got the sale deed executed in the names of the plaintiffs 1 and 2 who were described therein as his sons. The evidence which was led by the defendants 1 to 5 to the contrary was discarded by the High Court as of a negative character and of no value. Even when the deed of settlement was executed between the parties the plaintiff 5 was described as the widow and plaintiffs 1 to 4 were described as the children of Haji. All these circumstances raised the presumption that the plaintiff 5 was the lawfully wedded wife and the plaintiffs 1 to 4 were the legitimate children of Haji.

The result therefore is that both the contentions urged by the defendants 1 to 5 against the plaintiffs' claim in suit fail and the decree passed in favour of the plaintiffs by the High Court must be affirmed.

It was however pointed out by Shri S. P. Sinha that the High Court erred in awarding to the plaintiffs mesne profits even though there was no demand for the same in the plaint. The learned Solicitor-General appearing for the plaintiffs conceded that there was no demand for mesne profits as such but urged that the claim for mesne profits would be included within the expression "awarding possession and occupation of the property aforesaid together with all the rights appertaining thereto." We are afraid that the claim for mesne profits cannot be included within this expression and the High Court was in error in awarding to the plaintiffs mesne profits though they had not been claimed in the plaint. The provision in regard to the mesne profits will therefore have to be deleted from the decree. We dismiss the appeal of the defendants 1 to 5 and affirm the decree passed by the High Court in favour of the plaintiffs, deleting therefrom the provision in regard to mesne profits. The plaintiffs will of course be entitled to their costs throughout from the defendants 1 to 5.

Agent for Appellants : *V. P. K. Nambiar.*

Agent for Respondents : *B. P. Maheswari.*

G.R./K.S. *Appeal dismissed.*

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1. (1893) 4 M.L.J. 131 : L.R. 21 I.A. 56 : I.L.R. 21 Cal. 666 (P.C.).
2. (1910) 20 M.L.J. 579 : L.R. 37 I.A. 105 : I.L.R. 32 All. 345 (P.C.).

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT :—MEHRCHAND MAHAJAN, N. CHANDRASEKHARA AIYAR AND N. H BHAGWATI, JJ.

Raja Kamakshaya Narayan Singh Bahadur and after him Kumar Praja Palak Nath Singh .. *Appellant**

v.

Chohan Ram and another .. *Respondents.*

Transfer of Property Act (IV of 1882), sections 66 and 65-A—Mortgagor in possession before enactment of section 65-A by Act XX of 1939—If had power to grant a permanent lease of mortgaged property so as to bind the mortgagee—Validity of lease—Burden of proof.

The question whether the mortgagor in possession has power to lease the mortgaged property has got to be determined with reference to the authority of the mortgagor as bailiff or agent for the mortgagee to deal with the property in the usual course of management. It has to be determined on general principles and not on the distinction between an English mortgage and a simple mortgage or on considerations germane to section 66 of the Transfer of Property Act.

The mortgagor in possession may make a lease conformable to usage in the ordinary course of management, for instance he may create a tenancy from year to year in the case of agricultural lands or from month to month in the case of houses. But it is not competent to the mortgagor to grant a lease on unusual terms, or to alter the character of the land or to authorise its use in a manner or for a purpose different from the mode in which he himself had used it before he granted the mortgage.

It is for the lessee if he wants to resist the claim of the mortgagee to establish that the lease in his favour was granted on the usual terms in the ordinary course of management. Such a plea if established and it must not be overlooked that the burden of proof in this matter is upon him—would furnish a complete answer to the claim of the mortgagee. If the lessee failed to establish this position he would certainly have no defence to an action at the instance of the mortgagee.

Where there is no allegation that a grant of permanent lease by the mortgagor was a dealing with the mortgaged property in the usual course of management by the mortgagor the lessee has no answer to the mortgagee's claim to possession by virtue of his purchase in enforcement of the mortgage.

On appeal from the Judgment and Decree dated the 26th January, 1944, of the High Court of Judicature at Patna (Fazl Ali, C.J. and Chatterji, J.) in appeal from Original Decree No. 4 of 1941, arising out of Judgment and Decree dated the 20th September, 1940, of the Court of the Additional Subordinate Judge of Hazaribagh in Title Suit No. 45 of 1939.

S. N. Mukherjee, Advocate, for Appellant.

Gangacharan Mukherjee and *A. N. Sinha*, Advocates, for Respondent No. 1.

The Judgment of the Court was delivered by

Bhagwati, J.—The question that arises for our consideration in this appeal is whether prior to the enactment of section 65-A of the Transfer of Property Act in 1939 a mortgagor in possession had the power to grant a permanent lease of the mortgaged property so as to bind the mortgagee.

One Raja Nilkanth Narain Singh was the owner of Gadi Sirampur and he executed on the 1st August, 1914, a simple mortgage of Gadi Sirampur in favour of the Chota Nagpur Banking Association, Limited. In 1920, the Bank filed a suit againt his son Wazir Narain Singh to enforce the mortgage security and obtained a mortgage decree on the 29th November, 1921. The Bank purchased a third share of Gadi Sirampur in execution of that decree on the 28th October, 1922. Proceedings were taken to set aside this sale. During the pendency of these proceedings it appears that on the 5th November, 1925, Wazir Narain Singh granted a permanent lease of four villages Nawadih, Koldih, Pandna and Chihut'a by a Registered Patta to one Hiraman Ram who was the Manager and Karta of his joint Hindu family. The permanent lease was taken by him in his own name and in the name of his son Chohan Ram. An agreement was subsequently arrived at between the Bank and Wazir Narain Singh that if Wazir Narain Singh paid

* Civil Appeal No. 73 of 1950. 23rd October, 1952.

to the Bank on or before the 16th August, 1926, the sum of Rs. 1,10,631-4-0 the sale would be set aside. Wazir Narain Singh executed on the 14th August, 1926, a mortgage of Gadi Sirampur in favour of the Manager of the Court of Wards in charge of the plaintiff's estate during his minority to secure repayment of a sum of Rs. 1,47,000 and out of the same satisfied the dues of the Bank and the sale in favour of the Bank was accordingly set aside. The plaintiff through the Manager of the Court of Wards filed a suit on the 4th February, 1929, to enforce this mortgage and he impleaded as co-defendants in that suit Hiraman Ram as defendant 20 and his father Dilo Ram as defendant 19. A final decree for sale was passed on the 18th September, 1931, and the plaintiff purchased Gadi Sirampur at the auction sale held in execution of this decree on the 6th April, 1935. Delivery of possession was obtained by the plaintiff through the Court on the 16th February, 1936. Dilo Ram died after the mortgage decree but Hiraman Ram and his son Chohan Ram continued in actual possession of the disputed villages and the plaintiff therefore filed on the 16th November, 1939, the suit, out of which this appeal arises, in the Court of the Additional Subordinate Judge of Hazaribagh against Hiraman Ram and Chohan Ram, defendants 1 and 2 for khas possession of these villages. The plaintiff contended that he was subrogated to the position of the Bank, that the decree which had been passed in the mortgage suit was binding on the defendants, that he was the auction-purchaser in execution of that mortgage-decree and that the Patta being subsequent to the plaintiff's mortgage thus came to an end and he was entitled to recover khas possession from the defendants. Defendant 2 filed his written statement contesting the plaintiff's claim. He denied that the plaintiff was subrogated to the position of the Bank. He contended that the decree in the mortgage suit was not binding on him as he was not a party to that suit. He further contended that the Patta could not be put an end to by the auction-sale of the mortgaged property. The defendant 1 filed a separate written statement. He denied that he was the Manager and Karta of the joint Hindu family. He also contended that there was a partition amongst the members of the joint family within a year after their possession of the properties in suit and the properties had been allotted at that partition to the defendant 2.

The trial Court held that the plaintiff was subrogated to the position of the Bank. It also held that the defendant 1 was the Manager and Karta of the joint family and that the defendant 2 was fully represented in the mortgage suit, that the decree in the mortgage suit was binding on the defendants and that the plaintiff was entitled to recover possession of the said properties and mesne profits from the defendants. The defendants appealed againt this decree to the High Court of Judicature at Patna. The High Court negatived the contention in regard to constructive *res judicata* which was urged on behalf of the plaintiff. It then considered the further contention that Wazir Narain Singh had after creating the mortgage in favour of the Bank no power to grant the permanent lease in question to the defendants. After considering all the authorities which were cited before it, it came to the conclusion that the question whether Wazir Narain Singh had got such power or not had to be determined with reference to the provisions of section 66 of the Transfer of Property Act and the crucial test was whether the lease rendered the mortgagee's security insufficient. In spite of the fact that there was no allegation in the plaint that the defendant's lease had the effect of rendering the security of the Bank insufficient, the High Court went into this question and on a calculation of some figures came to the conclusion that the lease of the disputed villages in favour of the defendants did not in any way render the security of the bank insufficient. It therefore held that the lease was valid and was not affected by the plaintiff's mortgage decree or by the execution sale under that decree and accordingly dismissed the plaintiff's suit. The plaintiff obtained leave to appeal to the Privy Council from this decision of the High Court and the appeal was admitted on the 9th January, 1946.

Both the Courts below found that the plaintiff was subrogated to the position of the Bank. They also found that the defendant 2 was sufficiently represented in the mortgage suit. These findings were not challenged before us and the only

question which survived for our consideration was whether Wazir Narain Singh had the power to grant a permanent lease to the defendants so as to bind the plaintiff.

The question whether Wazir Narain Singh had such power has got to be determined under the law as it stood prior to the enactment of section 65 (A) of the Transfer of Property Act by Act XX of 1929. The mortgagor's power to lease the mortgaged property was the subject-matter of conflicting judicial decisions. Relying upon the rule of English Common Law under which the mortgagor had no power to lease, it was held in some cases that a mortgagor could not ordinarily without the concurrence of the mortgagee execute a lease which could be binding on the mortgagee. In other cases a distinction was drawn between English mortgages and other mortgages and it was considered that the mortgagor in India remained the owner and when in possession could *prima facie* exercise the rights of ownership inclusive of the power to grant leases of the mortgaged property. The question was decided with reference to section 66 of the Transfer of Property Act and it was held that the mortgagor could grant leases which were not wasteful in their effect on the mortgagee's security. This was the principle deduced by Jenkins, C.J., in *Balmukund* v. *Motilal*[1] from the old cases of *Banee Pershad* v. *Reet Bhunjun Singh*[2]. This line of reasoning was not adopted in other cases which laid down a different rule, *viz.*, that a mortgagor in possession might grant a lease conformable to usage in the ordinary course of management but was not competent to grant a lease on unusual terms or authorise the use of land in a manner or for a purpose different from the mode in which he himself had used it before he granted the mortgage. This was laid down by Sir Ashutosh Mukherjee, J., in *Madan Mohan Singh* v. *Raj Kishore Kumari*[3] and was followed in a number of cases. There was thus a conflict of decisions which was sought to be resolved by the enactment of section 65-A of the Transfer of Property Act which dealt with the mortgagor's power to lease while lawfully in possession of the mortgaged property.

"It is an elementary rule that though a mortgagor may assign the mortgaged premises, the assignee can only take subject to the encumbrances, and if the property is sold or foreclosed by the mortgagee any interest which the mortgagor may have created since the mortgage will be destroyed." (Ghosh on Mortgages, Vol. I, p. 212.)

As was observed by Lord Selborne in *Corbett* v. *Plowden*[4] :

"If a mortgagor left in possession, grants a lease without the concurrence of the mortgagee (and for this purpose, it makes no difference whether it is an equitable lease by an agreement under which possession is taken or a legal lease by actual demise), the lessee has a precarious title, inasmuch as although the lease is good as between himself and the mortgagor who granted it, the paramount title of the mortgagee may be asserted against both of them."

It does not however follow that a lessee from the mortgagor acquires no interest whatever in the property demised to him. A person taking a lease from a mortgagor after the mortgage does acquire an interest in the equity of redemption and can claim to redeem on that footing. But this right of redemption does not necessarily mean that a lease of this character is always operative against the mortgagee. Merely because a lessee acquires an interest in the mortgaged property which is sufficient to enable him to redeem the mortgage it does not follow that the interest which the lessee has thus acquired is operative against the mortgagee. The true position is somewhere in the middle of these two extremes. The mortgagee is not normally bound by the acts of the mortgagor with reference to the mortgaged property :

"But if a mortgagee takes his security with knowledge of the purposes to which the land is applied and allows the mortgagor to remain in possession, he will be bound by the acts done by the mortgagor in accordance with the usual course." (Ghosh on Mortgages, Vol. I, p. 212.)

1. (1915) 20 C. W. N. 350.
2. (1868) 10 W.R. 325.
3. (1916) 21 C.W.N. 88.
4. (1884) 25 Ch. D. 678 at p. 681.

As indicated in the observations of Sir James Parke in *Pope* v. *Briggs*[1], the mortgagor might be considered as acting in the nature of a bailiff or agent for the mortgagee :

"Consequently, if the mortgagor, after he has granted the mortgage, deals with the property in the usual course of management, the interest created by him may be rightly deemed operative against the mortgagee. An illustration of the view is found in the case of *Moreland* v. *Richardson*[2], where a person took a mortgage of a burial ground and it was held that as the object of the burial ground is to grant rights of burial, this being the mode in which such property is dealt with, the mortgagee was not entitled to disturb the graves of those who had been buried on the land, while the mortgagor continued to hold it. The mortgagor could thus in the usual course of management create a tenancy from year to year in the case of agricultural land or from month to month in case of property consisting of houses and his dealings with the mortgaged property in the usual course of management would be operative against the mortgagee." (Per *Mookerjee, J.*, in *Madan Mohan Singh* v. *Raj Kishore Kumari*[3].)

"Whether the mortgagor possesses any larger powers of leasing is however very questionable. The only reported case in which such a power was recognised is *Banee Pershad* v. *Reet Bhunjun Singh*[4], but the report in Sutherland is very meagre. The judgment too does not give forth any certain sound. It is only said that a mortgagor is not restricted in the management of the property by making a mortgage and that so long as nothing takes place to impair the value of the mortgagee's security the mortgagor does not exceed his powers in making a lease for a term. The learned judges add perhaps somewhat unnecessarily that their decision should not go beyond the particular facts of the case before them." (Ghosh on Mortgages, Vol. I, p. 213.)

This case of *Banee Pershad* v. *Reet Bhunjun Singh*[4] was considered by Jenkins, C.J., in *Balmukund* v. *Motilal*[5] as an authority for the proposition that as long as nothing took place which impaired the value or impeded the operation of the mortgage, the mortgagor in creating a temporary lease acted within his powers and these observations of Jenkins, C.J., were considered by the Courts as justifying the applicability of the provisions of the section 66 of the Transfer of Property Act, while determining the binding nature of the leases created by the mortgagor in possession on the mortgagee. Mookerjee, J., had occasion to consider this very case in *Madan Mohan Singh* v. *Raj Kishore Kumari*[6] and he cited it in support of the proposition that the interest created by the mortgagor while dealing with the mortgaged property in the usual course of management could be rightly deemed operative against the mortgagee. The following observations of Mookerjee, J., in this connection at page 91 are very apposite :—

"As the case is very imperfectly reported, we have examined the record and ascertained the questions in controversy. The proprietor of an estate mortgaged it on the 12th March, 1861. On the 7th July, 1862, the mortgagor granted an ijara potta of the property for a term of ten years. The mortgagee subsequently sued the mortgagor alone, and got a decree ; at the execution sale which followed, the property was sold on the 24th December, 1863. The purchaser sued on the 12th March, 1867, to eject the lessee, on the ground that as he had acquired the property in the condition in which it was when mortgaged, the lease, which would otherwise run till the 7th July, 1872, did not bind him. The Court of first instance overruled this contention as too broadly formulated and held that as the mortgagor had in good faith granted the lease for a limited term on a fair and reasonable rent, the mortgagee or the purchaser in execution of his decree could not repudiate it, specially as the mortgage deed did not prohibit the grant of temporary leases to middlemen or cultivators. On appeal, the District Judge affirmed this view and declined to accept the broad contention that leases of all descriptions granted by a mortgagor were void as against the mortgagee. On second appeal to this Court, Jackson and Mitter, JJ., took substantially the same view."

These observations of Mookerjee, J., point out what was the *ratio decidendi* of that case. The question of the sufficiency or insufficiency of the security was not really gone into but the Court considered that the lease was granted in good faith, was for a limited term and stipulated a fair and reasonable rent and it was therefore operative against the mortgagee. The Court was really guided by the consideration that the mortgagor dealt with the property in the usual course of management and the interest which was thus created by the mortgagor in the usual course must rightly be deemed operative against the mortgagee. The case of *Banee Pershad* v. *Reet Bhunjun Singh*[4], therefore is really no authority for the wide proposition that a

1. (1829) 9 Barn. and Cres. 245 at p. 258 : 109 E.R. 91.
2. (1857) 24 Beav. 33 : 53 E.R. 269.
3. (1916) 21 C.W.N. 88 at pp. 91 and 92.
4. (1868) 10 W.R. 325.
5. (1915) 20 C. W. N. 250.
6. (1916) 21 C.W.N. 88.

mortgagor was not restricted in the management of the property by making a mortgage and that so long as nothing took place to impair the value or impede the operation of the mortgage the mortgagor would be well within his powers in making a lease for a term.

In our opinion section 66 of the Transfer of Property Act has nothing to do with the mortgagor's power to lease the mortgaged property. Section 66 is a statutory enactment of the powers of the mortgagor in possession in regard to waste of mortgaged property. The mortgagor in possession is not liable for what in terms of the English Law of Real Property is known as permissive waste, *i.e.*, for omission to repair or to prevent natural deterioration. He is however liable for destructive waste, *i.e.*, acts which are destructive or permanently injurious to the mortgaged property if the security was insufficient or would be rendered insufficient by such acts. This section therefore has no application to the grant of a lease by the mortgagor in possession.

The only relevant consideration is whether, the mortgagor in possession having the authority to deal with the property in the usual course of management, the lease granted by him can be rightly deemed operative against the mortgagee. The true position has been stated in the following terms by Mookerjee, J., in *Madan Mohan Singh* v. *Raj Kishore Kumari*[1] :

> "The true position thus is that the mortgagor in possession may make a lease conformable to usage in the ordinary course of management, for instance, he may create a tenancy from year to year in the case of agricultural lands or from month to month in the case of houses. But it is not competent to the mortgagor to grant a lease on unusual terms, or to alter the character of the land or to authorise its use in a manner or for a purpose different from the mode in which he himself had used it before he granted the mortgage."

The question whether the mortgagor in possession has power to lease the mortgaged property has got to be determined with reference to the authority of the mortgagor as the bailiff or agent for the mortgagee to deal with the property in the usual course of management. It has to be determined on general principles and not on the distinction between an English mortgage and a simple mortgage or on considerations germane to section 66 of the Transfer of Property Act. Having regard therefore to the position that section 66 has no application to leases of the mortgaged property, the decision of Jenkins, C.J., in *Balmukund* v. *Motilal*[2] and the cases following that line of reasoning do not govern the question before us.

While we are on this subject we would like to emphasise that it is for the lessee if he wants to resist the claim of the mortgagee to establish that the lease in his favour was granted on the usual terms in the ordinary course of management. Such a plea if established—and it must not be overlooked that the burden of proof in this matter is upon him—would furnish a complete answer to the claim of the mortgagee. If the lessee failed to establish this position he would have certainly no defence to an action at the instance of the mortgagee.

No allegation was made on behalf of the defendants that the grant of the permanent lease was a dealing with the mortgaged property in the usual course of management by the mortgagor. In the absence of any such plea we are of the opinion that there was no answer to the plaintiff's claim and the permanent lease granted by Wazir Narain to the defendants could not prevail against the plaintiff.

We have therefore come to the conclusion that Wazir Narain Singh had no power to grant the permanent lease in question to the defendants, that the same was not binding and operative against the plaintiff, that the defendants had ample opportunity to redeem the mortgage if they so desired but did not choose to exercise their right of redemption, that the execution sale of Gadi Sirampur including the four villages in question was binding on them and that the plaintiff was entitled to khas possession of the four villages of which the defendants were in wrongful possession. The appeal is allowed. The decree passed by the High Court dismissing

1. (1915) 21 C.W.N. 88 at page 92. 2. (1915) 20 C.W.N. 350.

plaintiff's suit is set aside and the decree passed by the Trial Court in favour of the plaintiff is restored with costs throughout.

Agent for Appellant : *Ganpat Rai.*

Agent for Respondents : *R. R. Biswas.*

G.R./K.S. —— *Appeal allowed.*

[THE SUPREME COURT OF INDIA].

(Criminal Appellate Jurisdiction).

PRESENT :—N. CHANDRASEKHARA AIYAR AND N. H. BHAGWATI, JJ.

Rameshwar Bhartia .. *Appellant**

v.

The State of Assam .. *Respondent.*

Criminal Procedure Code (V of 1898), section 556—Scope of bar under—Deputy Commissioner of Assam giving sanction for prosecution under Assam Food Grains Control Order (1947)—If disqualified from trying the case himself—Security bond to produce paddy concerned in Court in favour of Procurement Inspector—Forfeiture under section 514, Criminal Procedure Code—If permissible.

The question whether the bar under section 556, Criminal Procedure Code, comes into play depends upon the facts and circumstances of each particular case, the dividing line being a thin one somewhat but still sufficiently definite and tangible, namely, the removal of legal impediment by the grant of sanction and the initiation of criminal proceedings as the result of a direction. Where a Deputy Commissioner has merely given sanction for prosecution for an offence under the Assam Food Grains Procurement Order (1947) he is not disqualified from trying the offence himself and a trial by him is not vitiated by the provisions of section 556 of the Criminal Procedure Code.

Where a security bond was taken from the person transgressing the Food Grains Control Order only by the Procurement Inspector and not by the Court undertaking that the seized paddy be produced before the Court, section 514, Criminal Procedure Code, will not apply. Action could be taken for breach of a bond only when the bond is taken by the Court under the provisions of the Code such as section 91 for appearance, the several security sections or those relating to bail. The power to forfeit and the imposition of the penalty provided for in the latter parts of section 514 arise only if the preliminary conditions are satisfied.

On appeal from the Judgment and Order dated the 1st June, 1951, of the High Court of Judicature in Assam (Thadani, C.J. and Ram Labhaya, J.) in Criminal Reference No. 1 of 1951, arising out of Judgment and Order, dated the 15th November, 1950, of the Court of the Additional District Magistrate, Lakhimpur, in Case No. 1126 C of 1950.

Jindra Lal, Advocate, for Appellant.

Nur-ud-Din Ahmad, Advocate, for Respondent.

The Judgment of the Court was delivered by

Chandrasekhara Aiyar, J.—Rameshwar Bhartia, the appellant, is a shopkeeper in Assam. He was prosecuted for storing paddy without a licence in excess of the quantity permitted by the Assam Food Grains Control Order, 1947. He admitted storage and possession of 550 maunds of paddy, but pleaded that he did not know that any licence was necessary. The Additional District Magistrate recorded a plea of guilty, but imposed on him a fine of Rs. 50 only, as he considered his ignorance of the provisions of the Food Grains Control Order to be genuine. The stock of paddy was left in the possession of the appellant by the Procurement Inspector under a *Jimmanama* or security bond executed in his favour. He was subsequently unable to produce it before the Court, as the whole of it was taken away by a Congress Member of Legislative Assembly for affording relief to those who suffered in the earthquake, and so, the appellant was ordered to procure a similar quantity of paddy after taking an appropriate licence, and to make over the same to the procurement department on payment of the price.

The District Magistrate, on being moved to do so by the procurement department, referred the case to the High Court under section 438, Criminal Procedure

* Criminal Appeal No. 40 of 1951. 23rd October, 1952.

Code, for enhancement of the sentence, as in his opinion the sentence was unduly lenient and the *Jimmanama*, which was admittedly broken, should have been forfeited.

The reference was accepted by the High Court, and the sentence was enhanced to rigorous imprisonment for six months and a fine of Rs. 1,000. As regards the *Jimmanama*, the case was sent back to the trial Court for taking action according to law under section 514, Criminal Procedure Code, for its forfeiture.

The appellant applied to the High Court for a certificate under Article 134 (1) (*c*) of the Constitution that the case was a fit one for appeal to this Court. This application was granted. Out of the three points urged for the appellant, two were rejected, but the third one was accepted as a good ground, namely, that there was a contravention of the provisions of section 556, Criminal Procedure Code and that consequently the trial before the Additional District Magistrate was void.

One of the contentions urged before us was that Sri C. K. Bhuyan was not a " Director " at all and therefore there was no valid sanction under section 38 of the Order. A notification dated 16th May, 1950 and published in the Assam Gazette of the 24th May, 1950, was produced before us to show that Sri C. K. Bhuyan was an Additional Deputy Commissioner, and it was conceded by the appellant's counsel before the High Court that if he was a Deputy Commissioner, he would be a Director under the Order, as all Deputy Commissioners in Assam were notified as Directors for the purposes of the Order. Mr. Jindra Lal sought to draw a distinction between a Deputy Commissioner and an Additional Deputy Commissioner in this respect, but there is no warrant for the same, apart from the circumstance that it is a question of fact which has to be investigated afresh, and which we cannot allow to be raised now for the first time.

The primary question to consider in this appeal is whether there has been any infringement of section 556, Criminal Procedure Code and a consequent want of jurisdiction in the Court which tried the offence. The facts relevant to this question lie within a narrow compass. The Procurement Inspector sent a report on 1st July, 1950, about the nature of the offence ; he wrote out a short note on the subject, and requested that the accused might be prosecuted and the Assistant Director of Procurement, Dibrugarh, might be authorised to dispose of the paddy immediately to avoid loss due to deterioration. Sri C. K. Bhuyan, who was the then District Magistrate, Lakhimpur, made the following order :

" Prosecution sanctioned under section 7 (1) of the Essential Supplies (Temporary Powers) Act, 1946, for violation of sections 3 and 7 of the Assam Food Grains Control Order, 1947."

The case happened to be tried by the same gentleman in his capacity as Additional District Magistrate, and the accused was convicted as aforesaid.

The argument for the appellant was that having sanctioned the prosecution, Sri C. K. Bhuyan became " personally interested " in the case within the meaning of section 556, and was therefore incompetent to try the same. It was contended that the trial was not only irregular but illegal.

There is no question that " personal interest " within the meaning of the section is not limited to private interest, and that it may well include official interest also. But what is the extent of the interest which will attract the disability is a subject on which different views are possible and have been taken. Section 556 itself indicates the difficulty. The Explanation to the section runs in these terms :

" A Judge or Magistrate shall not be deemed a party, or personally interested, within the meaning of this section, to or in any case by reason only that he is a Municipal Commissioner or otherwise concerned therein in a public capacity, or by reason only that he has viewed the place in which an offence is alleged to have been committed, or any other place in which any other transaction material to the case is alleged to have occurred, and made an inquiry in connection with the case."

This shows that to be connected with a case in a public capacity is not by itself enough to render the person incompetent to try it. Even if he had made an enquiry in connection with this case, it would not matter. But look at the illustration :

" *A*, as collector, upon consideration of information furnished to him, directs the prosecution of *B* for a breach of the Excise laws. *A* is disqualified from trying this case as a Magistrate."

It is evident from the words of the illustration that if a prosecution is directed by a person in one capacity, he shall not try the case acting in another capacity as a Magistrate.

The explanation and illustration lend some support to the view that there is a distinction between a passive interest and an active interest, and that it is only in the latter case that the disqualification arises or intervenes.

Under sub-section (3) (*a*) of section 2 of the Assam Food Grains Control Order " Director " means

" the Director of Supply, Assam and includes, for the purpose of any specific provision of this Order, any other officer duly authorised in that behalf by him or by the Provincial Government by notification in the Official Gazette."

Section 38 provides :

" No prosecution in respect of an alleged contravention of any provision of this Order shall be instituted without sanction of the Director."

A little confusion is likely to arise from the employment of the word " Director " in the Control Order and the word " directs " in the illustration to section 556 of the Code. It has to be borne in mind that a sanction by the Director within the meaning of the Code does not necessarily mean " a direction given by him that the accused should be prosecuted."

In both cases of sanction and direction, an application of the mind is necessary, but there is this essential difference that in the one case there is a legal impediment to the prosecution if there be no sanction, and in the other case, there is a positive order that the prosecution should be launched. For a sanction, all that is necessary for one to be satisfied about is the existence of a *prima facie* case. In the case of a direction, a further element that the accused deserves to be prosecuted is involved. The question whether a Magistrate is personally interested or not has essentially to be decided on the facts in each case. Pecuniary interest, however small, will be a disqualification, but as regards other kinds of interest, there is no measure or standard except that it should be a substantial one, giving rise to a real bias, or a reasonable apprehension on the part of the accused of such bias. The maxim " *Nemo debet esse judex in propria sua causa* " applies only when the interest attributed is such as to render the case his own cause. The fulfilment of a technical requirement imposed by a statute may not, in many cases, amount to a mental satisfaction of the truth of the facts placed before the officer. Whether sanction should be granted or not may conceivably depend upon considerations extraneous to the merits of the case. But where a prosecution is directed, it means that the authority who gives the direction is satisfied in his own mind that the case must be initiated. Sanction is in the nature of a permission, while a direction is in the nature of a command.

Let us now examine some of the decisions on the subject. For the appellant, strong reliance was placed on the judgment of the Privy Council in *Gokulchand Dwarkadas* v. *King*[1] and it was argued on the basis of some of the observations of the Judicial Committee that a sanction was an important and substantial matter and not a mere formality. The facts in that case were that while there was a sanction of the Government for a prosecution under the Cotton Cloth and Yarn Control Order, there was nothing in the sanction itself, or in the shape of extraneous evidence, to show that the sanction was accorded after the relevant facts were placed before the sanctioning authority. To quote their Lordships' own words,

" There is no evidence to show that the report of the Sub-Inspector to the District Superintendent of Police, which was not put in evidence, was forwarded to the District Magistrate, nor is there any evidence as to the contents of the endorsement of the District Magistrate, referred to in the sanction, which endorsement also was not put in evidence. The prosecution was in a position either to produce or to account for the absence of the report made to the District Superintendent

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1. (1948) 1 M.L.J. 243 : L.R. 75 I.A. 30 : I.L.R. (1948) Bom. 316 (P.C.).

of Police and the endorsement of the District Magistrate referred to in the sanction, and to call any necessary oral evidence to supplement the documents and show what were the facts on which the sanction was given."

It is in this connection that their Lordships emphasise that the sanction to prosecute is an important step constituting a condition precedent, and observe :

"Looked at as a matter of substance it is plain that the Government cannot adequately discharge the obligation of deciding whether to give or withhold a sanction without a knowledge of the facts of the case. Nor, in their Lordships' view, is a sanction given without reference to the facts constituting the offence a compliance with the actual terms of clause 23."

This, however, is no authority for the position that a sanction stands on the same footing as a direction. It is true that the facts should be known to the sanctioning authority ; but it is not at all necessary that the authority should embark also on an investigation of the facts, deep or perfunctory, before according the sanction. The decision lends no support to the view that wherever there is a sanction, the sanctioning authority is disabled under section 556 of the Code from trying the case initiated as a result of the sanction. On the other hand, there is plenty of support for the opposite view.

In the very early case of *The Government of Bengal* v. *Heera Lall Dass and others*[1], at a time when there was no such statutory provision as section 556 of the Code but only the general rule of law that a man could not be judge in a case in which he had an interest, the facts were that a Sub-Registrar, who was also an Assistant Magistrate, having come to know in his official capacity as a registering officer that an offence under the Registration Act had been committed, sanctioned a prosecution, and subsequently tried the case himself. A Full Bench consisting Sir Richard Couch, C.J. and five other learned Judges came to the conclusion, after an examination of some of the English cases, that the trial was not vitiated. The learned Chief Justice said :

" In this case, I think, the Sub-Registrar has not such an interest in the matter as disqualifies him from trying the case ; and I may observe with reference to some of the arguments that have been used as to the Sub-Registrar having made up his mind, and that the accused would have no chance of a fair trial, that the sanction of the superior officer, the Registrar, is required before the prosecution can be instituted, and certainly I do not consider that the prosecution will not be instituted unless the Sub-Registrar has made up his mind as to the guilt of the party. It is his duty, when he comes to know that an offence has been committed, to cause a prosecution to be instituted, by which I understand that there is *prima facie* evidence of an offence having been committed, that there is that which renders it proper that there should be an enquiry, and the Registrar accordingly gives his sanction to it ; and certainly, I cannot suppose that, because an officer in his position sanctions the institution of a prosecution, his mind is made up as to the guilt of the party and that he is not willing to consider the evidence which may be produced before him when he comes to try the case. In this case, there appears to be no such interest as would prevent the case from going before the Magistrate as the trying authority . . . ."

In *Queen-Empress* v. *Chenchi Reddi*[2], it was pointed out that when there was only an authorisation and not a direction, there was no supervening disability, and the case of *Girish Chunder Ghose* v. *The Queen-Empress*[3] was distinguished on the ground that there the Magistrate had taken a very active part in connection with the case as an executive officer. The Bombay High Court went even a step further in the case reported in *Emperor* v. *Ravji*[4], where the Magistrate who tried the case had earlier held a departmental enquiry and forwarded the papers to the Collector with his opinion that there was sufficient evidence to justify a criminal prosecution. As he did no more than express an opinion that there was evidence, which he had neither taken nor sifted, which made a criminal prosecution desirable, it was held that the Magistrate was not disqualified from holding the trial, though, no doubt it would have been more expedient had the Collector sent the case for disposal to another of his subordinates.

As stated already, the question whether the bar under section 556 comes into play depends upon the facts and circumstances of each particular case, the dividing line being a thin one somewhat but still sufficiently definite and tangible, namely,

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1. (1871) 17 W.R. Crl. Rulings, 39.
2. (1900) I.L.R. 24 Mad. 238.
3. (1893) I.L.R. 20 Cal. 857.
4. (1903) 5 Bom. L.R. 542 (2).

the removal of a legal impediment by the grant of sanction and the initiation of criminal proceedings as the result of a direction. In the present case before us, we have nothing more than a sanction, and consequently we are unable to hold that the trial has become vitiated by reason of the provisions of section 556, Criminal Procedure Code.

The other point taken on behalf of the appellant is a more substantial one. The security bond was taken from him not by the Court but by the Procurement Inspector. It is true that it contained the undertaking that the seized paddy would be produced before the Court, but still it was a promise made to the particular official and not to the Court. The High Court was in error in thinking that section 514, Criminal Procedure Code, applied. Action could be taken only when the bond is taken by the Court under the provisions of the Code such as section 91 for appearance, the several security sections or those relating to bail. Clause (1) of section 514 runs :

"Whenever it is proved to the satisfaction of the Court by which a bond under this Code has been taken, or of the Court of a Presidency Magistrate or Magistrate of the first class, or when the bond is for appearance before a Court, to the satisfaction of such Court, that such bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid."

The language is perfectly clear ; the power to forfeit and the imposition of the penalty provided for in the later parts of the section arise only if the preliminary conditions are satisfied.

There was no argument addressed to us that the High Court in suggesting that action should be taken under section 514 for forfeiture of the bond acted in the exercise of its inherent powers under section 561-A. It did not purport to exercise any such power ; and moreover, there will then arise the question whether when the Code contains an express provision on a particular subject there, could be any resort to inherent jurisdiction under a general provision.

We have got an additional circumstance in the appellant's favour in this case that the seized paddy was taken away by a member of the Legislative Assembly for giving relief to those affected by the earthquake, and if that is true, as it seems to be from the letter written by the Member of the Legislative Assembly to the Additional District Magistrate on the 1st November, 1950, it appears to us harsh, if not unjust, to ask him to produce the same paddy or a similar quantity of paddy. The order of the High Court sending back the case to the Magistrate for taking action according to law under section 514 will, therefore, stand set aside.

We generally do not interfere in the matter of sentence, but in this case we find that the Magistrate has held that the appellant's plea that he was ignorant of the provisions of the Assam Food Grains Control Order, 1947, was a genuine one. Having regard to this circumstance and the fact that from a fine of Rs. 50 to 6 months' rigorous imprisonment and a fine of Rs. 1,000 is a big jump, we think it is appropriate that the sentence of imprisonment imposed by the High Court should be set aside and we order accordingly. The fine of Rs. 1,000 will stand.

Agent for Appellant : *Rajinder Narain.*

Agent for Respondent : *Naunit Lal.*

G.R./K.S. *Appeal allowed ; sentence reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AYYAR.

The Express Estates, Ltd. .. *Appellant* *

v.

The Modern Furnishing House .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 7—*Scope—Eviction by landlord—Decree for—Sub-tenant if entitled to resist execution.*

The right given by section 7 (1) of the Madras Buildings (Lease and Rent Control) Act is expressly given to the tenant and the definition of " tenant " in section 2 (4) of the Act does not include a person placed in occupation of a building by its tenant. Section 7 (1) cannot on a proper construction apply to a sub-tenant and confer rights on him and he cannot get the benefit indirectly on the ground that he claims under the tenant. The explanation added by Act VIII of 1951 does not alter the position.

Devartha Bhatt v. *V. S. Raja*, (1952) 2 M.L.J. 179, referred to.

On appeal from the Order and Judgment of Krishnaswami Nayudu, J., dated 17th July, 1951 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in application No. 671 of 1951 in C.S. No. 419 of 1947.

This is an appeal against an order of Krishnaswami Nayudu, J., passed on 17th July, 1951, by which he disposed of four applications in C.S. No. 419 of 1947 on the Original Side of this Court. Though there were four applications before Krishnaswami Nayudu, J., the appeal relates only to one of the applications in which the respondent is the only party interested.

(*V. K. Tiruvenkatachari*) The Advocate-General and *V. Srinivasan* for Appellant.

K. N. Karunakaran for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The facts necessary for disposal of this appeal are as follows : Premises Nos. 177 to 179, Mount Road, Madras, were originally leased to Bosotto Brothers, Ltd., by the then owners of the building, Jamal Mahomed. On 22nd May, 1946, the Express Estates, Ltd., the appellant before us, purchased the premises. By an order dated 13th June, 1947, the Government exempted the building from the operation of the Madras Buildings (Lease and Rent Control) Act, 1946. On 26th September, 1947, the appellant filed a suit, C.S. No. 419 of 1947 on the Original Side of this Court, for recovery of possession from Bosotto Brothers, Ltd., and also for the recovery of rent at an enhanced rate. Pending the suit, the Government, by a subsequent order, dated 11th March, 1950, cancelled their prior order exempting the premises from the Rent Control Act. On 31st July, 1950, a decree was passed in the suit for possession and for enhanced rent till delivery of possession. The appellant filed an application for execution of the decree, E.P. No. 233 of 1950. After notice to Messrs. Bosotto Brothers, Ltd., the judgment-debtor in the case, the application was ordered. When the representative of the appellant went along with the bailiff to take delivery of possession, he found that portions of the premises were in the occupation of four persons, one of whom was the respondent before us, namely, the Modern Furnishing House. The said persons obstructed the delivery of possession and claimed that they were entitled to remain in possession in their own right. Thereupon the appellant filed an application for removal of obstruction, E.A. No. 788 of 1951. The learned Judge dismissed the application on the ground that the obstructors were entitled to remain in possession, because, the decree for possession could not be executed on account of the provisions of section 7 of Madras Act XXV of 1949 (which had replaced the Act of 1946).

The reasoning of the learned Judge was shortly as follows : Under section 7 (1) of the Rent Control Act, a tenant shall not be evicted in execution of a decree or otherwise except in accordance with the provisions of that section. The expression " tenant " in section 7 (1) of the Act does not mean and include only a tenant in actual possession but will also include a tenant in constructive possession, with the result that even though a tenant might have vacated a portion of the building and

* O. S. A. No. 145 of 1951. 15th October, 1952.

had let in sub-tenants in other portions of the building, the tenant must be deemed to be in constructive possession of the entire premises, and there can be no execution of a decree for ejectment against such a tenant.

With respect to the learned Judge, we think he has overlooked one important fact in this case. Whether in actual possession or in constructive possession, there can be no doubt whatever that the tenant of the premises was Bosotto Brothers, Limited. It is common ground that Bosotto Brothers, Ltd., did not raise any objection to the execution of the decree for possession. It may be that they could have raised an objection under section 7 (1) of the Rent Control Act, but actually they did not. After notice to them, a final order for execution was passed by this Court. The question is, can the respondent who admittedly was a sub-tenant of Bosotto Brothers, Ltd., having been let into possession by them sometime in 1949 when the ejectment suit was pending, be heard to say that the decree cannot be executed against them? It was contended on behalf of the respondent company that as they claimed under Bosotto Brothers, Ltd., they could raise all objections which Bosotto Brothers, Ltd., themselves could have raised to the execution and they could take advantage of section 7 (1) of the Rent Control Act, advantage of which could have been taken by Bosotto Brothers, Ltd. We do not agree with this contention. The right given by section 7 (1) of the Act is expressly given to the tenant and the definition of " tenant " in section 2 (4) of the Act would not include a person placed in occupation of a building by its tenant, that is, a person in the position of the respondent. While therefore section 7 (1) cannot, according to a proper construction of its language, apply to the respondent and confer any rights on him, we cannot permit the respondent to get the same benefit indirectly on the ground that they claim under Bosotto Brothers, Ltd. We reject this contention.

Reference was made to an amendment to section 2 (3) of the Act by Act VIII of 1951. By section 3 of the Act, an Explanation was inserted after the definition of " landlord " in section 2 (3) of the Act. It ran as follows :

" A tenant who sub-lets shall be deemed to be a landlord within the meaning of this Act in relation to the sub-tenant."

In our opinion, this Explanation would not help the respondent. It may be that, if Bosotto Brothers, Ltd., wanted to evict the respondent under the provisions of the Act, the respondent would be entitled to the protection afforded by section 7 (2) of the Act. That is to say, the respondent could not be evicted except on one of the grounds mentioned in that sub-section ; for example, failure to pay rent, causing damage to the premises, etc. Except to this extent, we do not think the effect of the amendment in any way affects the rights of the original landlord. The effect of the Explanation is certainly not to enable a sub-tenant to raise an objection to being evicted by the landlord either under the provisions of the Rent Control Act or otherwise, as for example, in execution of a decree for possession. The expression " tenant " in section 7 (1) would not include a sub-tenant in relation to the original landlord.

Reference may be made to the recent ruling of a Division Bench of this Court in *Devaraja Bhatt* v. *V. S. Raja*[1] (which included Krishnaswami Nayudu, J.) in which it was held that the Rent Control Act does not recognise any rights in a sub-tenant. Govinda Menon, J., delivering the judgment of the Bench observed as follows :—

" Under the Madras Buildings (Lease and Rent Control) Act, a sub-tenant as such is not recognised and if a landlord brings a suit in ejectment a sub-tenant let into possession cannot raise any question and submit that he has a status under the Act which should be safeguarded by its provisions."

The insertion of the Explanation does not make any difference.

In this view, the appeal must be allowed and the order of the learned Judge dismissing the application of the decree-holder for removal of obstruction should be set aside. There will be an order directing th removal of the obstruction caused by the respondent. The appellant will be entitled to the costs of this appeal. The respondent will have time to deliver possession till 2nd January, 1953.

V.P.S. ——— *Appeal allowed.*

1. (1952) 2 M.L.J. 179

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Mamidi Harihararayulu and others ... *Petitioners*.*

v.

Annavarapu Bangarayya .. *Respondent*.

Criminal Procedure Code (*V of* 1898), *section* 476-B *and section* 195—*Criminal Rules of Practice—Rule* 37—*Amin of Court executing decree obstructed by persons—Criminal complaint against them—Order of Court directing the filing of—If open to appeal or revision.*

Petitioners herein were Respondents in a criminal proceeding because of their obstruction to the Amin of the District Court while he was discharging his duties in effecting attachment of certain moveables of the Judgment-debtor. The Judge passed orders directing the Central Nazir of that Court to mke a criminal complaint against the respondent. Thereupon the respondent filed a Civil Miscellaneous Appeal falling under section 476-B, Criminal Procedure Code. The High Court Office returned it whereupon the Advocate for respondent filed it as a C.M.A. under Rule 37 of the Criminal Rules of Practice and section 476-B of Criminal Procedure Code which applies to orders passed in the lower Court under section 476-B, Criminal Procedure Code and section 195, Criminal Procedure Code.

Held, (1) the proceeding could be filed under the newly added sub-section 5 (5) to section 195, Criminal Procedure Code only as a revision and not as a Civil Miscellaneous Appeal. Case-law reviewed.

(2) Rule 37 of the Criminal Rules of Practice does not apply to this, and

(3) Stay could not be granted in this matter.

Petition under sections 476, 476-B and 561-A, Criminal Procedure Code, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing stay of the hearing of the complaint-proceedings in C.C. No. 26 of 1952 on the file of the Court of the Stationary Sub-Magistrate, Masulipatam, pending A.A.O. No. 234 of 1952, preferred to the High Court against the order of the District Court, Krishna at Masulipatam, dated 1st November, 1951, in O.P. No. 25 of 1951, etc.

Narayanachar and *K. R. Sharma* for Petitioners (in C.M.P. No. 4149 of 1952 and Respondent in C.M.P. No. 7331 of 1952.)

A. Subramaniam and *N. Subramaniam* for Respondent (in C.M.P. No. 4149 and Petitioner in C.M.P. No. 7331 of 1952).

The Court made the following

ORDER.—This Civil Miscellaneous Appeal has been placed on the list, subject to the question of the maintainability of the same being decided.

The facts are : Annavarapu Bangarayya, the decree-holder in O.S. No. 115 of 1937, on the file of the District Munsif's Court, Masulipatam, filed an application, dated 21st February, 1951, under sections 476 and 195, Criminal Procedure Code, in the Court of the District Judge of Krishna praying that the Court may be pleased to sanction and launch prosecution proceedings against the respondents Mamidi Harihararayulu, Dora Krishnarao and Kosaraju Venkateswara Rao, who had obstructed the amin of the District Court while he was discharging his duties in effecting the attachment of certain moveables of the Judgment-debtor Mamidi Harihararayulu in E.P. No. 316 of 1949, in O.S. No. 115 of 1937. The District Judge had before him the report of the amin and the connected papers. Notice was given to the respondents and the learned Judge heard arguments of the vakils for the petitioner and the arguments of the three advocates for the three respondents. Then he passed the following order :

"In view of the amin's report dated 14th December, 1950, which discloses offences under sections 183 and 186, Indian Penal Code, among others, the Central Nazir of this Court is directed to make a complaint against the respondents in respect of the said offences before a Magistrate.

I make no order as to costs."

This order was passed on 1st November, 1951.

* C. M. P. Nos. 4149 and 7331 of 1952. 29th August, 1952.

Thereupon the learned advocate for the defeated respondents in the lower Court purported to file a proceeding, which has originally been typed as a memorandum of criminal appeal and which has been subsequently corrected into a Civil Miscellaneous Appeal falling under section 476-B, Criminal Procedure Code. The High Court office returned the memorandum on the following ground :

> " Section 476 applies only to offences under section 195 (*b*). Sections 183 and 186 fall under section 195 (*a*). Hence the proceedings in the lower Court could not have been taken under section 476. It may be stated how C. M. A. lies under section 476-B."

Thereupon the learned advocate re-presented it with the following endorsement :

> " The C. M. A. is filed as civil miscellaneous appeal under rule 37, Criminal Rules of Practice, and section 476-B, Criminal Procedure Code, which applies to orders passed by the lower Court under section 476, Criminal Procedure Code, and section 195, Criminal Procedure Code."

There can be no doubt that this endorsement of the learned advocate is based on a profound misreading and, if I may say without meaning any offence, non-reading of sections 476 and 476-B, Criminal Procedure Code and rule 37 of the Criminal Rules of Practice.

Section 476-B, Criminal Procedure Code, gives a right of appeal against the orders passed under section 476 and 476-A directing the filing of a complaint or refusing to make a complaint : see *Wajid Ali* v. *Emperor*[1], *Mahabaleswarappa* v. *Gopalaswami Mudaliar*[2]. The right of appeal is restricted to complaints in respect of offences mentioned in clauses (*b*) and (*c*) of section 195 (1) of the Code and no appeal lies in respects of offence mentioned in clause (*a*) of that sub-section : see *Maruda Pillai* v. *Narayanaswami Pillai*[3], *Bajirung* v. *Durga Prasad*[4], *Brijendranath* v. *Emperor*[5] and *P. J. Money* v. *Emperor*[6]. Before the amendment of 1923 it was held that where a public servant acted judicially as a Court and passed an order sanctioning prosecution for an offence referred to in clause (*a*) of section 195, he must, for the purpose of appeal be taken to have acted as a Court, the forum of appeal being governed by the provisions of sub-section (7), now sub-section (3), but that if he should be taken to have acted not as a Court, but in his executive capacity, the forum of appeal was not governed by sub-section (7) : see *Nataraja Pillai* v. *Rangaswami Pillai*[7]. Since the amendment of the Code in 1923, an appeal lies only against a complaint preferred by a Court under section 476, in respect of offences falling within clause (*b*) and clause (*c*) of section 195 ; vide *Rameshwarlal* v. *Emperor*[8]. Where a public servant, whether he is a Court or not, files a complaint in respect of an offence falling under clause (*a*) of section 195 there is no appeal ; vide *Brijendranath* v. *Emperor*[5]. But sub-section (5) newly added enables the authority to which such public servant is subordinate, to withdraw the complaint. Thus, it has been held that a Sub-Divisional Magistrate acting under clause (*a*) of sub-section (1) is subordinate to the District Magistrate, the authority to which he is subordinate under section 17 of the Criminal Procedure Code, and an application for withdrawal of complaint should be made to him and not to the Court of session to which appeals ordinarily lie from his decisions as a Court or to the High Court ; see *Maini Misser* v. *King-Emperor*[9], *Naguservai*, In re[10] and *Emperor* v. *Ramjanam*[11]. It has further been held that the High Court as being the authority to which a District Judge or an Additional Sessions Judge is subordinate within the meaning of this sub-section, is competent to withdraw a complaint filed by the latter as a public servant ; vide *Brijendranath* v. *Emperor*[5] and *Chidilal* v. *Emperor*[12]. In other words, there is no appeal in this case but there can only be a resort to sub-section (5) to section 195 newly added and this can only be by way of revision. Thus, where a Subordinate Judge declined to make a complaint under sub-section (1) clause

1. A.I.R. 1934 Oudh 344, 347.
2. (1935) 69 M.L.J. 589 : I.L.R. 38 Mad. 954.
3. A.I.R. 1939 Mad. 336.
4. A.I.R. 1937 Pat. 31, 33.
5. A.I.R. 1927 All. 828.
6. (1928) I.L.R. 6 Rang. 529 : A.I.R. 1928 Rang. 296.
7. (1923) 44 M.L.J. 328: I.L.R. 47 Mad. 56.
8. (1927) I.L.R. 49 All. 898 : A.I.R. 1927 All. 571.
9. (1926) I.L.R. 6 Pat. 39 : A.I.R. 1927 Pat. 111.
10. (1934) 67 M.L.J. 195 : I.L.R. 57 Mad. 1101.
11. A.I.R. 1942 Cal. 307.
12. A.I.R. 1924 Oudh 402.

(*a*) of section 195 in respect of an offence under section 186, Indian Penal Code, alleged to have been committed against the peon of the Court while executing a process of the Court, the High Court interfered in revision and set aside the order of the Subordinate Judge directing him to dispose of the matter after taking into consideration the observations of the High Court; vide *Rajashahi Banking and Trading Corporation, Ltd.* v. *Surendranath*[1]. It is unnecessary to consider here whether a revision lies against the withdrawal of a complaint under sub-section (5) and the High Courts of Allahabad and Patna and the Judicial Commissioner's Court of Peshawar have held that a withdrawal of a complaint under sub-section (5) is an administrative or executive act and hence not open to revision by the High Court. On the other hand, the High Court of Madras has held in a case where a District Magistrate summarily rejected an application under this sub-section for the withdrawal of a complaint preferred by the Joint Magistrate without giving notice or hearing the applicant, that the application was by way of a judicial revision, and the order was open to revision under section 439, Criminal Procedure Code, vide *Nagu Servai*, In re[2]. It has also been held by the same High Court that where a Joint Magistrate has passed an order withdrawing a complaint, the order of the District Magistrate in revision setting aside that order is passed as a Court and is open to revision by the High Court. *P. S. Vijayaranga Reddiar* v. *S. V. Muthuswami Reddiar*[3]. The order of the Joint Magistrate directing the withdrawal of the complaint is not, however, an order of discharge and consequently it will not be open to the District Magistrate under section 436 to himself set it aside (*Ibid.*). Therefore, this proceeding can be filed under the newly added sub-section (5) only as a revision and not as a civil miscellaneous appeal.

The reference to rule 37 of the Criminal Rules of Practice is meaningless in this connection. That rule merely states:

"Every application made to a criminal Court under the provisions of the section 476, 476-A or 485, Criminal Procedure Code, and every appeal filed against an order made under the above sections or filed in a Court of Session against an order of a Court of Small Causes in the mofassal under section 486, Criminal Procedure Code, shall be registered as a criminal miscellaneous petition and a criminal appeal respectively. Such applications and appeals when filed in a civil Court will be registered as civil miscellaneous petitions and civil miscellaneous appeals.

This rule applies to revision petitions also."

That this rule which prescribes a different procedure in case of appeals filed under section 476-B, Criminal Procedure Code, is not in consonance with procedure has been indicated in *Raja Gupta*, In re[4]. See also *Janardhan Rao* v. *Lakshminarasamma*[5].

Therefore, even assuming that this is a revision petition, the final point to be decided is whether stay should be granted and for doing so there is not the slightest warrant because when our interference is by way of revision, the limitations incidental to interference in revisions automatically apply. The facts of this case show that when the amin of the Civil Court was executing the warrant of attachment in execution of a decree, he had been resisted and assaulted by the judgment-debtors and therefore there is a good *prima facie* case for making the complaint. The procedure followed is correct, *viz.*, the District Judge has been moved in his capacity as a public servant to whom the amin is subordinate to make a complaint. The learned District Judge has given an opportunity to both sides and examined the matter and arrived at his conclusion. Therefore there are no grounds to hold that a case has been made out for granting stay.

The petition for stay is dismissed and the petition for vacating the order of stay is allowed and, in both cases, without costs because it has been held by Lakshmana Rao, J., that in an application of quasi-criminal character costs should not be allowed.

K.C. —— *Petitions dismissed.*

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1. I.L.R. (1942) 2 Cal. 108: A.I.R. 1942 Cal. 434.
2. (1934) 67 M.L.J. 195 : I.L.R. 57 Mad. 1101.
3. (1944) 2 M.L.J. 208 : A.I.R. 1945 Mad. 58.
4. (1939) 1 M.L.J. 480 : I.L.R. (1939) Mad. 439.
5. (1933) 65 M.L.J. 873: I.L.R. 57 Mad. 177 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE RAMASWAMI.

Arankandath Sankaran Nair and another .. *Appellants**

v.

A. Doraiswamy Chettiar (died) and others .. *Respondents.*

Civil Procedure Code (*V of* 1908); *section* 60 (1)—*Splints and veneers owned by a match factory under a licence under rule* 60 *of the Central Salt and Excise Rules—If can be attached under Order* 38, *rule* 5.

Under rule 60 and rule 174 of the Central Excise Rules the licensee is the owner of the articles (splints and veneers in a match factory). In the interests of public, their custody, sale and purchase are regulated under the rules framed by the Government under the Central Excise and Salt Act. There is nothing in that Act or the rules framed thereunder prohibiting the sale of the said articles. The rules only regulate the mode of sale. If so, it follows that the licensee has a disposing power within the meaning of section 60, Civil Procedure Code. As the defendant has a saleable interest it is clearly liable to be attached.

Radhakrishna Beni Prasad v. *Kishore Chand Shiva Charanlal*, I.L.R. (1939) All. 901 ; *Ramdass* v. *Bhagwat Narain Singh*, A.I.R. 1931 Pat. 97 ; *Whitnarain* v. *Surju Seth*, A.I.R. 1931 Pat. 364 : I.L.R. 10 Pat. 252, distinguished ; *Purushottam* v. *Balwant*, (1907) 10 Bom.L.R. 13, referred to.

Appeal against the order of the Court of the Subordinate Judge, Ottapalam, dated 30th July, 1947, in I.A. No. 68 of 1946, in O.S. No. 3 of 1945.

D. A. Krishna Variar for Appellants.

T. R. Srinivasan for Respondents.

The Judgment of the Court was delivered by

Subba Rao, J.—The only question in this appeal is whether the splints and veneers can be attached under Order XXXVIII, rule 5, Civil Procedure Code. The facts are simple and may be briefly narrated. The respondent instituted O.S. No. 3 of 1945 on the file of the Court of the Subordinate Judge of Ottapalam for possession of a match factory and for mesne profits. After obtaining a decree therein, he took possession of the factory and applied for ascertainment of mesne profits. He also applied for attachment before judgment of splints and veneers owned by the 1st defendant. It was contended, *inter alia*, that the said articles were not liable to attachment on the ground that the 1st defendant had no disposing power over the said articles. The learned Subordinate Judge rejected the contention and directed the attachment of the said articles. The defendants have preferred the above appeal.

Mr. Variar the learned counsel for the appellants raised before us the point which his clients had unsuccessfully raised in the Court below. It is contended that the licence, custody and sale of the articles are regulated by the rules framed under the Central Excise and Salt Act and that under the said rules they cannot be sold except with the previous consent of the Excise Officer. So it is argued that the 1st defendant has no disposing power over the articles and therefore the articles are not liable to be attached.

The relevant provisions of the Civil Procedure Code and the rules made under the Central Excise and Salt Act may now be read. Section 60 (1) of the Civil Procedure Code runs thus :

"The following property is liable to attachment and sale in execution of a decree, namely, ... goods, ... all other saleable property, moveable or immoveable, belonging to the judgment-debtor, or over which, or the profits of which he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf."

Under rule 174 of the Central Excise Rules

"every manufacturer, trader, dealer, or person hereinafter mentioned, shall be required to take out a licence . . . . . . and shall not conduct his business in regard to such goods otherwise than

*A. A. O. No. 121 of 1948. 7th October, 1952.

by the authority, and subject to the terms and conditions of a licence granted by a duly authorised officer in the proper form . . . . . "

Rule 60 runs thus :

" Where the splints and veneers are obtained form a licenced manufacturer or importer of such goods, an indent shall be prepared in duplicate and counter-signed by the officer at the factory. The supplier shall return one copy to the officer with an endorsement stating the quantity actually supplied. Each consignment shall be produced before the officer at the factory and if the quantity received differs from the quantity stated in the suppliers endorsement, the supplier shall be required to explain the discrepancy."

It will be seen from the aforesaid provisions that the licensee is the owner of the articles. In the interests of public, their custody, sale and purchase are regulated under the rules framed by the Government under the Central Excise and Salt Act. We have searched in vain to find any provision either in the Act or the rules framed thereunder prohibiting the sale of the said articles. The rules only regulate the mode of sale. If so, it follows that the licensee has a disposing power within the meaning of section 60, Civil Procedure Code.

But the learned counsel for the appellants relied upon certain decisions in support of his contention. *Radhakrishna Beni Prasad* v. *Kishore Chand Shiva Charanlal*[1], is a case arising under the Electricity Act. Under that Act, in case a licence had been revoked certain provisions laid down by section 5 of the Act had an imperative effect, and under those provisions the licensee had the power of disposing of all lands, buildings, works, materials and plant belonging to the undertaking in any manner which he might think fit only if caluse (*f*) of the section applied to the case. On a construction of the provisions of the Act, the learned Judges held that the defendant in that case had a disposing power only under the provisions of clause (*f*) of section 5 and as the contingency contemplated by that clause had not arisen, he had no disposing power and therefore the undertaking was not liable to be attached. As the defendant had no disposing power, the learned Judges rightly held that the undertaking was not liable to be attached. In *Ramdass* v. *Bhagwat Narain Singh*[2], Rowland, J., has held that section 12-A, Encumbered Estates Act, read with section 60, Civil Procedure Code, prevents a property released under section 12 from being sold in execution, of a money decree obtained against the holder of such property without the sanction of the Commissioner. On a construction of the relevant provisions the learned Judge pointed out that under the Act a proprietor had no right to sell the property extending beyond his lifetime, except with the consent of the Commissioner. Having regard to the object and express provisions of the Act, the learned Judge held that the proprietor had no disposing power. A Bench of the same Court consisting of Macpherson and Dhavle, JJ., accepted the correctness of the aforesaid judgment in *Khitnarain* v. *Surju Seth*[3] and also observed :

" The object of the Act of 1876 is to provide for the relief of ' holders ' of land in Chota Nagpur who may be in debt and whose ' immoveable property may be subject to mortgages, charges and liens, and the method adopted is to vest the management of the property of a holder in an officer appointed by the Commissioner and termed the manager whose function is to clear off the encumbrances after which the property is released to the holder. For reasons of public policy the property is to be saved to the holder."

In view of the object underlying the Act and the provisions thereof, the learned Judges found that that the holder had no disposing power over the property and therefore it was not liable to be attached. They have succinctly stated the proposition thus :

" The measure of liability to involuntary alienation is the power of voluntary transfer."

The aforesaid judgments only recognised and applied the incontestable proposition that a property of a judgment-debtor is not liable to be attached if he has no disposing power over the same. Whether a judgment-debtor has a disposing power in respect of a particular property is a question to be decided in each case.

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1. I.L.R. (1939) All. 901.
2. A.I.R. 1931 Pat. 97.
3. (1931) I.L.R. 10 Pat. 582: A.I.R. 1931 Pat. 364.

A judgment of the Bombay High Court in *Purushottam* v. *Balvant*[1] is appos and may be usefully referred to. The judgment-creditor in that case attached thr casks of country liquor which were in the judgment-debtor's shop. The Collecto intervened and objected to the attachment on the ground that the liquor could not be removed without a transport permit and could not be sold without a permit under the Abkari Act and therefore not liable to be attached. Heaton, J., dealing with the aforesaid argument made the following pertinent remarks :

> "Nothing has been pointed out to us in the law from which we can infer that country liquor is exempt from attachment and sale in execution. The liquor had admittedly been purchased and paid for by the judgment-debtor ; it was his property. There was no doubt it could be sold by him though he had to deal with it in accordance with the terms of his licence and the provisions of the Abkari Act. It is, therefore, clear that it is saleable property, and is covered by the provisions of the first part of section 266, Civil Procedure Code."

We respectfully agree with the aforesaid observations.

In the present case the splints and veneers are the property of the 1st defendant. Though under the Central Excise Rules he could only deal with them in the manner prescribed, the rules prescribed do not affect his saleable interest in the property. There is no clause just like in the Electricity Act or Chota Nagpur Encumbered Estates Act laying down a condition precedent for the exercise of his right to sell. As the 1st defendant has a saleable interest in the property, it is clearly liable to be attached.

Mr. Variar then contended that on the date when the property was attached the term of the 1st defendant's licence had expired and therefore on the date of the attachment he had no saleable interest in the property. This argument was not raised in the Court below. Indeed the judgment discloses that both parties proceeded on the basis that the licence was subsisting on the date when the property was attached. In the circumstances, we do not think we are justified in allowing the appellants to raise this question of fact for the first time before us.

For the aforesaid reasons, we agree with the conclusion of the Court below and dismiss this appeal with costs.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AYYAR.

N. Gopalan .. *Appellant**

v.

The State of Madras, by the Collector of Tanjore .. *Respondent.*

Constitution of India (1950), *Article* 372 (1)—*Scope—If bars amendment with retrospective effect by a State Legislature of an Act continued in force by virtue of Article* 372 (1).

Madras Estates Land (Reduction of Rent) Second Amendment Act, 1951—*Validity.*

Article 372 (1) of the Constitution of India clearly recognises the contingency of an enactment which is declared to continue in force, being altered, repealed or amended by a competent Legislature. Article 372 (1) will not render invalid any alteration, repeal or amendment which is declared to be retrospective even in respect of an Act which is continued in force by virtue of Article 372 (1) of the Constitution.

The provision introduced by the Madras Estates Land (Reduction of Rent) Second Amendment Act, 1951, adjusting the account between the landlord and tenant (by adjustment of rent paid by a ryot before the commencement of the amending Act towards rent payable by the ryot to the landholder for subsequent faslis or to claim refund of amounts remaining unadjusted) cannot be impugned as confiscatory in nature and therefore unconstitutional. There is no acquisition by the impugned provision of any portion of the rent. The provision is one pertaining to the relationship of landlord and tenant but would in no sense be a provision for acquisition of any interest in land by the Government. The fact that the result of such provision may be to prejudicially affect the rights of the landholder would not by itself make the provision illegal or unconstitutional.

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1. (1907) 10 Bom.L.R. 13.

* L. P. A. No. 263 of 1952. 17th September, 1952.

Appeal under Clause 15 of the Letters Patent against the order, dated 16th September, 1952, in W.P. No. 674 of 1952, on the file of the High Court by Subba Rao, J.

R. Kesava Ayyangar and *K. Parasaran* for Appellant.

The Judgment of the Court was delivered by

Rajamannar, C.J.—In this Appeal under the Letters Patent against the decision of Subba Rao, J., dismissing the appellant's application for a writ of *certiorari*, the only ground taken is the invalidity of Madras Estates Land (Reduction of Rent) Second Amendment Act, 1951. That Act inserted a sub-section in section 3 of the original Act and substituted a clause for a clause already existing in section 4 of the principal Act and by section 4 made provision for adjustment of rent paid by a ryot before the commencement of the amending Act. The excess was to be adjusted towards the rent payable by the ryot to the landholder for subsequent faslis. The ryot was in certain circumstances entitled to claim a refund of the amount remaining unadjusted from the landholder to whom it was paid.

Mr. R. Kesava Ayyangar contended that the Act is unconstitutional for two reasons : (1) because it was retrospective and to that extent was inconsistent with the provisions of Article 372 (1) of the Constitution and (2) because it was confiscatory in so far as it directed the adjustment of rent already paid before the commencement of the Constitution.

Section 1 (2) of the Amended Act runs thus :

> " Sections 2 and 3 shall be deemed to have come into force on the 7th January, 1948."

That is the date on which the principal Act came into force. The argument of learned counsel is that Madras Act XXX of 1947 continued to be in force only by virtue of Article 372 (1) of the Constitution and any amendment, alteration or repeal of any provisions of that Act after 26th January, 1950, can only be prospective from the date on which the amendment, alteration or repeal is made, or in any event only from 26th January, 1950, but it cannot affect the Act as it stood on the date of the commencement of the Constitution in respect of a period prior to the Constitution. Article 372 (1) runs thus :

> " Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority."

We are unable to agree with learned counsel that there is any thing in this Article to support his contention. That Article clearly recognises the contingency of an enactment which is declared to continue in force being altered, repealed or amended by a competent Legislature. Undeniably in this case the amendment in question has been made by a competent Legislature. It was not suggested that the Madras Legislature is not competent to pass any legislation which would have a retrospective effect. When an alteration, repeal or amendment is itself contemplated under Article 372 (1) and an alteration, repeal or amendment can be retrospective, it follows that Article 372 (1) would not render any alteration, repeal or amendment which is declared to be retrospective invalid. We therefore reject this contention on behalf of the appellant.

It was next contended that the provision in the Amending Act for adjustment of rents already paid is confiscatory in nature and therefore unconstitutional. Reliance was placed on the observations in the recent decision of the Supreme Court in *The State of Bihar* v. *Sir Kameswar Singh*[1], made in connection with the provision of the Bihar Act under which 50 per cent of the arrears of rent collected by the Government was appropriated by the Government without payment of any compensation to the landholder. We fail to see how those observations can be of any help to the appellants here. There is no acquisition by the Government of any portion of the rent. The impugned provision is only a provision adjusting the

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1. (1952) S.C.J. 354 : 1952 S.C. 252 (S.C.).

account between landholder and tenant. Such a provision would be a prov[illegible] pertaining to the relationship of landlord and tenant but would in no sense b[illegible] provision for acquisition of any interest in land by the Government. There[illegible] therefore no question of confiscation. It is true that the result of the enactment may be to prejudicially affect the rights of the appellants, but that itself would not make the provision illegal or unconstitutional.

The appeal is therefore dismissed.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI NAYUDU.

Varada Pillai .. *Appellant* *

v.

Minor Sriramulu Reddiar and another .. *Respondents.*

Hindu Law—Alienation by father of ancestral property—Right of after-born sons to question.

If a son who objects to the alienation of his property comes into existence or is conceived after the alienation, but during the life of a child born or conceived before the alienation, then the overlapping of the two lives enables the later born son to contest the validity of the father's act.

Even if the eldest member has not filed a suit to set aside an alienation within the period of limitation, provided by the law the right of the members of the coparcenary to question the alienation is not taken away, as the right arises in an individual member of the coparcenary, not by virtue of his being a managing member but in his character as son and that individual right cannot be controlled by anything which the eldest or the managing member has done or has failed to do.

Held : on the facts of the case that the eldest member who could have questioned the alienation had separated himself from the family and had ceased to be a member of the family, the fact of his not having taken steps for setting aside the alienation is immaterial as far as the rights of the after-born sons to question the mortgage is concerned.

Held further : on the facts that the alienation by the father was for the benefit of the family and the sons cannot impugn it.

Appeal against the decree of the Court of the Subordinate Judge, Chingleput, in O.S. No. 50 of 1948.

M. S. Venkatarama Ayyar for Appellant.

A. Duraiswami for Respondents.

The Court delivered the following

JUDGMENT.—Plaintiff is the appellant. As assignee of a mortgage he instituted O.S. No. 50 of 1948 on the file of the Subordinate Judge's Court, Chingleput, against defendants 1 and 2 who are the minor sons of one Subbaraya Reddi, for a mortgage decree on a mortgage executed by Subbaraya Reddi in favour of one Munuswami Reddi on the 9th July, 1925, for Rs. 4,000 and assigned by Munuswami Reddi in the plaintiff's favour on the 15th April, 1943. Subbaraya Reddi had three sons, one Dasu Reddi who is alive and who is not made a party, and defendants 1 and 2 who are minors and are represented by a guardian *ad litem*. Subbaraya died in 1944. On the 29th November, 1940, his eldest son Dasu Reddi executed a release, Ex. A-8, taking away his one-fourth share and releasing his rights in the joint family and its properties. Ex. A-8 makes it clear that thereafter he shall have only blood relationship and that there shall be no right as regards assets and liabilities.

It may be necessary to refer to the transactions which led to the mortgage and the assignment. Subbaraya Reddi was possessed of 28 acres 47 cents nanja and punja lands which are stated to be his ancestral properties, and on the 24th July, 1920, by Ex. A-3 he executed a usufructuary mortgage in favour of Munuswami Reddi the mortgagee in the suit mortgage under Ex. A-1 for Rs. 4,000. On 31st July, 1920, under Ex. A-4 there was a further mortgage for Rs. 250 on 2 acres only, all the 28 acres 47 cents having been mortgaged under the usufructuary mortgage, Ex. A-3, on the 20th July, 1921, Subbaraya Reddi sold 7 acres 52 cents

* Appeal No. 475 of 1949. 13th August, 1952.

of the properties mortgaged under Exs. A-3 and A-4 to the mortgagee Munuswami Reddi for Rs. 2,800. The sum of Rs. 2,800 was paid by Munuswami Reddi by adjustment of a sum of Rs. 2,125 towards the amount due on the mortgages, Exs. A-3 and A-4 and the balance of Rs. 675 was appropriated towards the debt due by Subbaraya to Munuswami Reddi on a promissory note dated 5th November, 1920. The entire consideration of Rs. 2,800 for the sale was thus accounted for. After the lapse of about four years, on the 9th July, 1925, Subbaraya Reddi purchased from Munuswami Reddi 6 acres 34 cents out of the 7 acres 52 cents sold by him on the 28th July, 1921, under Ex. A-5 for the sum of Rs. 3,000 the sale deed being Ex. A-7. On the same date Subbaraya Reddi executed a simple mortgage in favour of Munuswami Reddi, the vendor under Ex. A-7, and the mortgagee under Exs. A-3 and A-4, mortgaging 25 acres 32 cents including the 6 acres 34 cents purchased by Subbaraya under Ex. A-7 on that date. The consideration for the sale and the mortgage were provided in the following manner: Rs. 3,000 was the sale price for the sale under Ex. A-7 out of which Rs. 2,038 was included as part of the consideration of Rs. 4,000 in the mortgage Ex. A-1. For the balance Munuswami adjusted a sum of Rs. 880 towards the amount due under a promissory note executed by Subbaraya in favour of Munuswami and the balance of Rs. 82 is stated to have been paid in cash by Munuswami Reddi to Subbaraya. As for the sum of Rs. 4,000 which is the mortgage amount under Ex. A-1, Rs. 2038 had been accounted for and the balance of Rs. 1,962 represents the amount of principal and interest due on another promissory-note executed by Subbaraya Reddi in favour of Munuswami Reddi dated 31st October, 1922.

The plaintiff obtained an assignment of this mortgage Ex. A-1 on 15th April, 1942, Ex. A-2, and the suit is on that assignment and the mortgage Ex. A-1. The defence on behalf of the minors was that their interests in the properties which are joint family and ancestral properties, are not bound by the mortgage and so far as their share is concerned no decree can be passed as the alienation is not binding on them. The lower Court agreed with the contentions on behalf of the minors and passed a decree only against an undivided half of the suit properties, *i.e.*, to the extent of the share Subbaraya was possessed of on the date of the alienation. The right of the minors to question the alienation is stated not to have been disputed seriously in the lower Court. But Mr. M. S. Venkatarama Aiyar, learned counsel for the appellant, raised the question and urged that the right to dispute the alienation on behalf of the minor defendants depended on the right of the eldest son Dasu Reddi to attack the alienation, but since Dasu Reddi is stated to have impliedly consented to the mortgage, it is not open to the minors to raise the question once again. I am unable to find in the evidence as to any consent, expressed or implied, given by Dasu Reddi to the transaction of the mortgage, and as such it may be taken that there was no consent on the part of any of the sons to this alienation.

The position of minor defendants 1 and 2 is different from the position of Dasu Reddi as defendants 1 and 2 were born subsequent to the alienation, while Dasu Reddi was alive even on the date of the alienation. Dasu Reddi was not a party to the mortgage and in 1940 he separated himself from the family and ceased to have any interest in the family properties and thereafter the joint family consisted alone of Subbaraya and the sons who were born subsequently. In these circumstances where an alienation is made by the father before the birth of the sons whether it will be open to the after-born sons to question the alienation, is the matter that requires to be considered in this case.

The right of the sons to the property which they acquire as coparceners by birth cannot be disputed; but they not having been born on the date of the alienation, are they precluded from questioning the binding nature of the alienation made by the father before their birth? The decision of the Privy Council in *Lal Bahadur* v. *Ambika Prasad*[1], is understood to have laid down that the right to challenge alienations of family property is confined to the coparceners born and alive on the

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1. (1925) L.R. 52 I.A. 443 : I.L.R. 47 All. 795 (P.C.).

date of the alienation and that such a right of a coparcener who was born subsequent to the alienation is denied even though on his birth he acquires a share in the family property. Mayne, 11th Edn., on Hindu Law observed at page 502 with reference to this decision, that the point was not considered and it may not be right to regard the observation as a decision on the question :

"It would be against the whole current of Indian authorities which were neither referred to nor considered and cannot therefore be deemed to be overruled. If, however, the observation means that coparceners born in the family subsequent to an alienation before the death of the other coparceners who could challenge it have no right to the property and consequently no right to challenge the alienation, it would conflict with what was said by the Board in *Ramkishore* v. *Jainarayan*[1], as well as with the cardinal principle of Hindu law. The coparcenary which is interested in the property, not validly alienated, is continually enlarged by births as it is diminished by deaths. Where *A* makes an invalid alienation of the family property, his son *B* is entitled to object to it, not because he is in existence but as he is equally interested in it. The property is not effectively carried away from the family except to the extent of the father's share in the provinces in which he could alienate."

So far as Madras is concerned, it would be open to a father to alienate his share in the property ; but the right of the son to question the alienation would depend on the circumstance, whether he was born or not on the date of alienation, but whether he has acquired an interest, by reason of his birth, in the property. This is made clear by the observations of the commentator at page 502, that the right to challenge is only by reason of the interest in the family property and it is a right in every member of the coparcenary for the time being. As long as that right exists in the coparcenary, it would seem immaterial whether the son was alive at the date of the alienation or born subsequently. It is pointed out by Mayne that the question must be deemed to have been decided, as it appears to be, by reason of the latest decision of the Privy Council in *Akhara Udasi Nirwani* v. *Surajpal Singh*[2], where their Lordships observed :

"It is asserted that a member of a joint family must be content with the family estate as he finds it at his birth or at any rate he cannot complain of anything done before the period of gestation. Upon this rule, it is admitted, there is engrafted an exception to the effect that if the child who objects to the alienation of his property comes into existence or is conceived after the alienation, but during the life of a child born or conceived before the alienation, then that overlapping of the two lives enables the later born child to contest the validity of the father's act."

In this case there is the overlapping of the two lives, the lives of defendants 1 and 2 with the life of Dasu Reddi as he was born on the date of alienation and he is still alive. In *Rajah Vasi Reddi* v. *Lakshmi Narasimham*[3], a Bench of this Court, though it did not expressly decide the question that arises for determination in this case, however, was inclined to the view taken by the commentator of Mayne's Hindu Law, and this is evident from the observations of Venkataramana Rao, J., at page 922 where the learned Judge says as follows (while referring to a decision of a Bench of this Court in *Visweswara Rao* v. *Surya Rao*[4]) :

"They express an opinion that if before the after-born son is born, the sons in existence were to die, the right is lost to the after-born son though the right to set aside an alienation may be within the time from the date when the cause of action accrued to the sons in existence. This seems to be in conflict with the view expressed in Mayne's book, at page 513, where it is stated that it is a right in every member of the coparcenary for the time being and as long as that right in the coparcenary exists it would be immaterial whether he was alive on the date of the alienation or born subsequently. Much may be said in favour of either view and it may be that that view expressed in Mayne's book is sounder. The scope of the Privy Council decision in *Lal Bahadur* v. *Ambika Prasad*[5] may require reconsideration."

The other question which may have to be considered in examining the rights of after-born sons to question the alienation made by their father before their birth is whether the failure on the part of the elder son to sue within the period of limitation would be a bar to the right of the subsequent-born sons. Mayne in his book deals with this question at page 497 :

"Where a suit to set aside a father's alienation by sons who were in existence at the date of alienation is barred, it is equally barred as to sons who were born subsequent to the alienation for they do not acquire a fresh cause of action."

1. (1913) 25 M.L.J. 512 : L.R. 40 I.A. 213 : I.L.R. 40 Cal. 966 (P.C.).
2. (1944) 2 M.L.J. 395 (P.C.).
3. (1940) 1 M.L.J. 820 : I.L.R. (1940) Mad. 913.
4. (1935) 70 M.L.J. 360 : I.L.R. 59 Mad. 667.
5. (1925) L.R. 52 I.A. 443 : I.L.R. 47 All. 795 (P.C.).

This is based on the decisions referred to at the footnote, mainly, the Privy Council decision in *Ranodip Singh* v. *Parmeshwar Prasad*[1]. The commentator proceeds to state as follows :

"Conflicting views have been expressed on the question whether when a suit to set aside an alienation by an elder son is barred, a suit by a younger son is also barred under sections 6 and 7 of the Limitation Act. In *Jawahir Singh* v. *Udai Parkash*[2], the Privy Council held that though a suit to set aside an alienation by the elder of the two sons would be barred on the ground that he had attained majority more than three years of his majority to recover possession of the property would not be barred . . . . Where a son brings a suit to set aside an alienation of ancestral property within the meaning of Article 126 of the Limitation Act, he brings it in his character as son and not in his character as managing member. The right of the manager to represent the coparcenary as a whole cannot extend to his representing the rights of individual coparceners to challenge alienations made by one or more members of the coparcenary. Where several coparceners are entitled to set aside an alienation, the view that if the managing member is barred from bringing the suit, the other coparceners are also barred is open to doubt."

If therefore the eldest member or the managing member has not filed a suit to set aside an alienation within the period of limitation provided by the law, the right of the other members of the coparcenary to challenge the alienations is not taken away. As pointed out by the learned commentator, the right to question the alienation arises in an individual member of the coparcenary not by virtue of his being a managing member but in his character as son and that individual right cannot be controlled by anything which the eldest or the managing member has done or has failed to do. It appears to me that the correct and reasonable view to be taken in such cases consistent with the principles of Hindu law is that each son has an independent right to question the alienations irrespective of the fact or otherwise of the eldest or managing member having failed to ask the alienation to be set aside within three years on his attaining majority. In the present case, however, that question would not arise for the reason that Dasu Reddi had separated himself from the family and had ceased to be a member of the family, the only two surviving members of the joint family being defendants 1 and 2. The fact or otherwise of Dasu Reddi having taken no steps for setting aside the alienation is immaterial of the right of defendants 1 and 2 to question the suit mortgage. In that view I agree with the lower Court that defendants 1 and 2 are entitled to dispute the alienations.

But still the question remains to be considered whether the lower Court's finding that the mortgage, Ex. A-1 is not binding on the minor defendants as neither being for necessity or benefit is correct. The learned Judge observed that the property being ancestral property the alienation of ancestral property for purchase of new property is *prima facie* not a necessity. If it is a matter of benefit, it is to be alleged and proved and in this case there is no evidence let in to show that the joint family was benefited by the reconveyance, and in his opinion special facts must be alleged and proved to show that the alienation was one for necessity or was beneficial to the minors.

It will be necessary to analyse what is the effect of this mortgage, whether it can be said to have been necessary, supported by legal necessity or whether it could be said to be beneficial or whether in any event the defendants have not suffered by such alienation. The entire property of the family was mortgaged to Munuswami Reddi in 1920. When the principal debt under the mortgages was Rs. 4,250 in 1921, Subbaraya apparently considered it beneficial in view of the debt not having been discharged, to dispose of a portion of his property, and with that view he sold 7 acres 52 cents for Rs. 2,800 out of which Rs. 2,125 was paid towards earlier mortgages. What he did subsequently was to repurchase 6 acres 34 cents out of the 7 acres 52 cents for a sum of Rs. 3,000 under which he got the property which was sold away except one acre and odd, and discharged the entire debt due by him on a promissory note to the extent of Rs. 800. By the mortgage Ex. A-1 he created a liability of Rs. 4,000 out of which Rs. 1,962 represents the amount due on a promissory note of 1922 executed by the father which however is not alleged to

1. (1924) 48 M.L.J. 29 : I.L.R. 47 All. 165 (P.C.).
2. (1925) 50 M.L.J. 344 : L.R. 53 I.A. 36 : I.L.R. 48 All. 152 (P.C.).

be not binding on the minors since it cannot be so alleged as it appears to be an antecedent debt, the balance of Rs. 2,038 alone being a liability incurred afresh. This transaction of mortgage may be viewed in two ways. The family lost 7 acres 58 cents by sale in 1921 but gained to the extent of Rs. 2,125, being the part payment towards the earlier mortgages, and by the purchase under Ex. A-7 the family gained 6 acres 34 cents, practically taking back the property sold by them, with a liability of Rs. 2,038. What was originally a liability to the extent of Rs. 2,125, which was discharged, was practically created by the simple mortgage to the extent of Rs. 2,038, and there has been no increase of burden on the family. Properties as originally held were retained, the debt continuing. It may also be considered in this manner: By reason of the simple mortgage and the sale, Exs. A-1 and A-7, the family got 6 acres 34 cents with a liability of Rs. 4,000 and out of this Rs. 4,000 the minors were liable to pay the two promissory notes debts of Rs. 1,962 and Rs. 880 amounting to Rs. 2,842 and out of the sum of Rs. 4,000 only a sum of Rs. 1,158 is a new liability created under the mortgage for which the recompense is a property of 6 acres 34 cents. I am unable to see how it could be said to be a transaction by which the minors have suffered. It might be that Subbaraya considered the securing back of the family properties was for the benefit of the family not only getting back the family properties but consolidating the debts then due and making the entire property liable under a mortgage which he executed, Ex. A-1. I am unable to agree with the learned Judge in his conclusions. This is not one of the transactions which could be put on the same category as sales of properties by managers or fathers for the purpose of purchasing other properties which are generally not recognised by Courts, inasmuch as a father is not allowed to speculate by sale and purchase of joint family properties. This case does not come within that category. It is a transaction which the father felt was and appears also to be one necessary in the interests of the family, to secure back to the family properties which had been lost and to consolidate the family liabilities by the execution of a fresh mortgage on the entire properties. In that view the mortgage Ex. A-1 is binding on the minor defendants.

The appeal is allowed and a decree for the amount claimed will be passed. Time for redemption 3 months. Appellant's costs is fixed at Rs. 300 including out-fees.

V.P.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE RAJAGOPALAN.

Sri Gajalakshmi Ginning Factory, Ltd., Palladam .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 31—Powers of Appellate Assistant Commissioner in disposing of appeals after remand by the Tribunal—Distinction between capital receipt and revenue receipt.

Whether the Appellate Assistant Commissioner was hearing an appeal against the order of assessment in the first instance or was hearing an appeal which was remanded by the Appellate Tribunal he has finally to dispose of the appeal in the manner indicated in section 31 of the Act and under sub-section (3) of section 31 he is empowered in disposing of an appeal against an order of assessment either to confirm the order, or to reduce, enhance or annul the assessment. It would not be open to the Appellate Assistant Commissioner to introduce into the assessment new sources and his power of enhancement is confined only to the income which was the subject-matter of consideration for purposes of assessment by the Income-tax Officer.

Where the assessee bought land with no intention of selling it and after a long interval finds it convenient to sell the land by parcelling it out into different plots and also by laying out roads and providing other amenities with a view to get more price, it cannot be said that the activity which he carried on has any element of trade, commerce or business and it cannot be said it is an activity in the nature of a trade. To constitute a trade or business the intention must be that even at the time when the property was acquired it was so acquired for the purpose of sale with a view to make profit. The contrast is one of an owner selling and a speculator purchasing with a view to sell and make profit out of it.

*Case Referred No. 54 of 1950. 15th April, 1952.

Hudson Bay Co. v. *Stevens*, 5 Tax Cases 424; *Kahan Chand and Kishen Chand* v. *Commissioner of Income-tax, Punjab*, (1944) I.T.R. 472, referred to.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922), as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939), in 66 R. A. No. 745 (Madras) of 1949-50 on its file.

S. Swaminathan for Applicant.

C. S. Rama Rao Saheb for Respondent.

The Judgment of the Court was delivered by

Satyanarayana Rao, J.—Two questions have been referred to this Court for decision by the Income-tax Appellate Tribunal under section 66 (1) of the Act. They are:

(1) Whether on the facts and in the circumstances of the case the inclusion and assessment of the sum of Rs. 9,397, representing the sale proceeds of plots of land, by the Appellate Assistant Commissioner after remand and upheld by the Appellate Tribunal, when this amount had not formed the subject-matter of the appeal in respect of assessment year 1944-45 either before the Appellate Assistant Commissioner or the Appellate Tribunal in the first instance, is legal?

(2) Whether on the facts and in the circumstances of the case the assessment of the sum of Rs. 13,197 realized by the sale of vacant plots and fruit shop buildings under the head 'business' is lawful?

The assessee is Sri Gajalakshmi Ginning Factory, Limited, Palladam, hereinafter called the "company." The company purchased in 1932 a ginning factory with extensive lands appurtenant to the factory and also a plot which was somewhat removed from the factory and was in the heart of the town of Tirupur. On this plot there were some fruit stalls. The whole lot was purchased for a sum of Rs. 33,000. The extent of the land appurtenant to the building was about 11 acres 33 cents. The site of the fruit stalls was 9 cents. Before the termination of the accounting year 1942 the building, the machinery and the factory were sold together with some of the land appurtenant to it for a sum of Rs. 40,000. The profit which accrued from out of that transaction was subjected to income-tax without objection during the assessment year 1942-43. Out of the vacant site of 7 acres, two acres were reserved by the assessee for erecting a cinema theatre, and the remaining 5 acres of land was parcelled out into 81 small plots in accordance with the requirements of the town-planning scheme of the municipality and the plots were sold thereafter in public auction; and by January, 1943, 61 plots were sold which fetched a profit of Rs. 2,036. Out of this amount the Income-tax Officer assessed the company to pay income-tax on a sum of Rs. 400. But this decision was reversed by the Appellate Assistant Commissioner on appeal who held that the sum of Rs. 2,036 was a capital receipt.

We are now concerned with the subsequent accounting year ending 31st January, 1944. During this period, by the sale of the remaining plots the assessee realised a sum of Rs. 9,397 and a further sum of Rs. 3,800 from the sale of the fruit shop buildings making a total of Rs. 13,197. During this assessment year now (1944-45), the sum of Rs. 9,397 was treated as a capital receipt by the Income-tax Officer. He assessed the sum of Rs. 3,800 under the head 'business' under the erroneous impression that this amount represented the sale proceeds of the factory building on which depreciation was allowed. Against the order of the Income-tax Officer, the assessee preferred an appeal to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner by his order of 31st July, 1945, upheld the order of the Income-tax Officer, but reduced the amount to Rs. 2,800. There was a further appeal by the assessee to the appellate Tribunal, and the Tribunal was not clear about the facts and therefore, remanded the matter to the Appellate Assistant Commissioner for a decision in accordance with law after considering all the facts of the case. Under the law the appellate Tribunal had authority to remand a case, as was decided by this Court in *Koduri Pulleswara Rao and another* v. *Commissioner of Income-tax, Madras*,[1]. After remand, the Appellate Assistant Com-

1. (1947) 2 M.L.J. 216.

missioner after considering the facts, came to the conclusion that the sum of Rs. 3,800 and the sum of Rs. 9,397, *i.e.*, in all a sum of Rs. 13,197 was assessable to a tax as income of business earned by the assessee. In other words, he enhanced the assessment which was made by the Income-tax Officer.

The second order of the Appellate Assistant Commissioner was again taken on appeal to the Tribunal and the assessee objected to the order on two grounds. In the first place, it was contended that the whole of the amount Rs. 13,197 was only a capital receipt and not a business income assessable to tax under the Act. In the second place, the sum of Rs. 9,397 which was never the subject-matter of appeal before the Appellate Assistant Commissioner should not have been added to the assessable income by the Appellate Assistant Commissioner after remand as he was precluded from doing so because that amount was not the subject-matter of appeal before him. The decision on both these questions was adverse to the assessee; and at the instance of the assessee, a reference was made by the Appellate Tribunal of the two questions formulated above.

The first question referred to us raises the point relating to the jurisdiction of the Appellate Assistant Commissioner under section 31 of the Act. In the present case, the appeal in the first instance to the Appellate Assistant Commissioner was confined only to the sum of Rs. 3,800 and there could possibly be no appeal against the order of the Income-tax Officer treating the sum of Rs. 9,000 and odd as a capital receipt, for under section 30 of the Act the right of appeal against the order of assessment is conferred only upon the assessee and not upon the Commissioner of Income-tax. The actual subject-matter of the appeal before the Appellate Assistant Commissioner was only the sum of Rs. 3,800. After the matter was decided by him there was a further appeal to the Appellate Tribunal under section 33 of the Act. It must be noted that the right of appeal to the Appellate Tribunal is conferred under section 33 also upon the Commissioner, unlike the provision in section 30 of the Act. The Appellate Tribunal in the exercise of its power under section 33 (4) of the Act remanded the case to the Appellate Assistant Commissioner. The use of the word "thereon" in sub-section (4) of section 33 has been construed as indicating that the power of the Appellate Tribunal was restricted to deal with the actual subject-matter of the appeal, for, it was open to both the assessee and the Commissioner to prefer appeals to the Tribunal to the extent to which they were aggrieved by the order of the Appellate Assistant Commissioner. The power under section 33 (4) of the Act undoubtedly includes the power to remand. (See *Koduri Pulleswara Rao and another* v. *Commissioner of Income-tax, Madras*[1].) But the position is different so far as the power of the Appellate Assistant Commissioner is concerned. Whether the Appellate Assistant Commissioner was hearing an appeal against the order of assessment in the first instance or was hearing an appeal which was remanded by the Appellate Tribunal, he has finally to dispose of the appeal in the manner indicated in section 31 of the Act; and under sub-section (3) of section 31, he is empowered in disposing of an appeal against an order of assessment either to confirm the order, to reduce, enhance or annul the assessment. The power, therefore, conferred upon the Appellate Assistant Commissioner by this clause is undoubtedly wider and is not restricted to the subject-matter of the appeal. Even though no appeal was preferred by the Commissioner in respect of that portion of the order of the assessment of the Income-tax Officer which contained an adverse decision against the Department, in disposing of an appeal by the aggrieved assessee, though the appeal was confined in its subject-matter to a portion of the order, it would be open to the Appellate Assistant Commissioner to deal with the whole of the assessment order of the Income-tax Officer, even to enhance the assessment. It was held that when once an appeal was preferred by an assessee, it would not be open to the assessee to withdraw the appeal so as to prevent the Appellate Assistant Commissioner from enhancing the Assessment under section 31 (3) (*a*) of the Act. (Vide *Commissioner of Income-tax, Punjab* v. *Nawab Sha Nawaz Khan*[2].) Of course, it would not be open to the Appellate

1. (1947) 2 M.L.J. 216. 2. (1938) I.T.R. 370.

Assistant Commissioner to introduce into the assessment new sources, as his power of enhancement should be restricted only to the income which was the subject-matter of consideration for purposes of assessment by the Income-tax Officer. In view of this scheme underlying the provisions of the Act, it is difficult to accept the contention strenuously urged on behalf of the assessee, that the Appellate Assistant Commissioner, while dealing with the appeal after remand, was not entitled to enhance the assessment so as to include the sum of Rs. 9,397 also in the assessable income on the ground that it was not a capital receipt but was a revenue receipt. That decision may be right or wrong. But that is a matter for consideration on the merits. It seems to us difficult to draw a distinction between cases where the Assistant Commissioner was dealing with an appeal which was remanded and an appeal which was heard by him in the first instance. The only power which he could exercise in disposing of an appeal whether received by him after remand or directly against the order of the Income-tax Officer is the one conferred upon him by section 31 of the Act, and it is not subject to any restrictions arising out of the subject-matter of the appeal. The position, however, in the civil cases, *i.e.*, appeals arising under the Civil Procedure Code is different. For, there the aggrieved party, whether he is the plaintiff or the defendant, has got the right to appeal against that portion of the decree which is adverse to him and by which he was aggrieved, and the appellate Court can deal only with such subject-matter as was properly brought before it and not otherwise. If the respondent did not file an appeal in respect of that portion of the decree which was adverse to him, it is open to him to file a Memorandum of Cross-objections in case his opponent chooses to prefer an appeal against that portion of the decree which was adverse to him. Without a Memorandum of Cross-objections, the matter, to the extent to which the decision was against the respondent, could not be brought up before the appellate Court, subject, however, to this exception, *viz.*, that it would be open to the respondent without filing Memorandum of Cross-objections to support the judgment of the lower Court on grounds other than those on which it was based by the trial Court. The procedure to be followed and the powers to be exercised by the appellate Court are entirely different under the Civil Procedure Code from that which obtains under the Income-tax Act. As stated already, while the assessee is entitled to prefer an appeal against the order of assessment by which he was aggrieved, no such right was given to the Commissioner. The powers of the Appellate Assistant Commissioner which he is entitled to exercise are wider under section 31 of the Act than those which could be exercised by an appellate Court under the Civil Procedure Code. The analogy, therefore, of what obtains in appeals under the Civil Procedure Code does not apply to the case of the appeals against the assessment orders of the Income-tax Officer to the Appellate Assistant Commissioner. The answer, therefore, to the first of the two questions must be in the affirmative and against the assessee.

There remains the second question. The sum of Rs. 13,197 referred to in that question consists of two amounts, an amount of Rs. 9,397 which represents the sale proceeds of the plots of land which were appurtenant to the factory and a sum of Rs. 3,800 which represents the sale proceeds of the site with the buildings in which there were certain fruit shops. So far as the latter amount is concerned, there cannot possibly be any difficulty in answering the question, in favour of the assessee, as that amount can in no sense, be said to be a revenue receipt as opposed to a capital receipt. There is no element of any business in the matter of the sale of those sites, and it is difficult to follow the legal basis on which a contrary conclusion was reached by the Appellate Assistant Commissioner and by the Appellate Tribunal.

The sum of Rs. 9,397, in our opinion, must also be treated as a capital receipt and not a revenue receipt. It was claimed by the Department that this amount really represents profits earned by the assessee by carrying on business or at any rate an adventure in the nature of a trade; and in support of this view, a number of decisions, English and Indian, were cited, in which on a given set of facts one view or the other was held. It is, however, not possible from an examination of

these decisions to evolve a satisfactory definition or draw the line of demarcation between a capital receipt and a revenue receipt. As is often the case, each case must be decided on its own facts and no hard and fast rule can be laid down. That is the only "principle" that emerges on an analysis of the decisions cited at the Bar. When it is claimed that an income is an income earned by carrying on a business, one has naturally to look into the definition of 'business' contained in the Act [*vide* section 2 (4)] where it is defined as including any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. It consists, therefore, really of two parts. The activities of a person constitute either trade, commerce or manufacture or it may be an adventure or concern not exactly amounting to trade, commerce or manufacture, but may be something analogous or in the nature of a trade, commerce or manufacture. Now, then, what is trade? Trade has been explained in the Concise Oxford Dictionary as business, especially mechanical or mercantile, employment opposed to profession carried on as means of livelihood or profit. The meaning of 'commerce' as given by the same Dictionary is 'exchange of merchandise, especially on large scale.' In ordinary parlance, trade and commerce carry with them the idea of purchase and sale with a view to make profit. If a person buys goods with a view to sell them for profit, it is an ordinary case of trade. If the transactions are on a large scale it is called commerce. Nobody can define the volume of business which would convert a trade into commerce. But everybody understands the distinction between the two with sufficient vagueness. It cannot be said that the sale of the plots by the assessee is trade or commerce in the ordinary sense of the term. Indeed, it was not claimed by the Department at any stage of these proceedings that the person did in fact carry on trade in sites for the purpose of earning profit. But what was claimed was that the transactions of the assessee in selling these plots were an adventure in the nature of a trade, and therefore it falls within the definition of 'business', and the profit he made is profit which accrued from a business. If a person buys lands with a view to sell them and thereafter carries on certain operations so as to bring greater profit and facilitate the sale of the plots, it can be said, if it is a single transaction, that his activity is an adventure in the nature of trade, for, the essence of a trade, buying and selling for profit, is present in that activity. But if a person buys land with no intention of selling it and after a long interval finds it convenient to sell the land by parcelling it out into different plots and also by laying out roads and providing other amenities with a view to get more price, it cannot be said that the activity which he carried on has any element of trade, commerce or business and it cannot be said, therefore, that it is an activity in the nature of a trade. He was merely selling and did not at the time of buying start with the intention of buying and selling with a view to make profit. The intention must be that even at the time when the property was acquired it was so acquired for the purpose of sale with a view to make profit. In other words, the object of the acquirer was to deal in that commodity, if one may use that expression, as he deals with the goods in the course of an ordinary trade. In the absence of any such intention gatherable from the circumstances of the case, it is difficult, if not impossible, to hold that the activity he carried on was something analogous to a trade and therefore, the profit he made was not a capital receipt but a revenue receipt. It is not necessary to deal with any of the decisions cited at the Bar, except to make a passing reference to the case in *Hudson's Bay Co.* v. *Stevens*[1], where at page 437 Farewell, L.J., gave the illustration which is nearer to the present case. There, the learned Lord observed:

"Again, a landowner may lay out part of his estate with roads and sewers and sell it in lots for building, but he does this as *owner*, not as a land *speculator*." (The italics are ours.)

The contrast is, therefore, between an owner selling the property for the purpose of converting his investment into money and a speculator purchasing property with a view to sell and make profit out of it. If it is the latter, it may be an adventure in the nature of a trade and the income would be not a capital receipt but an income earned by exercise of a trade or something in

1. 5 Tax Cases 424.

the nature of a trade and would be assessable to tax. The case in *Kahan Chand and Kishan Chand* v. *Commissioner of Income-tax, Punjab*[1], to which our attention was drawn by Mr. Rama Rao Saheb, the learned counsel for the Commissioner of Income-tax, refers to two transactions, one of which was held to be an investment of surplus capital and the profits arising from the sales were casual and non-recurring and therefore, not taxable, while in the other case which related to 158 kanals of land the purchase was from the beginning a speculative purchase and the brothers intended to sell the land to their best advantage. It was held that it was not an investment of surplus capital but a purchase made with the sole and exclusive object of selling it at a profit when a suitable opportunity had occurred. This case itself brings out the distinction between and explains under what circumstances the profits received by the sale of land would be a capital receipt and when it would be a revenue receipt. It is unnecessary, therefore, to refer to the other decisions on the point. In our opinion, the sum of Rs. 9,397 also should be treated as a capital receipt. It, therefore, follows that the sum of Rs. 13,197 is exempt from tax and the second question must be answered in the negative and in favour of the assessee.

As the assessee has substantially succeeded, he is entitled to costs, which we fix at Rs. 250.

V.P.S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Balarama Reddi .. *Petitioner**

v.

Subbarama Reddi and another .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 9, *rule* 13 *and Order* 43, *rule* 1 (*d*)—*Order setting aside an* ex parte *decree on condition that a certain sum was to be paid by a fixed date and in default application was to be dismissed—Limitation for appeal against by the applicant—Starting point—Criterion date.*

A single application cannot be rejected on two different dates to permit of two different criterion dates for limitation. An order setting aside an *ex parte* decree on condition that a certain sum was to be paid by a certain date and in default application was to be dismissed, is the only appealable order, if the applicant is aggrieved by it in any way or finds it impossible to comply with the conditions as inequitable or onerous, in which case he should appeal against it within the prescribed period from the date of such order. If the Court does pass a further discretionary order varying on his application the conditions of the original order or extending time for performance which will form a fresh basis for a rejection of the application, it would be open to an applicant to file an appeal against such an order. It is clearly not open to an applicant after such a conditional order is passed against him to do nothing at all by way of compliance or even by moving the Court before the date fixed for compliance to extend the time and then to claim a right of appeal from the date on which the dismissal of his application for default is recorded. Limitation for appeal runs from the date of the conditional order itself and not from the date of formal dismissal for non-compliance with the conditions.

Case-law discussed and *Ramayya* v. *Lakshmayya*, (1944) 1 M.L.J. 381 : I.L.R. (1945) Mad. 203, relied on.

Petitions under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the orders of the District Court, Chingleput, dated 31st March, 1951, in C. M. A. Nos. 20 of 1949 and 4 of 1951, respectively (I.A. No. 94 of 1948 in O. S. No. 319 of 1947 and I. A. No. 730 of 1950 in O. S. No. 139 of 1950, respectively, District Munsiff Court, Trivellore).

D. Ramaswami Aiyangar, P. R. Varadarajan, K. N. Srinivasan and *P. R. Pakir Sankar* for Petitioner.

T. M. Krishnaswami Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—These two petitions raise an interesting point of limitation law for determination in connection with orders passed under Order 9, rule 13, Civil Procedure Code.

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1. 1944 I.T.R. 472.

* C.R.P. Nos. 2056 and 2057 of 1951. 10th October, 1952.

The petitioner was a defendant in two suits. The first was by his wife's brother, O. S. No. 319 of 1947 for recovery of mesne profits. This was decreed *ex parte* on 9th January, 1948. He filed an application to set the decree aside on 23rd January, 1948. On this an order was passed on 19th January, 1949, directing the decree, to be set aside on certain conditions, that Rs. 25 was to be paid by 7th February, 1949, and in default the application was to be dismissed. The petition was called on 8th February, 1949 and the Court passed a further order "costs not paid. Dismissed." The petitioner appealed against this order to the District Judge, who on payment of Rs. 41 by the petitioner to the respondent directed the *ex parte* decree to be set aside. In C. R. P. No. 1843 of 1949 filed by the plaintiff in that suit against that order, Balakrishna Aiyar, J., set aside the order of the District Judge observing that there was no finding that the appellant was prevented by sufficient cause from appearing in the trial Court on the relevant date, and *inter alia* directing a question of limitation, *viz.*, that the appeal to the District Judge was time-barred to be heard and disposed of. The learned District Judge dismissed the appeal with costs on the sole ground that the appeal was time-barred as the order to be appealed against was the first order dated 19th January, 1949 and not the formal order of dismissal on 8th February, 1949. If the latter date is taken into consideration, the appeal would be in time.

The same point has arisen in another suit, O. S. No. 139 of 1950 filed by the plaintiff's wife for maintenance in which she claimed Rs. 30 a month. This was decreed *ex parte* on 26th July, 1950. The application to set aside this decree was filed on 21st August, 1950, and a conditional order passed on 25th October, 1950, allowing it to be set aside on petitioner paying Rs. 35 costs and depositing Rs. 150 by 1st December, 1950, with a direction that in default his application was to be dismissed. This application was called on 1st December, 1950, when the Court passed the following order :

> "Costs alone tendered, but refused. The petitioner wants time to pay Rs. 150. The order works itself out. The petition is therefore dismissed."

Petitioner's appeal to the District Court, C. M. A. No. 4 of 1951 was heard on the same date as his previous appeal C. M. A. No. 20 of 1949 and similarly dismissed as being time-barred in a separate judgment.

The point for determination is what is the criterion date for limitation in a case of this kind for purposes of an appeal. Under Order 43, rule 1 (*d*), an appeal shall lie from an order under rule 13 of Order 9, rejecting an application (in a case open to appeal) for an order to set aside a decree passed *ex parte*. This is the only provision in law under which these appeals lie. The conditional order passed in these two cases is of a very common type and frequently used on the admission side of this Court. It is regarded as a final order, one favourable to the petitioner, if he complies with the conditions by the appointed date, whereas if he fails to do so, the order works itself out automatically as one of dismissal adverse to the petitioner. In *Ramayya* v. *Lakshmayya*[1], Mockett and Bell, JJ., considered a conditional order of dismissal of this kind and held that it was final and appealable, the further order of dismissal for default of compliance with the conditions merely recording the legal position which had arisen from non-fulfilment of the condition precedent. A different view was taken by Madhavan Nair, J., sitting by himself in *Rajagopalachari* v. *Narasimha Thathachariar*[2], that the first order of the trial Court was merely conditional and that it was only the final order dismissing the application to set aside the *ex parte* decree, which was appealable under Order 43, rule 1 (*d*). In that case too, the conditional order was to the effect that if the money was not paid by the appointed date, the petition will stand dismissed with costs. That decision was considered by the learned Judges in *Ramayya* v. *Lakshmayya*[1], and differentiated on the ground that in that case the parties all treated the conditional order as open, and that on the date of subsequent posting, there was some discussion as to terms. The only fact from which this inference was drawn was the posting of the

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1. (1944) 1 M.L.J. 381 : I.L.R. (1945) Mad. 203.
2. A.I.R. (1925) Mad. 1182.

application to a following date as is apparent from the following observation by Madhavan Nair, J., himself:

"In this case all the parties as well as the Court treated the prior order as a conditional order because it appears, as I have already pointed out, from the note on the order passed on the first occasion that the petition was to be posted for the 13th September, 1923, meaning thereby that no final order has been passed upon it and the learned District Munsif would pass final orders only on that day, and the subsequent history of the application also shows that it was never intended to treat the order as a final one."

I have found great difficulty in differentiating between cases in which conditional orders passed in precisely the same terms can be treated as final and those which cannot be so treated. In the circumstances I prefer, and I am also bound to follow the Bench decision in *Ramayya* v. *Lakshmayya*[1], which took the view that such a conditional order is final and appealable. It is true that such an order, as the petitioner's learned advocate contends is in a sense favourable to him. He urges that his application has not been dismissed until he has failed to comply with the conditions, and that only after his application is finally rejected that his right of appeal arises under Order 43, rule 1 (*d*).

Mr. T. M. Krishnaswami Aiyar contends *contra* that the conditional order is one definitely and finally rejecting the application under Order 9, rule 13, unless a condition is fulfilled by a certain date, and that a petitioner cannot wait without either appealing against the conditional order or complying with the condition, and then reckon time from the date on which the order rejecting his application has worked itself out. A different view appears to have been taken more in harmony with the view of Madhavan Nair, J., in *Rajagopalachariar* v. *Narasimha Thathachariar*[2], by Oldfield and Bakewell, JJ., in *Venkataswami Naidu* v. *Shanmuga Pillai*[3], a decision also considered in *Ramayya* v. *Lakshmayya*[1], and differentiated on the ground that the precise terms of the order passed by the lower Court were not set out there. A view in favour of the petitioner has been taken by the Allahabad and Bombay High Courts. A Full Bench of the Bombay High Court in *Narayan Putapa* v. *Vaikunt Subaya*[4], held that an appeal lay against the second order in such cases. Marten, C.J., in his judgment made reference to two types of orders which were usual in the mofussil (*a*) a preliminary order and (*b*) a final order; whereas on the original side of the High Court there was only one order that if the applicant did not comply with the condition stated, his application was to be dismissed, and the original *ex parte* decree to stand. He then went on to make the following observations (at page 75) with which I am with respect in complete agreement.

"Though *pro forma* an appeal may lie, still in the vast majority of cases, the appeal will be one of those known as 'hopeless', because the conditions imposed by the lower Court will be reasonable ones and accordingly if they are not fulfilled, the only result will be that the appeal will be dismissed with costs. It can only therefore be in exceptional cases such as those where the lower Court has not exercised its discretion judicially or where quite unreasonable conditions are imposed, that an appeal of this nature can have any chance of success."

In *Jagarnath Sahi* v. *Kamta Prasad Upadhya*[5], a Bench of the Allahabad High Court, Ryves and Piggott, JJ., also held that an appeal lay from the second order in such cases and further more that the lower Court had jurisdiction to extend the time for payment of the damage or to pass a fresh conditional order setting aside the decree upon terms, the original order having become inoperative. That was a case in which a suit was ordered to be restored to file on 31st March, 1913, subject to the payment of Rs. 15 as damages by the appellant within three days to the plaintiff. The Subordinate Judge, who passed this order, was transferred immediately afterwards and the matter came up before his successor on 4th April, 1913, on which date the money was tendered in Court and refused by the plaintiff. The question arose whether the other Subordinate Judge had jurisdiction to extend the time. This is a type of case which is always cropping up. With great respect I am in agreement with the view taken by Mockett and Bell, JJ., that the first order in such cases must be regarded as final and appealable. It is tantamount to a

1. (1944) 1 M.L.J. 381 : I.L.R. (1945) Mad. 203.
2. A.I.R. 1925 Mad. 1182.
3. 1917 M.W.N. 815.
4. (1926) I.L.R. 51 Bom. 67 (F.B.).
5. (1913) I.L.R. 36 All. 77.

rejection of an appeal unless certain conditions are satisfied. It is open to a party affected by such an order to appeal on the ground that the conditions imposed are too onerous, or that the *ex parte* decree should be set aside or the suit restored to file without any terms at all. I am extremely reluctant to take this view to its logical conclusion pressed upon me by Mr. T. M. Krishnaswami Aiyar, that the Court after passing such an order is absolutely powerless, and hamstrings itself from passing any further order in the application, which may be necessitated by changed conditions or exigencies of various kinds. Under section 148, Civil Procedure Code where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired. The point would arise whether such discretionary orders passed from time to time extending time for compliance with conditions fixed by the original order will be appealable. A solution of the dilemma is by no means easy, and the question has, in no decision, which has been placed before me, been considered from the standpoint of limitation. Order 43, rule 1 (*d*) contemplates one appeal against the rejection of an application under Order 9, rule 13. A single application cannot be rejected on two different dates to permit of two different criterion dates for limitation. The only practicable and possible view to take appears to be that the conditional order, which is the basis of the rejection of the application, is the only appealable order, if the petitioner is aggrieved by it in any way or finds it impossible to comply with the conditions as inequitable or onerous, in which case he should appeal against it within the prescribed period from the date of such order. If the Court does pass a further discretionary order varying on his application the conditions of the original order or extending time for performance which will form a fresh basis for a rejection of the application, it would be open to an applicant to file an appeal against such an order. It is clearly not open to a petitioner after such a conditional order is passed against him to do nothing at all as in the present cases by way of compliance or even by moving the court before the date fixed for compliance to extend the time, and then to claim a right of appeal from the date on which the dismissal of his application for the default is recorded. The observations of Marten, C.J., in *Narayana Putapa* v. *Vaikunt Subaya*[1], reproduced *supra*, are apposite to the present cases in which it cannot be said that the terms imposed for setting aside the *ex parte* decree were unreasonable or onerous. Bound as I am to follow, the view in *Ramayya* v. *Lakshmayya*[2] with which as I have indicated with respect, I also agree that such a conditional order is final and appealable, it must follow, although this limitation aspect was not considered in that judgment, that these appeals against the subsequent orders of formal dismissal have been rightly held by the District Judge to be time-barred.

The petitions are dismissed, but on them I make no order as to costs.

K.S. — *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Krishnappa Chettiar .. *Petitioner**

v.

Sivagami Achi .. *Respondent.*

Criminal Procedure Code (V of 1898), Section 488 (4)—Husband and wife settling maintenance to be paid and living apart by mutual consent—Jurisdiction of Magistrate to award maintenance to such wife.

When the husband and wife have amicably settled the maintenance to be granted to the wife and when they have been living apart by mutual consent there is no jurisdiction for a Magistrate to entertain an application for maintenance under section 488 (4) of the Criminal Procedure Code.

1. (1926) I.L.R. 51 Bom. 67 (F.B.).
2. (1944) 1 M.L.J. 381 : I.L.R. (1945) Mad. 203.

* Cr. R.C. No. 585 of 1951. (Cr. R.P. No. 580 of 1951). 4th September, 1952.

A Magistrate purporting to act under section 488, cannot assume the functions of a Civil Court and give judgment in accordance with a bond evidencing a compromise entered into between a husband and a wife.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Additional First Class Magistrate, Devakottai, dated 25th June, 1951, in Crl. M. C. No. 4 of 1951.

T. R. Arunachalam for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Court made the following

ORDER.—This is a criminal revision case, which has been preferred against the judgment of the Additional First Class Magistrate, Devakottai, in Crl. M.C. No. 4 of 1951.

The short facts are : Sivakami Achi, the respondent before us, is the lawfully wedded wife of Krishnappa Chettiar. Krishnappa Chettiar and Sivakami Achi could not carry on their married life by 1948. This Chettiar, as is common in these parts, was keeping a concubine and wanted to take a second wife also. Therefore, the husband and wife entered into an arrangement, which has been marked as Ex. D-1, and it is nobody's case that this arrangement was not entered into or that the husband is going behind Ex. D-1.

The relevant passage in Ex. D-1 is as follows :

"As the party No. 1 among us is about to marry a second wife and as the party No. 2 above could not hereafter live amicably with party No. 1 and in view of the above factors, accounts were looked into with the help of mediators and it was settled that party No. 1 should pay and has accordingly paid party No. 2 a sum of Rs. 5,500. As party No. 2 desires hereafter to live separately and has asked party No. 1 to make provision for her maintenance till her lifetime and party No. 1 has agreed to the same and should accordingly pay party No. 2 a sum of Rs. 100 per annum on or before the 10th of the month (of) Thai every year till her lifetime in default party No. 2 could take steps to recover the same. Out of the sum of Rs. 5,500, there is a balance of Rs. 4,500 after reducing Rs. 1,000 paid in cash for which sum the party No. 1 has executed a mortgage deed in favour of party No. 2, Till this entire principal and interest is paid, the party No. 1 shall be bound to pay without any plea of limitation the seethanam money of Rs. 1,362-4-0 in respect of which a hundi has been executed to this effect both of us have agreed and executed this written deed."

There was a receipt executed by Sivakami Achi, which has been marked as Ex. D-2 and which can be considered to be the counterpart of Ex. D-1. It runs as follows :

"According to the agreement entered into between us, you have to pay me Rs. 100 as and for my maintenance till the 10th day of Thai this year. I have this day received from you cash for which I have executed this receipt.".

Subsequently, the affairs of this Chettiar seem to have got into a fair amount of muddle and he seems to have lost his income from the Federated Malay States and other places and, what is more, his affairs in Ramanathapuram district itself seem to be not in flourishing circumstances, and, therefore, the Chettiar says that he has taken that refuge which is open to persons of that description, *viz.*, a religious life. The wife has now come forward with a petition under section 488, Criminal Procedure Code, asking for maintenance of Rs. 100 per month instead of Rs. 100 per annum, which has been secured for her in Ex. D-1.

The learned Additional First Class Magistrate gave a complete go-by to Ex. D-1 and came to a conclusion of his own that the wife should be given Rs. 25 per month and hence this criminal revision case. The short point taken is that when the parties have amicably settled the maintenance to be granted to the wife and when the husband and wife have been living apart by mutual consent, there was no jurisdiction for the Magistrate to entertain this application under section 488 (4), Criminal Procedure Code.

There can be no doubt that a Magistrate purporting to act under this section, cannot assume the functions of a civil Court and give judgment in accordance with a bond evidencing a compromise entered into between a husband and a wife. Where a claim for maintenance is amicably settled by the parties, the Magistrate should simply dismiss the petition if pending before him. *Lingadu* v.

Labakka[1], *Mt. Rahim Bibi* v. *Khair Din*[2]; *Rahim Ali* v. *Fateh Bibi*[3]. In Madras High Court, Crl. R. C. No. 489 of 1903, a husband and wife came to a settlement outside the Court, whereby the husband consented to maintain the wife. It was held by the High Court that the Magistrate had no longer any power to make an order under this section as it could no longer be said that the husband was refusing to maintain the wife.

In this case, if the wife was dissatisfied with the miserable pittance secured for her under Ex. D-1, there are courses open to her like filing a civil suit for denouncing Ex. D-1 or she can ask for enhanced maintenance on account of the rise in the cost of living or she can file a suit on the ground that Ex. D-1 was executed by her without fully understanding its import and that it is an invalid document. It is not for us to advise this respondent as to the many courses open to her for getting enhanced maintenance if she deserves it.

This petition is allowed and the order of the lower Court is set aside and the respondent is left to her own reliefs in the civil Court, if so advised.

V.P.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

The State

v.

Ex-Major P. K. Swamy and another*

Criminal Law Amendment Act (XLVI of 1952), section 7—Scope—How far retrospective—Offences under Prevention of Corruption Act (II of 1947), section 5—Accused committed before passing of Act (XLVI of 1952) to take their trial in the High Court Sessions—High Court's jurisdiction to try the offence after the coming into force of Act (XLVI of 1952).

For offences under section 120-B of the Indian Penal Code and section 5 (2) read with section 5 (1) (*c*) of Act II of 1947 (Prevention of Corruption Act) and section 477 read with section 34 of the Indian Penal Code) the accused were committed by the Presidency Magistrate, Madras, on the 8th July, 1952, to take their trial in the High Court Sessions. On the 28th July, 1952, Act XLVI of 1952 was passed by which among other things, the forum for the trial of certain offences, one of which was the offence under section 5 (2) of Act II of 1947 was altered, making it triable by a Special Judge only who is to be appointed by the State Government. On a question as to whether the High Court had jurisdiction to try the case or whether it was triable only by a Special Judge.

Held: On the date of the order of commitment in this case the accused had a vested right to be tried in the High Court with the aid of a jury and he could not be deprived of that right. Assuming Act XLVI of 1952 to be retrospective, it will be seen that the Act does not make provision for any cases which are pending before a court other than that of a magistrate—for example a case pending before the High Court, and it is clear that the Act is not intended to be retrospective except to the extent indicated in section 10.

Accordingly the High Court and not the Special Judge is the only Court competent to try the instant case. Nor can the High Court transfer a case pending before the High Court Session to any other Court.

Case-law reviewed.

Cases committed by the Third Presidency Magistrate, Madras, to the High Court Sessions.

The State Prosecutor (*S. Govind Swaminathan*) for the State.

B. T. Sundararajan and *F. Jagannathan* for Accused 1 and 2 Respondents.

The Court made the following

ORDER.—The two accused in the case were committed by the Third Presidency Magistrate, Madras, to take their trial in the High Court Sessions, for offences under section 120-B of the Indian Penal Code, and section 5 (2) read with section 5 (1) (*c*) of Act II of 1947 and section 477 read with section 34 of the Indian Penal Code. The offences under section 5 (2) read with section 5 (1) (*c*) of Act II of 1947 and section 477, Indian Penal Code are offences triable exclusively by

1. 2 Weir 629.
2. 1888 P.R. (Crl.) 42.
3. 1905 P.R. (Crl.) 39.

*Case No. 15 of the 3rd Criminal Sessions of 1952. 17th September, 1952.

the Sessions Court. The order of commitment was passed on the 8th July, 1952, and the High Court became seized of the case immediately after the order of committal was passed on that day.

On the 28th July, 1952, that is, 20 days after the said order of committal, Act XLVI of 1952 was passed by the Parliament in and by which among other things, the forum for the trial of certain offences, one of which is the offence under section 5 (2) of Act II of 1947 was altered. Section 7 of the Act is as follows :

"(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, (Act V of 1898), or in any other law, the offences specified in sub-section (1) of section 6 shall be triable by Special Judges only.

(2) Every offence specified in sub-section (1) of section 6 shall be tried by the Special Judge for the area within which it was committed, or where there are more Special Judges, than one for such area, by such one of them as may be specified in this behalf by the State Government.

(3) When trying any case, a Special Judge may also try any offence other than an offence specified in section 6 with which the accused may, under the Code of Criminal Procedure, be charged at the same trial."

It will thus be seen that the said offence under section 5 (2) of Act II of 1947 is triable by a Special Judge only, who is to be appointed by the State Government. Section 8 provides for the procedure and powers of Special Judges in the trial of such offences. Under that section a Court of the Special Judge shall be deemed to be a Court of Sessions trying the case without a Jury or without the aid of assessors. Section 6 of the Act (XLVI of 1952) provides that the State Government may, by notification in the official Gazette, appoint as many Special Judges as may be necessary for such area or areas as may be specified in the notification. The State has accordingly by notification No. 918, dated 25th August, 1952, in G. O. Ms. No. 3100 (Home) appointed the Sessions Judge of Chingleput as a Special Judge not only for the district of Chingleput but also for the area covering the local limits of the original jurisdiction of the High Court of Madras.

It is now contended that section 7 of the Act (XLVI of 1952) is retrospective in its operation and after the said enactment the High Court has no jurisdiction to try the offences under section 5 (2) of Act II of 1947 and that is triable only by the Sessions Judge of Chingleput. It is well-settled that :

"no statute shall be construed to have retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication".

It is equally well-settled that a statute which affects the procedure only is retrospective and :

"no one has any vested right in any course of procedure. He has only a right of prosecution or defence in the manner prescribed for the time being by or for the Court in which he sues and if an Act of Parliament alters that mode of procedure he has no other right than to proceed according to the altered mode."

The question now is whether the trial of the accused in this Court relates to a vested right or a right in existence on the date of the enactment of Act XLVI of 1952 or to mere matter of procedure. In *Colonial Sugar Refining Co.* v. *Irving*[1], the question was whether a suitor could be deprived of a right of appeal to the Privy Council which he had on the date he instituted the suit by a subsequent change in the law and it was held he could not be deprived. Lord Macnaghten observed :

"It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case, there is an interference with the existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

It will be seen that even the transferring of an appeal to a new tribunal is held to be an interference with the vested right. This decision has been followed in all the High Courts and the Federal Court of India. In *Venugopala* v. *Krishnaswami*[2], Varadachariar, J., following the decision in *Colonial Sugar Refining Co.* v. *Irving*[1], observed :

1. (1905) A.C. 369. (1943) F.C.R. 39 (F.C.).
2. (1943) 2 M.L.J. 57 : (1943) 6 F.L.J. 47

"Their Lordships' decision recognised that from the date of the initiation of the action, the suitor had a right of appeal to a superior tribunal according to the state of the law as it stood at the time of the commencement of the proceeding. This necessarily involves the recognition of an equally valuable right that the proceedings should in due course be tried and disposed of by the tribunal before which it had been commenced."

The learned Judge further observed that:

"This principle that a statute should not be so interpreted as to take away an action which has been well commenced has been affirmed in various cases in different circumstances"

and quotes with approval the observations of Wilde, C.J., in *Marsh* v. *Higgins*,[1]

"It must have been well known to both branches of the Legislature that strong and distinctwords would be necessary to defeat the vested right to continue an action which has been well commenced."

This decision established that a right to continue an action which has been well commenced is a substantive right.

The principle of these decisions has been extended to and applied in the trial of criminal cases. The question is when can a criminal case be said to have well commenced. It has been well established that once a criminal case is well commenced such rights as the accused has—such as the right to have a case tried with the aid of assessors, the right to have the case tried with the aid of Jury, the right of appeal to a superior Court and even a right to bail are substantive rights which cannot be affected by a change in the law (Vide *Srinivasachari* v. *The Queen*[2], *The Crown* v *Fitzmaurice*[3], and *Shreekant Pandurang* v. *Emperor*[4]. I would refer in this connection to one of the above cases, namely, the decision in *The Crown* v. *Fitzmaurice*[3]. In that case a European British subject was committed on the 11th of June, 1923, to the Court of Sessions to take his trial for an offence under sections 420 and 477-A of the Indian Penal Code. But the right to be tried by a Jury was taken away by Act XII of 1923 which came into force on the 1st of September, 1923. The accused appeared before the Sessions Judge in October, 1923, and asked for trial by a mixed jury. It was held that the right of trial by Jury was a subtantive right and not a mere matter of procedure and the accused who had this right when he was committed for trial could not be deprived of it by the amendment by Act XII of 1923. Zafar Ali, J., following the decision in *Colonial Sugar Refining Co.* v. *Irving*[5], held that

"A person who had the right to be tried by a Jury when he was committed for trial could not be deprived of it, it being a substantive right."

Sir Henry Scott-Smith, J., who agreed with Zafar Ali, J., observed that the right of trial by a Jury which was vested in Sergeant Fitzmaurice by the Code of Criminal Procedure, 1898, was a substantive right and not a mere matter of procedure.

As I have already stated the question is when a criminal case can be said to have well commenced? In the Full Bench case in *Banwari Gope* v. *Emperor*[6], Fazl Ali, J., held that a criminal case must be deemed to have well commenced as soon as the Magistrate takes cognizance of the case and the accused acquired vested right to have his case tried according to the procedure on the date when the Magistrate takes cognizance of it. A slightly different view is taken in *Shreekant Pandurang* v. *Emperor*[4], where Divatia, J., observed as follows :

"In cases which could be tried by a magistrate, the trial may begin when cognizance was taken but in cases which are exclusively triable by a Court of Session, the trial does not begin unless and until an order of commitment is made. All the previous proceedings before the commitment are stages of enquiry at the end of which the accused may or may not be committed."

The learned Judge was of the view that, in cases exclusively triable by the Sessions, the case can be said to have well commenced when the order of commitment is made and such rights as trial by jury, etc., the accused had on the date of the order of commitment are rights vested in him and he could not be deprived of those rights

1. (1850) 9 C.B. 551 : 137 E.R. 1007.
2. (1883) I.L.R. 6 Mad. 336.
3. (1925) I.L.R. 6 Lah. 262.
4. (1943) 6 F.L.J. 119 : I.L.R. (1943) Bom. 331 : A.I.R. 1943 Bom. 169 at page 175 (F.B.).
5. (1905) A.C. 369.
6. (1942) I.L.R. 22 Pat. 175 : A.I.R. 1943 Pat. 18 (F.B.).

by a change in the law. The observation in *The Crown* v. *Fitzmaurice*[1], is clear that if the accused had a right to have his case tried by a Jury on the date of the order of commitment he could not be deprived of it.

I would here refer to the decision of the Full Bench in *Ram Singh* v. *Crown*[2]. In that case by notifications dated 20th March, 1947, and 23rd August, 1947, issued by the Punjab Government under the Punjab Public Safety Act, the district of Ludhiana was declared to be a dangerous area within the meaning of the Act. Under the Act the declaration that the area is dangerously disturbed involved certain changes in the procedure for the trial of criminal cases. One such offence for which the trial under the Code was not to be followed but the one under the Act is to be followed was the offence under section 302, Indian Penal Code. Section 37 of the Act which lays down the procedure is as follows :

"For purpose of trials under this Act the Code shall be deemed to have been amended as follows:

(1) (i). For sections 208 to 220 inclusive, the following shall be deemed to have been substituted, namely :

When it appeals from the police report that the offence is one triable exclusively by a Court of Sessions or one which in the opinion of the magistrate ought to be tried by such Court, the magistrate shall, on perusal of the police report or when the accused appears or is brought before him, make over the accused to the Sessions Court having jurisdiction and shall forward the accused if in custody and shall send all police reports relating to the case to that Court, and that Court shall thereupon proceed with the trial of the case following the procedure for the trial of summons case."

On 30th September, 1948, the accused who was charged with the offence under section 302, Indian Penal Code was committed to the Sessions at Ludhiana and the trial commenced on the 18th November, 1948. In the meantime by a notification dated 22nd October, 1948, appearing in the Gazette of 29th October, 1948, the notification declaring the Municipal area of Ludhiana as dangerous was cancelled. The question arose whether the trial should proceed as in summons case (in accordance with the provisions of section 37 of the Punjab Public Safety Act) without the aid of assessors or jury or whether the trial should be in accordance with the provisions of the Criminal Procedure Code. The Full Bench held that the trial should proceed under section 37 of the Act as in a summons case in accordance with the provisions of the law in force *on the date of the order of committal* (*underlining* is mine). The observations of Achhru Ram, J., who delivered the leading judgment are worth quoting:

"It is well settled that no one has any vested right in any procedural rule and that, therefore, any change in the procedural law has retrospective effect in the sense of being applicable even to judicial proceeding initiated before the change, provided of course this can be done without affecting any substantive rights acquired by any of the parties to the proceeding before the change. It is however equally well settled that the validity or operation of any order validly passed or any act validly done by a judicial tribunal in the procedural law for the time being in force cannot be affected by any subsequent change in the said law. It therefore follows that the action taken by the magistrate under the provisions of sub-section (1) of section 37 on the 30th September, 1948, in making over the case to the sessions court cannot be affected by the subsequent cancellation of the notification in section 2 (*b*) in respect of Ludhians district and the consequent change of procedure applicable to the trial of cases like the present in the said district. By reason of that action the learned Sessions Judge was properly and validly seized of the case on the day the Provincial Government chose to make an order for the cancellation of the notification and he continued to be seized of the case even after the said Government had cancelled the notification."

This case established that if an order had been validly passed committing a case to the Court of Sessions under the law then in force, a subsequent change in the law would not divest the Court of Sessions of its jurisdiction to try it and the accused acquired a vested right to have the case continued in that Court and tried according to the law in force on the date of the order of commitment (*Vide* section 6 of the General Clauses Act and the observations of Varadachariar, J., in the decision cited above).

It will be clear from the principles laid down in the above decisions that on the date of the order of commitment in this case the accused had a vested right to be tried in this Court with the aid of a Jury and he could not be deprived of that right.

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1. (1925) I.L.R. 6 Lah. 262. 2. (1950) E.P. Reports 25.

Assuming the Act to be retrospective, to what extent is it retrospective ? Maxwell on Interpretation of Statutes, 9th Edition, page 222, says :

" A statute is not to be construed to have a greater retrospective operation than its language renders it necessary. Even in construing a section which is to a certain extent retrospective the maxim ought to be borne in mind as applicable whenever the line is reached at which the words of the section cease to be plain."

After enacting section 7, the Act provides for pending cases in section 10, which is as follows :—

" All cases triable by a Special Judge under section 7 which immediately before the commencement of this Act were pending before any Magistrate shall, on such commencement be forwarded for trial to the Special Judge having jurisdiction over such cases."

It will be seen that the Act does not make provision for any cases which are pending before a Court other than that of a Magistrate—for example a case pending before this Court. The Legislature must be deemed to have been aware of cases pending before Courts other than Magistrates and yet, it has refrained from making any provision for them. By necessary intendment it is reasonably plain that the trial of cases pending before Courts other than those pending before Magistrates is not affected. From the fact that the Legislature thought fit to enact section 10 it is clear that section 7 is not intended to be retrospective and at any rate not to have greater operation than what is indicated in the said section 10.

I am of opinion that the High Court is the only Court competent to try this case and the Sessions Judge of Chingleput is not competent.

Further, there is no provision of law under which a case pending before the High Court Sessions can be transferred to any other Court. The Letters Patent and the Criminal Procedure Code provide for the transfer of cases to the High Court from other courts ; and there is no provision for transfer of a case pending before it to any other Court. In the absence of such provision a case pending before the High Court Session cannot be transferred to any other Court.

The result is that the trial will go on before this Court. The case is adjourned to November sessions.

K.S. —————— *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Dr. K. C. Nambiar .. *Petitioner**

v.

The State of Madras by its Chief Secretary and others .. *Respondents.*

The Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 13—*Order of Government exempting a house from the provisions of the Act—Whether administrative or judicial—Whether it offends the Constitution of India,* 1950, *Articles* 14 *and* 19—*Validity of order.*

Constitution of India (1950), *Article* 226—*Writ petition—Parties—Right of interested party to implead himself in a writ and support the order impugned.*

Practice—Rules guiding Courts in following decisions of Courts of co-ordinate or appellate jurisdiction.

An order of the Government exempting a house from the operation of the provisions of the Madras Buildings (Lease and Rent Control) Act is an administrative order and not a judicial or quasi-judicial one.

Such an order does not affect the fundamental rights of a tenant under Article 14 of the Constitution of India, as there is no violation of the principle of equality before the law.

Nor is there any violation of Article 19 of the Constitution of India, as a statutory tenant, with certain rights and restrictions cannot accept the rights and complain of the restrictions. No question

* C.M.P. Nos. 9491 of 1950 and 11818 of 1951. 19th August, 1952.

of unreasonable restriction on his part would arise as the Statute itself created the right subject to restrictions. He acquires the right not to be evicted except under certain circumstances, and one of those circumstances is when the Government exempts a building from all or particular provisions of the Act.

The landlords in whose favour the order of the Government is made, are proper parties to the writ and are entitled to be heard in support of the order under rule 6 of the Rules regulating proceedings under Article 226 of the Constitution of India, when all that the Government stated at the hearing was that they do not propose to support their order but leave it to the landlords to do so, there is no concession by the Government that their order is bad.

A single Judge is bound by a judgment of a Bench of two Judges, unless that judgment is expressly overruled by the Supreme Court of India. He cannot ignore a Bench decision on the ground that some observation of the Supreme Court of India made in a different context might indicate a different line of reasoning.

Petition under Article 226 of the Constitution of India praying in the circumstances stated in the affidavit filed herewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records in G. O. Ms. No. 3678 Public (General C) Department, dated 9th September, 1950, relating to the building No. 2/157, Purasawalkam High Road, Madras, and quash the order made therein.

M. K. Nambiar and *C. F. Louis* for Petitioner.

V. P. Sarathy for the Government Pleader (*P. Satyanarayana Raju*) on behalf of the State.

Messrs. Subramanyam and *Rajagopal* for Respondents.

The Court made the following

ORDER.—This is an application for issuing a writ of *certiorari* to call for the records and quash the order of the Government of Madras dated 9th September, 1950. The petitioner is a doctor. Premises No. 2/157, Purasawalkam High Road, is owned by three brothers, P. Sourirajulu Naidu, Rangarajulu Naidu and Dhanarajulu Naidu. On 10th October, 1938, the petitioner took the said house on lease for the purpose of running a nursing home. Since that time he has been running a nursing home under the name and style of "Nambiar's Hospital." On 6th February, 1945, Sourirajulu Naidu, since dead, filed an application before the Rent Controller, H.R.C. No. 3989 of 1945, for evicting the petitioner on the ground that he made a default in the payment of rent. But that was dismissed on 13th December, 1945. In October, 1946, he filed another application, H.R.C. No. 5244 of 1946, seeking to evict him on the ground that the petitioner was in arrears of rent and that he wanted the premises for his personal use. On 5th July, 1947, the House Rent Controller dismissed the application. An appeal filed against that order to the Court of Small Causes, Madras, was dismissed. The landlords filed C. M. P. 4139 of 1948 for issuing a writ of *certiorari* to quash the order of the Small Cause Judge; but that was dismissed by a Divisional Bench of this Court on 6th October, 1948. Rangarajulu Naidu filed another application, H.R.C. No. 4788 of 1949, for evicting the petitioner, alleging that he required the upstairs for his own occupation. The House Rent Controller ordered that application. The petitioner preferred an appeal against that order to the Court of Small Causes at Madras which held that the building was a non-residential one and that a second petition on the same facts was barred under section 10 of the Madras Buildings (Lease and Rent Control) Act, 1949 (hereafter called the Act). That order was made on 10th April, 1950. Thereafter the landlords approached the Government with a request to exempt their buildings from the operation of the provisions of the Act. The Government by their order dated 9th September, 1950, exempted the building under section 13 of the Act. The aforesaid petition was filed for getting the said order quashed. The Government filed a counter-affidavit supporting their order: but when the application came up for final disposal, the learned counsel appearing for the Government represented that the Government did not propose to support the order but leave it to the landlords to support the same if they thought fit to do so. The landlords filed an application, C. M. P.

No. 11818 to add them as party-respondents. This application was strongly opposed by the learned counsel for the petitioner. He contended that the writ *nisi* was issued against the Government and when they did not oppose it, the writ should be made absolute and the landlords had no *locus standi* to intervene in the proceedings. He further argued that in a writ of *certiorari* the Tribunal whose order is sought to be quashed is the only necessary party and therefore the landlords need not be made parties to the petition. I cannot agree. If this contention be accepted, the High Court would be issuing writs against the interests of parties without hearing them even though they are anxious to be represented in Court. That procedure would be against all principles of natural justice. No authority has been cited to me which compels me to hold that a party affected has no right to be heard in a writ of *certiorari*. It is one thing to say that in a writ of *certiorari* the Tribunal whose order is sought to be quashed is a necessary party. But it is altogether a different thing to assert that the party affected should not be heard. If the Tribunal is a necessary party, the party affected is a proper party. Further to meet this situation, rule 6 of the Rules to regulate proceedings under Article 226 of the Constitution has been framed which enables the Court to give a hearing to the parties affected. The said rule reads :

"At the hearing of the petition, any person who desires to be heard in opposition to the petition and appears to the Court to be a proper person to be heard shall be heard, notwithstanding that he has not been served with notice, and subject to such conditions as to costs as the Court may deem fit to impose."

The landlords are certainly proper parties to be heard where the order of the Government is in their favours and they are interested to suppot it.

Nor can the petitioner rely upon the alleged concession made by the Government pleader. The learned Government pleader did not concede that the order made by the Government was bad and was, therefore, liable to be quashed. But what he stated was that he was asked not to support the order but leave it to the landlords to do so. For the aforesaid reasons I hold that the landlords are entitled to be made parties. I allow C. M. P. No. 11818 of 1951 and make them party-respondents.

Learned counsel for the landlords contended that the order of the Government in question was not a judicial act and therefore not liable to be quashed in a writ of *certiorari*. Arguments, therefore were addressed on the question whether the order of the Government exempting the building under section 13 of the Act is a judicial Act or an administrative Act. Section 13 says :

"Notwithstanding anything contained in this Act, the Provincial Government may, by notification in the *Fort St. George Gazette*, exempt any building or class of buildings from all or any of the provisions of this Act."

The power conferred on the Government under this section is very wide and does not depend upon any prescribed objective considerations. They are not bound to give reasons. Neither the section nor the rules framed under the Act prescribe a judicial procedure for exercising the power conferred on the Government under the section. It is in the discretion of the Government to exempt a building or not. A comparative study of the provisions of section 13 with that of other sections of the Act indicates that the Government is not expected to follow a judicial procedure in exempting a building from the operation of the Act, for wherever the Legislature intended that judicial procedure should be followed, they said so, either expressly or by necessary implication. Sections 4, 5, 5-A and 6 relating to the fixing of fair rent and section 7 for eviction of a tenant prescribe a judicial procedure for making the orders thereunder. I cannot therefore hold that the act of the Government in exempting the building from the operation of the Act is a judicial act.

The connotation of the words "Judicial Act" has been well settled. The leading case on the subject is *The King* v. *The Electricity Commissioners*[1]. Atkin, L.J. (as he then was) laid down the following test :—

1. (1924) 1 K.B. 171.

"Wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

This passage was accepted as laying down the correct law on the subject and was followed in innumerable decisions. Slesser, L.J., in *The King* v. *London County Council*[1], separated the four conditions laid down by Atkin, L.J. and expressed the view that the existence of each was necessary to determine the nature of the act in question. The Supreme Court of India accepted the analysis of Slesser, L.J., in *Province of Bombay* v. *Khushaldas*[2]. Therefore one of the necessary conditions, the existence whereof will clothe an act with a judicial character, is that the Tribunal concerned shall have the duty to act judicially. Elaborating this aspect Kania, C.J., made the following observations at page 226 :

"It seems to me that the true position is that when the law under which the authority is making a decision, itself requires a judicial approach, the decision will be quasi-judicial. Prescribed forms of procedure are not necessary to make an inquiry judicial, provided in coming to the decision the well-recognised principles of approach are required to be followed. In my opinion the conditions laid down by Slesser, L.J., in his judgment correctly bring out the distinction between a judicial or quasi-judicial decision on the one hand and a ministerial decision on the other."

Can it therefore be said that in the instant case the Act or the Rules made thereunder indicate that the Government should follow the well-recognised principles of judicial approach in exercising the power under section 13 of the Act? I do not find any indications to that effect. Indeed, as I have already stated, an unqualified power of exemption was conferred on the Government, to be exercised by them in their discretion. I therefore hold that the order of the Government exempting the house in question is not a judicial act.

Even so, it was argued that the order in question affected the fundamental right of the petitioner under Article 14 of the Constitution of India. But this question was covered by authority of a Bench decision which is binding on me. Rajamannar, C.J. and Venkatarama Ayyar, J., held in W.P. No. 132 of 1951 that the Government in exempting a house have not violated any of the fundamental rights of the petitioner therein. The learned Judges said :

"We are unable to see what fundamental right of the petitioner has been violated. Admittedly, the petitioner has no fundamental right to remain in possession of the building for all time. Whatever rights he now urges in his support are rights conferred by the very Act, and the Government has purported to pass the order only under one of the sections of the same Act.

Article 14 of the Constitution cannot be invoked in support of the petitioner. There is no violation of the principle of equality before the law. Logically the contention of the petitioner must lead to the position that either every building must be exempted, or no building should be exempted, —an absurd conclusion."

The learned Judges therefore stated in clear and unambiguous terms that no fundamental rights of the petitioner in that case were violated by the order made under section 13 of the Act. I should have thought that this judgment being that of a Bench was binding on me and no further arguments would be addressed. But elaborate arguments were advanced in support of the contention that in the circumstances of the case I am not bound by the Bench decision. More in respect to the arguments advanced than to clear any doubt that exists, I shall proceed to deal with the point raised.

Salmond on Jurisprudence states that the following classes of decisions are recognised by English law as absolutely authoritative :

(1) Every Court is absolutely bound by the decisions of all Courts superior to itself. A Court of first instance cannot question a decision of the Court of Appeal, nor can the Court of Appeal refuse to follow the judgments of the House of Lords.

(2) The House of Lords is absolutely bound by its own decisions. A decision of this House once given upon a point of law is conclusive upon this House afterwards, and it is impossible to raise that question again as if it was *res integra* and could be re-argued, and so the House to be asked to reverse its own decision.

(3) The Court of Appeal is, it would seem, absolutely bound by its own decisions and by those of older Courts of co-ordinate authority, for example, the Court of Exchequer Chamber.

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1. (1931) 2 K.B. 215. A.I.R. 1950 S.C. 222 (S.C.).
2. (1950) 2 M.L.J. 703 : (1950) S.C.J. 451 :

In all other cases save these three, it would seem that the authority of precedents is merely conditional. It is to be noticed, however, that the force of a decision depends not merely on the Court by which it is given but also on the Court in which it is cited. Its authority may be absolute in one Court, and merely conditional in another. A decision of the Court of Appeal is absolutely binding on a Court of first instance but is only conditionally binding upon the House of Lords."

This passage, if I may say so, accurately represents the procedure followed in British Courts. I do not see how the rules stated above help the petitioner's case. The first principle laid down directly applies to the present case. The Divisional Bench decided the case as an appellate Tribunal. Sitting as a Court of first instance I am bound by that judgment. Nor does the decision in *Young* v. *Bristol Aeroplane Co., Ltd.*[1], lay down any new principle. Lord Greene, M.R., after considering the case-law on the subject summarised the law as follows :

" On a careful examination of the whole matter we have come to the clear conclusion that this Court is bound to follow previous decisions of its own as well as those of Courts of co-ordinate jurisdiction. The only exceptions to this rule (two of them apparent only) are those already mentioned which for convenience we here summarise : (i) the Court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (ii) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot in its opinion stand with a decision of the House of Lords. (iii) The Court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam* ".

Learned Counsel relying upon this passage argued that I should refuse to follow the Bench decision on the ground that the opinion expressed is inconsistent with the observations made by the Supreme Court in connection with a different matter. The passage cited applied only to Courts of co-ordinate jurisdiction but not to a case of a decision of a Bench in exercise of appellate jurisdiction in its application to a case before a single Judge disposing of it as a Court of first instance. These rules may be applied to decisions of two different Benches of this High Court made in exercise of their appellate jurisdiction. The practice obtaining in our Court has been incorporated by Leach, C.J., in *Seshamma* v. *Narasimharao*[2]. At page 474, the learned Chief Justice observed :

" While a Judge of the High Court sitting alone is not bound on a question of law by the decision of another Judge sitting alone, this principle goes no further. The Division Bench is the final Court of appeal in an Indian High Court, unless the case is referred to a Full Bench, and one Division Bench should regard itself bound by the decision of another Division Bench on a question of law. In England where there is the Court of Appeal, Divisional Courts follow the decisions of other Divisional Courts on the grounds of judicial comity . . . If a Division Bench does not accept as correct the decision on a question of law of another Division Bench the only right and proper course to adopt is to refer the matter to a Full Bench, for which the rules of this Court provide. If this course is not adopted, the Courts subordinate to the High Court are left without guidance. Apart from the impropriety of an appellate Bench refusing to regard itself bound by a previous decision on a question of law of an appellate Bench of equal strength and the difficulty placed in the way of subordinate courts administering justice, there are the additional factors of the loss of money and the waste of judicial time."

This judgment, if I may say so with respect, lays down the salutary rules of practice to be followed. In *Manilal* v. *Venkatachalapathy*[3], Leach, C.J., again made the following observations at page 97 :

" A Judge has, of course, always the right of expressing his own opinion and indicating that he is not in agreement with an authority binding on him, but he is nevertheless in duty bound to follow it, as the Full Bench of this Court which decided *Seshamma* v. *Narasimha Rao*[2], had occasion to point. The fact that a Judge thinks that some argument has been overlooked in a judgment binding on him is no reason for refusing to follow it."

I am not therefore prepared on the English authorities cited and on the arguments advanced, to depart from the well-recognised practice and the salutary conventions established in this Court. If I did, I would be introducing only confusion and uncertainty and put the subordinate judiciary in a very unenviable position. I would therefore unreservedly follow the procedure obtaining in our Court which is supported by principle and found satisfactory in practice. A single Judge is bound by a decision of a Divisional Bench exercising appellate jurisdiction. If there is a conflict of Bench decisions, he should refer the case to a Bench of two

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1. (1944) 2 All E.R. 293.
2. (1940) 1 M.L.J. 400: I.L.R. (1940) Mad. 454 (F.B.).
3. (1943) 1 M.L.J. 353 : I.L.R. (1944) Mad. 95.

Judges who may refer it to a Full Bench. A single Judge cannot differ from a Divisional Bench unless a Full Bench or the Supreme Court overruled that decision specifically or laid down a different law on the same point. But he cannot ignore a Bench decision, as I am asked to do, on the ground that some observations of the Supreme Court made in a different context might indicate a different line of reasoning. A Divisional Bench must ordinarily respect another Divisional Bench of co-ordinate jurisdiction ; but if it differs, the case should be referred to a Full Bench. This procedure would avoid unnecessary conflict and confusion that otherwise would prevail. I therefore follow the Bench decision and hold that no fundamental rights of the petitioner were violated in this case.

But it was contended that the Bench decision should be confined only to the point decided and that the learned Judges did not purport to decide whether section 13 or the order made thereunder affected the fundamental right of the petitioner under Article 19 (1) (*f*) of the Constitution of India. But in my view this argument also is not open to the petitioner in view of the Bench decision. In the second paragraph of the judgment, the learned Judges dealt generally with the question whether any fundamental right of the petitioner has been violated and they held that the petitioner has no fundamental right to remain in possession for all time and the rights he claimed were only rights conferred under the Act. In the third paragraph they dealt specifically with the right claimed under Article 14 of the Constitution. It is therefore not correct to state that the learned Judges did not deal with the petitioner's right under Article 19 of the Constitution.

As the arguments were advanced at some length, I shall also express my view on the subject. It was contended that under the Act the petitioner has acquired a right to hold the property till he is dispossessed in accordance with the provisions of the Act and that section 13 conferring an arbitrary power on the Government is not a reasonable restriction on the exercise of his right in the interests of the general public. The relevant provisions of the Constitution read :

"*Article* 19 (1) : All citizens shall have the right (*f*) to acquire, hold and dispose of property ; (5) nothing in sub-clauses (*d*), (*e*) and (*f*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interest of the general public or for the protection of the interests of any scheduled tribe."

In *N. B. Khare* v. *State of Delhi*[1], the provisions of clause (5) have been construed by the Supreme Court. Kania, C.J., observed at page 213 as follows :

"In my opinion, clause (5) must be given its full meaning. The question which the Court has to consider is whether the restrictions put by the impugned legislation on the exercise of the right are reasonable or not. The question whether the provisions of the Act provide reasonable safeguards against the abuse of the power given to the executive authority to administer the law is not relevant for the true interpretation of the clause. . . . . . The law providing reasonable restrictions on the exercise of the right conferred by Article 19 may contain substantive provisions as well as procedural provisions. While the reasonableness of the restrictions has to be considered with regard to the exercise of the right it does not necessarily exclude from the consideration of the Court the question of reasonableness of the procedural part of the law."

In *State of Madras* v. *V. G. Rao*[2], Patanjali Sastri, C.J., accepted the law laid down in *Dr. Khare's case* and elaborated the same in the following manner :

"This Court had occasion in *Dr. Khare's case* to define the scope of the judicial review under clause (5) of Article 19 where the phrase 'imposing reasonable restrictions on the exercise of the right' also occurs, and four out of the five Judges participating in the decision expressed the view (the other Judge leaving the question open) that both the substantive and the procedural aspects of the impugned restrictive law should be examined from the point of view of reasonableness ; that is to say, the Court should consider not only factors such as the duration and the extent of the restrictions, but also the circumstances under which and the manner in which their imposition has been authorised. It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general patterns, of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the

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1. (1950) S.C.J. 328 : (1950) S.C.R. 519 : A.I.R. 1950 S.C. 211 (S.C.).

2. (1952) S.C.J. 253 : (1952) 2 M.L.J. 135 : (1952) S.C.R. 597 (S.C.).

evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict."

Applying these principles, can it be said that section 13 of the Act imposes unreasonable restrictions on the right of the petitioner to use the premises as a lessee. The contention was that section 13 is an unreasonable restriction on the petitioner's right to hold a property. So stated, the argument appears plausible but ingores the nature of the right, the circumstances under which it was created and the underlying purpose of the restriction imposed. Before the Act became law, the landlords and tenants were governed by the contract and the provisions of the Transfer of Property Act. If it was a monthly tenancy, the tenant could be asked to quit after notice for the prescribed period was given. But the Act evolved a scheme imposing restrictions on the landlord. While the main object of the Act was to prevent the arbitrary eviction of the tenants, it took good care to see that interests of the landlords were protected within reasonable limits. A statutory tenant, the creation of the Act, with certain rights and restrictions cannot accept the rights and complain of the restrictions. No question of unreasonable restriction on his part would arise as the statute itself created that right "subject to restrictions". He acquired the right not to be evicted except under certain circumstances and one of those circumstances is when the Government exempts a particular building from all or particular provisions of the Act. His right to the user of the properties therefore is not an absolute one, but is circumscribed by the provisions of the Act itself. In this view I cannot hold that section 13 imposes any unreasonable restriction on the petitioner's right to use the property leased to him.

It was then contended that the Government exercising their power under section 13 of the Act acted with *mala fides*, namely, to circumvent the order of the Civil Court dismissing the application of the landlords to evict the petitioner. There is an essential distinction between the scope of the enquiry before the Tribunals constituted by the Act and the ambit of the power of the Government under section 13 of the Act. The Tribunals are concerned only with the question whether the landlord has made out his case for eviction under the provisions of the Act; but under section 13 the Government may in their discretion exempt a particular building from the operation of the Act. In exempting the building their power is not limited by the provisions of the Act. It is therefore incumbent upon the petitioner to establish that the Government have exempted the building with the sole object of circumventing the orders of Court.

From the aforesaid facts, it will be seen that the application for eviction of the petitioner was finally dismissed by the Small Cause Court on 10th April, 1950. But it appears from the records placed before me that one D. Subramanian filed Application No. 4455 of 1949 before the House Rent Controller for eviction of his tenant, the second respondent, on the ground that he wanted the premises for his own occupation. In that application there was an order of eviction. But presumably on an application made by the second respondent to the Government bringing to their notice that his petition for eviction of his tenant was dismissed, whereas the application filed by Subramanian for evicting him was ordered, the Government issued a notification exempting the house of Subramanian from the operation of sections 7 (3) and 9 of the Act. Subramanian in his turn filed an application to the Government bringing to their notice his difficulties. The second respondent approached the Government for exempting his house from the operation of the Act. Having regard to the situation created, namely, that the two owners of the houses could not live in their own houses, the Government thought that a case had been made out for allowing the owners to have their houses in preference to the tenants. On 9th September, 1950, by the same notification the G.O. exempting Subramanian's house from the operation of sections 7 (3) and 9 was revoked and the second respondent's house was exempted from the provisions of the Act. After going through the entire records, I am not satisfied that the petitioner has made out that the Government exempted the second respondent's house to circumvent the orders of civil Courts. It is more likely that they exercised their undoubted powers with the *bona fide* intention of protecting the interests of the landlords who had no other

houses to live in. I cannot therefore hold that the Government was actuated by *mala fides* in issuing the order. In the result the application is dismissed with costs of respondents 2 to 6. Advocate's fee Rs. 100.

V.P.S. ——— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE PANCHAPAKESA AYYAR.

Reku-ul-Mulk S. Abdul Wazid .. *Appellant**

v.

R. Viswanathan and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 13—Foreign judgments—Vitiating circumstances—Distinction between judgments of Municipal Courts and foreign Courts.

There is a distinction between vitiating the judgments of Courts subordinate to one's jurisdiction on the grounds of suspected bias, interest, etc., and in vitiating the judgments of the foreign Courts. Foreign judgments are recognised by private international law only on the principle of comity between the nations, reciprocity, acquired rights, acquired obligations, international usage and custom, etc. and not as fundamental rights guaranteed by any world constitution or world courts the world not having reached that stage yet.

Errors in procedure, interest of slight nature (like using cars of party, eating marriage dinners, etc.) mere suspected bias, pungent observations of Judges at hearing, a non-liberal attitude towards requests for constituting another Bench and not hearing the case themselves, and not granting adjournments for engaging eminent counsel will all be inadequate for vitiating a foreign judgment of a competent Court, as not affecting the jurisdiction or coming under any other exception mentioned in section 13, Civil Procedure Code.

Appeals from the judgment of the Honourable Mr. Justice Rajagopalan, dated 24th April, 1950, in C. S. No. 214 of 1944, in the Ordinary Original Civil Jurisdiction of this Court.

The Advocate-General (*V. K. Thiruvenkatachari*) for Appellant.

C. E. Padmanabhan of *Messrs. Short, Bewes & Co.*, for Respondents in O.S.A. No. 67 of 1950.

The Judgment of the Court was delivered by

Panchapakesa Ayyar, J.—These are two appeals against the judgment of our learned brother, Rajagopalan, J., in C. S. No. 214 of 1944 on the Original Side of this Court, holding that the judgment of the Mysore High Court, consisting of Medappa, C.J., and Balakrishnaiya and Mallappa, JJ., operated as *res judicata* in this suit regarding the moveable properties mentioned therein, subject to proof of pecuniary or other interest of Medappa, C.J., in a Mercedes Car, belonging to the estate of the deceased Ramalinga, and proof of his having attempted, in October, 1945, and the beginning of 1946, to dissuade Mr. L. S. Raju, Advocate for the plaintiffs, from appearing for the plaintiffs, Ramalinga's sons, and making strong and unwarranted remarks against them, which two facts, if proved, would, in the opinion of our learned brother, make Medappa, C.J., so interested in the subject-matter of the suit or in the parties to the suit as to make him disqualified to be a Judge in the matter, as he would be practically judging his own cause and violating the principle of *audi alteram partem*, and make the trial *coram non judice*, and the judgment a nullity. Regarding the four items of immoveables situated in Madras and included in C. S. No. 214 of 1944, our learned brother held that there was no question of applying the principle of *res judicata* under section 13, Civil Procedure Code, since there was no attempt at any adjudication of the title to those four items by the Mysore Courts, as three of them (included in the Bangalore City Suit) were specifically excluded from the decree, on objection being taken by the defendants (executors) to the inclusion of properties outside the jurisdiction of the Mysore Courts, and the fourth item had not been included in the Mysore suits at all.

The facts may briefly be stated. V. Ramalinga, the father of the plaintiffs, was a resident of Bangalore in Mysore State. He died at Bangalore on 18th December,

*O.S. Appeals Nos. 67 and 84 of 1950. 1st November, 1951.

1942. He had been extremely affectionate and considerate towards his wife, eldest son, Viswanathan, and other members of the family in the earlier stages and had tried to establish his eldest son, Viswanathan, in his prosperous business, he being worth over 20 lakhs of rupees and having influential connections and friends, but, it is said that he became, later on, disappointed with his eldest son's conduct and application to business, and felt himself insulted by the conduct of his wife, eldest son and other children, and so executed a will, dated 10th September, 1942, some three months before his death leaving to his wife, sons, etc., only a comparatively paltry pittance and bequeathing almost his entire properties to charities claiming them all to be his self-acquired properties and therefore devisable by him by will. The properties were admittedly worth more than 20 lakhs and consisted of immoveable properties situated in Bangalore Cantonment administered in those days by the British Resident in Mysore and subject to his Court, but admittedly part of Mysore State for purposes of sovereignty though appeals from the Resident's Court lay to the Privy Council till Independence and retrocession, in Bangalore City, within the State of Mysore, and in Hospet, Madras City and other parts of Madras State. Ramalinga appointed three persons as executors to administer his estate after his death and conduct the charities he prescribed in the will. Those are the defendants in C. S. No. 214 of 1944.

The executors obtained probate of the will from the District Judge, Civil and Military Station, Bangalore Cantonment. An appeal to the Resident's Court by the sons and daughters of Ramalinga (plaintiffs here and others), who had entered caveat, failed. A further appeal was preferred by them to the Privy Council. Before that appeal came on for hearing before the Privy Council, the Cantonment area was retroceded to His Highness the Maharajah of Mysore. The Privy Council held, therefore, that they had no more jurisdiction to hear the appeal because Mysore had become an independent State not subject to their jurisdiction any more. An attempt was made to induce them to reconsider the matter, but they refused, by their order dated 12th December, 1949, to reconsider the decision. The attempt of the plaintiffs and other members of Ramalinga's family to get the appeals taken on file by the Supreme Court of India and decided there, also failed apparently because the Supreme Court considered that Mysore had not yet come within its jurisdiction by the relevant date. So the Privy Council refused to deal with the appeals as it had lost its jurisdiction and the Supreme Court refused to deal with the appeals as it had not got jurisdiction by the relevant date. So, the plaintiffs fell between two stools and remained remediless in that matter.

The executors applied also to this Court for probate with reference to the properties situated within the jurisdiction of this Court, and Chandrasekhara Aiyar, J., on 17th July, 1944, in O.P. No. 45 of 1944, granted probate to the executors regarding the properties situated within the jurisdiction of this Court. There was no appeal against that grant by any member of Ramalinga's family apparently because the proceedings here were merely complementary to those instituted in the Court of the District Judge, Bangalore Cantonment, and appeals were filed in the Privy Council regarding the very same matter.

The plaintiffs here, the three sons of Ramalinga, contended that the properties dealt with under the will of Ramalinga were the properties of the undivided Hindu family, of which he and they were members, and so could not be bequeathed under the will under the Hindu Law applicable to the parties, which is admitted to be the same in Mysore State as well as in Madras State. They at first instituted two suits, O.S. No. 56 of 1942-43 in the District Court, Bangalore and O. S. No. 60 of 1944 in the District Court, Bangalore Cantonment, for establishing their contention that the properties were joint family properties, and that the will was null and void and not binding on them, and for directing the executors (defendants 1 to 3) to deliver possession of the properties to them and the 4th defendant, their mother, and for rendering an account to them of their dealings with the properties and the profits, etc., and for costs. The Cantonment suit, of course, comprised only the moveables and immoveables of Ramalinga situated within the Bangalore Cantonment

limits. The Bangalore City suit comprised not only the moveables and immoveables situated in Mysore State, but also the moveables and immoveables of Ramalinga situated in Madras State with the exception of one item of immoveable property. On objection being taken by the executors-defendants that the Bangalore City Court had no jurisdiction over the moveables and immoveables situated in Madras State, the plaintiffs filed C. S. No. 214 of 1944 in this Court, regarding the moveables and immoveables situated in Madras State, for the same reliefs. These moveables consist of sugar shares, Oriental Assurance Company's shares, etc., valued at 4 to 6 lakhs now, and of all four items of immoveable properties (one of which has been converted into cash subsequently) worth some four lakhs. The trial of the Madras suit was deferred until the completion of the trial of the suits in Bangalore City and Bangalore Cantonment, as the same witnesses and documents would obviously be required in all the three suits. Before the Cantonment suit was ready for trial, the retrocession intervened. So, both the Cantonment and the Bangalore City suits were tried by the same Judge, Mr. Ramakrishna Iyengar, the Bangalore City suit being renumbered as O.S. No. 61-A of 1947. They were disposed of by him by a single judgment, though, of course, there were separate decrees in each of these suits. The District Judge, Mr. Ramakrishna Iyengar, accepted the plaintiff's case and decreed both the suits, on 5th December, 1947, but excluded the four items of immoveable properties situated in Madras State from the scope of his decree, obviously because of the rule of private international law that a Court has no jurisdiction to entertain an action for the determination of the title to or the right to the possession of any immoveable property situated outside its jurisdiction (mentioned by Dicey as rules 20 and 66 in his book, *Conflict of Laws*).

The executors-defendants in both the suits appealed to the Mysore High Court against both the decrees. The appeal against the Cantonment suit was numbered as R. A. No. 104 and the appeal against the Bangalore City suit was numbered as R. A. No. 109 of 1947-48 on the file of the Mysore High Court. These two appeals were consolidated, and heard, in the first instance, by a Bench of the Mysore High Court, consisting of Balakrishnaiya and Kandaswami Pillai, JJ. Before the appeals were heard, the plaintiffs-respondents applied to the Mysore High Court, in I. A. No. 6, for a stay of the hearing of the appeal, till the disposal of the appeals to the Privy Council against the grant of the probate. That prayer was not granted, though I. A. No. 6 itself was formally dismissed only on 15th March, 1949, after the appeals before the Division Bench were heard. The plaintiffs-respondents filed also I. A. No. 8 to record a compromise, which had, according to them, been arrived at between them and the appellants. That application also was dismissed on 15th March, 1949. On 2nd April, 1949, the Bench of the Mysore High Court delivered its judgment in the two appeals. Kandaswami Pillai, J., held that the decrees of the District Judge in favour of the plaintiffs should be confirmed while Balakrishnaiya, J., held that the appeals should be allowed and the two suits dismissed. Balakrishnaiya, J., the senior judge directed, under section 15 (3) of the Mysore High Court Act, as follows :

"Since a difference of opinion is expressed by my learned colleague on material questions involved in the appeals, these appeals are referred to a Full Bench for decision under section 15 (3) of the High Court Act."

A Full Bench of the Mysore High Court had, therefore, to be constituted to hear the matter in law and on the facts. The plaintiffs strongly objected to the Full Bench being constituted of Medappa, C.J., Balakrishnaiya, J., and Mallappa, J., as proposed, on various grounds. Mallappa, J., was not objected to on any specific ground carrying conviction even to the plaintiffs themselves, and, so, the objection to his sitting in the Full Bench was eventually dropped. Balakrishnaiya, J., was objected to as having already formed an opinion against the plaintiffs' contentions in the case and delivered judgment against them in the Bench decision, and therefore unfit to sit on the Full Bench which had to consider not merely the law *but also the very facts* on which he had come to a definite conclusion against the plaintiffs, but no interest or bias or partiality or misconduct was alleged against him. Medappa, C.J., was objected to on the ground that he had heard the application for probate of

Ramalinga's will when he was District Judge of Bangalore Cantonment, and had formed an opinion against the plaintiffs' contentions and overruled their contention that the will had been brought about by undue influence on Ramalinga by two enemies of theirs, converting Ramalinga's expressed original intention to bequeath at least 3/4ths of his properties to his wife and children into a decision to practically cut them off with a pittance. It was also alleged that Medappa, C.J., was unfit to sit on the Full Bench, because he and his wife and children had, during the probate proceedings in the Cantonment in 1943 and subsequently (till 1945, when the car was sold) been using the *Mercedes* car of Ramalinga's estate for going to Court, school, etc., practically as if the car belonged to him, and had thus a strong reason for favouring the executors who had allowed him the use of the car, and also because, in October 1945 and the beginning of 1946, he had attempted to dissuade Mr. L.S. Raju, the plaintiffs' Counsel, from appearing for them, and had made strong and unwarranted remarks to him against them. The plaintiffs filed I. A. No. 14 for a re-constitution of the Bench on the above grounds. That petition was dismissed, and a Full Bench was constituted of these three learned Judges alone. The attempt of the plaintiffs to move the Government of Mysore to change the constitution of the Full Bench, and to constitute another Full Bench consisting of *ad hoc* Judges, if necessary, also failed.

The plaintiffs next asked for an adjournment of the hearing of the appeals in I. A. No. 15, so that, they might get Sir Alladi Krishnaswami Ayyar, who was then said to be in Delhi and could not appear at the hearing, or Sri Sarat Chandra Bose who was intended to be briefed, failing Sir Alladi Krishnaswami Ayyar. Neither of these eminent Counsel had requested the Court for an adjournment. I. A. No. 15 was rejected on 20th July, 1949, by the learned Chief Justice. I.A. No. 16 was then filed by the plaintiffs for another adjournment. All the three Judges of the Full Bench heard it. In that very application, the plaintiffs had objected at first to the presence of every one of the three Judges on the Full Bench. At the time of the hearing, they withdrew their objection to Mallappa, J., being on the Full Bench, but persisted in their objections to the presence of the other two learned Judges. The three learned Judges overruled the objections of the plaintiffs and dismissed I. A. No. 16. Thereupon the Counsel for the plaintiffs asked for permission to withdraw from their appearance. That request also was rejected. All the same, when the two appeals were heard by the Full Bench, on 27th July, 1949, the plaintiffs and their Counsel did not participate in the hearing of the appeals. The appeals were thus virtually heard *ex parte*, and the judgment of the Full Bench in the appeals was delivered, by Mallappa, J., on 29th July, 1949, allowing both the appeals of the executors and dismissing both the suits of the plaintiffs. The other two Judges concurred with him. The plaintiffs then filed I. A. Nos. 49, 50, 61 and 62 for reviewing the judgment of the Full Bench and for setting it aside on various grounds. All those petitions were heard by the same Full Bench and were dismissed. That marks the termination of the proceedings in Mysore State.

In C. S. No. 214 of 1944, the judgment of the above Full Bench was contended, by the executors' Counsel, to operate as *res judicata* and to be conclusive under section 13, Civil Procedure Code, regarding the properties comprised in this suit, and to preclude the contention of the plaintiffs, that they were ancestral properties, from being gone into by this Court. It is on this preliminary issue, regarding *res judicata* under section 13, that Rajagopalan, J., delivered the judgment which is in appeal before us. The plaintiffs who seem to have succeeded more than the defendants, under the decision on this issue, have filed O.S.A. No. 84 of 1950, contending that Rajagopalan, J., ought not to have restricted the scope of the enquiry into proof of bias, interest, partiality, misconduct, etc., vitiating the judgment of the Full Bench regarding the moveables, to actual proof of bias, partiality, etc., or probable proof thereof, but should have acted on several well-known decisions of the House of Lords, the Privy Council, and our High Courts, that a *mere suspicion of partiality*, bias, or misconduct on the part of the Judge by a party would be enough, and ought to have at least allowed the plaintiffs full scope for proving every one of

their allegations of partiality, bias, misconduct, pre-formed opinion, etc., against Medappa, C.J., and of pre-formed opinion against Balakrishnaiya, J. O.S.A. No. 67 of 1950 has been filed by the defendants-executors and is against the exclusion of the immoveable properties from the scope of *res judicata* in Rajagopalan J.'s order, and against the enquiry directed regarding the proof of interest, and bias by proof of possession of the estate *Mercedes* car by Medappa, C.J., and his asking the plaintiffs' Counsel Mr. Raju to withdraw from his appearance for the plaintiffs in the Bangalore suit and making allegations to him against the plaintiffs, it was urged that, under private international law, the contention of the plaintiffs regarding even the immoveable properties could not be gone into as the finding of the Full Bench of the Mysore High Court that all the properties of Ramalinga were his self-acquired properties would be conclusive under section 13, Civil Procedure Code, as it related to a matter directly adjudicated upon between the same parties and would not be affected by any of the exceptions and as the enquiry regarding the use of the motor car and the alleged attempt by Medappa, C.J., to dissuade Mr. L. S. Raju from appearing for the plaintiffs and the allegations to him against the plaintiffs would be inexpedient and unwarranted under the rules of private international law, though permissible, if alleged against a Subordinate Judge, under the municipal law of a State.

So, these appeals raise very important questions of private international law which require careful consideration. Before proceeding further we may state a few well-settled principles of private international law. As observed by Wolff, in his *Private International Law*, 1945 Edition, the recognition of foreign judgments and their enforcement is an important problem arising in international intercourse by reason of the extensive foreign trade between a country and foreign countries in these days, and the judgments obtained by merchants of one country in respect of their debts and claims, in foreign Courts and also because of world war 1 and 2 having made millions of people migrate from their home country to other countries like the vast migrations from Pakistan to India and *vice versa* after partition, and the migrations of the Jews, Poles, etc., from their home lands and the need to recognise various foreign judgments got by these unfortunate persons. As Wolff observes, it is impossible to recognise all judgments of all Courts in any country all over the world, despite its manifest advantages, as the disadvantages are equally manifest in so unrestricted a recognition. In his own words :

"It is not advisable to trust every Court in the world to administer justice irreproachably. Bribery of Judges may have become so rare as to reduce this risk to a minimum ; but in some countries unsatisfactory legal education, appointment of Judges from political motives, and the influence which the State or some powerful criminal organization within the State brings to bear on the Judges are considerable obstacles to a universal recognition of judgments. Further, even where there is no danger of any kind of corruption of Courts, differences between two countries in their fundamental attitude to questions of morality or public policy must often make the recognition of some individual judgments seem undesirable. Finally, general recognition might result in grave injustice where the same relationship was regarded differently by the Courts of two countries, as in cases of marriage, divorce, inheritance, etc."

The extent to which foreign judgments will be recognised as conclusive in India has been clearly stated in section 13, Civil Procedure Code, which runs as follows :

"A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim, litigating under the same title, except—

(*a*) where it has not been pronounced by a Court of competent jurisdiction ;

(*b*) where it has not been given on the merits of the case ;

(*c*) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of British India in cases in which such law is applicable ;

(*d*) where the proceedings in which the judgment was obtained are opposed to natural justice ;

(*e*) where it has been obtained by fraud ;

(*f*) where it sustains a claim founded on a breach of any law in force in British India."

Needless to say, section 13, Civil Procedure Code, is based on well-known decisions of the House of Lords, Privy Council and other Courts in England and abroad, and the High Courts in India. Though, after the coming into force of the Constitution of India on 26th January, 1950, and the Independence of India and the severance of India's dependence on the King of England and the Privy Council, the rulings of the Privy Council are not legally binding on Courts in India, they are treated with very great respect, as held by the Federal Court and the Supreme Court and various High Courts including our own *see* the Bench decision in *Lakshmi Narsa Reddi* v. *Official Receiver, Sree Films, Ltd.*[1]. That is why Counsel on both sides have profusely quoted from English rulings and text-books, Indian rulings being few, as India was not having this question of *foreign judgments* frequently till she became independent in 1947. We may add that the qualities required in Judges, and regarding a Court of competent jurisdiction and rules of natural justice, and what constitutes fraud and the effect of fraud on judgments, do not differ appreciably in English law and the law of the Indian Republic. The Constitution of India accords the same recognition to foreign judgments as section 13, Civil Procedure Code, does, and has not altered the law of India in this respect. We may go further and say that even under the immemorial Hindu Law the views held regarding the qualities required in Judges and judgments and the views about natural justice were much the same as held in Indian Courts now, and judgments were held to be null and void in cases of proved perjury, bribery and fraud and also where the party was not given an opportunity to be heard.

We shall now state the well-settled principles of private international law regarding the recognition of judgments and the application of section 13 to them, and discuss the merits of the contentions in these appeals. A " foreign judgment " has been defined by the Privy Council in *Brijlal* v. *Govindram*[2], confirming the view expressed by Beaumont, C.J. and Weston, J., in the Bench decision of the Bombay High Court reported in *Brijlal* v. *Govindram*[3], the Privy Council decision being given on appeal. The Privy Council has said that the expression 'foreign judgment' must be understood to mean 'an adjudication by a foreign Court upon the matter before it,' and has added that it would be quite impracticable to hold that a foreign judgment means a statement by a foreign Judge of the reasons for his order, since, if that were the meaning of the judgment, section 13, Civil Procedure Code, would not apply to an order where no reasons were given. It is clear to us that the Full Bench judgment is a foreign judgment, as mentioned in section 13 within the definition accepted by the Privy Council. The phrase 'directly adjudicated upon between the same parties' in section 13 also admits of little difficulty. It is clear from the Full Bench judgment that all the properties included in C.S. No. 214 of 1944 and the properties in Mysore State, including the Bangalore Cantonment, were directly adjudicated upon, except the four items of immoveable properties included in this suit, regarding which there was no direct adjudication at all. We cannot agree with the learned Advocate-General, who appeared for the executors-appellants in O.S.A. No. 67 of 1950, that simply because all the properties of Ramalinga, moveable and immoveable, were held by the Full Bench to be the self-acquired properties of Ramalinga, and no exception was made, there was an adjudication that these four items of immoveable properties, which were not covered by the decree of the trial Court, Bench Court or Full Bench, would be a matter directly adjudicated upon. When there was no decree at all regarding them, there cannot be any adjudication. Besides, Dicey, Wolff and other authorities on private international law are emphatic that a municipal Court of a country has no jurisdiction to entertain an action for the determination of the title to or the right to the possession of immoveables situated in foreign lands. The exception that where a municipal Court has jurisdiction to entertain a suit for administering an estate or trust and the property includes moveables or immoveables situated abroad, the municipal Court may have jurisdiction to determine questions of title to the foreign immove-

1. (1951) 1 M.L.J. 488 at 492 : I.L.R. (1952) Mad. 108.
2. (1947) 2 M.L.J. 498 : L.R. 74 I.A. 203 : A.I.R. 1947 P.C. 192 (P.C.).
3. I.L.R. (1943) Bom. 366 : A.I.R. 1943 Bom. 201.

ables for purposes of the administration, mentioned as an exception to rule 20 by Dicey, and relied on by the learned Advocate-General, will have no application to this case for three reasons. First of all, the trial Court's decision and the decision of the Bench and the Full Bench in these cases were not in administration suits or proceedings, but in regular suits for recovery of properties from the executors, claiming them to be ancestral properties not devisable by Ramalinga by will. Secondly, there was *no decree or adjudication* regarding *these four items*, one of them not being included in the suits at all, and the other three being omitted from the decree after objection was taken to jurisdiction. Thirdly, the learned Advocate-General had to confess that there was no direct decision in his favour. The decisions relied on by the learned Advocate-General, namely, In re *Piercy*[1], In re *Holles*[2] and In re *Duke of Wellington*[3], will not prove the point raised by the appellants in O.S.A. No. 67 of 1950, as, though the lands in those cases were situated in Italy, Canada (Ontario) and Spain, the jurisdiction was assumed by the Courts in England and the party submitted to their jurisdiction and there was *no consideration or recognition of a foreign judgment and its applicability to lands in England at all.* Besides, as already mentioned, the lands were *covered* by the decree in those cases, and were *not left out* of the decrees, as in our case, *expressly owing to want of jurisdiction.* In In re *Ross*[4], it has been held that the *lex loci* (local law) or *lex situs* (law of country where the lands are situated) will govern immoveables, though the law of domicile will govern moveables. That is also the view taken in India, as in all civilised countries : see *Khur Singh* v. *Achar Khasia*[5]. It follows, therefore, that Rajagopalan J.'s judgment holding that *res judicata* did not operate by virtue of the Full Bench judgment of the Mysore High Court regarding the four immoveables was right, and must be confirmed, and the appeal, O.S.A. No. 67 of 1950, dismissed, regarding that matter. We may add that the clause "the matter directly adjudicated upon" in section 13, Civil Procedure Code, is narrower than the clause "the matter directly and substantially in issue" in section 11.

We now come to the contention of the learned Advocate-General, in O.S.A. No. 67 of 1950, that Rajagopalan, J., was not justified in ordering any enquiry regarding the motor car allegation or the alleged attempt to dissuade Mr. L. S. Raju from appearing for the plaintiffs, and the contention of Mr. Padmanabha Mudaliar in O.S.A. No. 84 of 1950, that Rajagopalan, J., should have ignored the Full Bench judgment *in toto* regarding the moveables also or, at least, directed a full and unrestricted enquiry into all allegations of interest, bias, partiality, misconduct, preconceived notions, and errors in procedure, on the part of Medappa, C.J. and Balakrishnayya, J., who took part in the Full Bench. The scope of an enquiry into a foreign judgment, for holding it not to be conclusive, has been laid down in the exceptions to section 13, Civil Procedure Code, which will be conclusive in the matter, as can be inferred from the judgment of the Privy Council in *Brijlal* v. *Govindram*[6]. Dicey and Wolff also expressly say that the foreign judgment of a Court of competent jurisdiction regarding moveables will be conclusive unless it is vitiated by fraud, or, is opposed to fundamental principles of natural justice, as, for example, by want of due notice to the party affected thereby, or denial of an opportunity to a party of presenting his case to the Court (under which last heading the alleged attempt of Medappa, C.J., to dissuade Mr. L. S. Raju, if proved, will fall). Dicey says that the fraud invalidating a foreign judgment may be either *fraud on the part of the party* in whose favour the judgment is given (as by bribing the Judge to give a decision in his favour, misleading the Judge into giving a decision in his favour, by proved false evidence, etc.), or *fraud on the part of the Court* pronouncing the judgment (as, for example, by writing a judgment before hearing the parties and delivering that judgment after hearing the parties and pretending that it was written only after hearing the parties, or taking a bribe for delivering a corrupt and untenable decision in favour of a party).

1. (1891) 1 Ch. 83.
2. (1911) 1 Ch. 179.
3. (1948) 1 Ch. 118.
4. (1930) 1 Ch. 377.
5. (1945) 49 C.W.N. 754.
6. (1947) 2 M.L.J. 498 : L.R. 74 I.A. 203 : A.I.R. 1947 P.C. 192 (P.C.).

Dicey says :

" There are two rules relating to these matters which have to be borne in mind and the joint operation of which gives rise to difficulty. First of all, there is the rule, which is perfectly well established and well known, that a party to an action can impeach the judgment in it for fraud. Whether it is the judgment of an English Court or of a foreign Court does not matter; using general language, that is a general proposition, *unconditional and undisputed*. Another general proposition which, speaking in equally general language, is perfectly well settled is, that when you bring an action on a foreign judgment, you cannot go into the merits which have been tried in the foreign Court."

Relying on the ruling in *Abouloof* v. *Oppenheimer*[1] and *Vadala* v. *Lawes*[2] he says that in cases of fraud bringing about a foreign judgment, the municipal Court will have to go into the very facts which were investigated and which were in issue in the foreign Court. Mr. Padmanabha Mudaliar, for the appellants in O.S.A. No. 84 of 1950, urged before us that the Full Bench judgment was already prepared and was ready before the hearing before it began, and was delivered after the hearing, fraudulently pretending that it had been prepared only after the hearing, and, so, was vitiated by fraud and should be treated as null and void and as not operating as *res judicata* even regarding the moveables. The learned Advocate-General urged before us that this point was not raised before Rajagopalan, J., and so should not be allowed to be raised before us. We agree. The only thing urged by the plaintiffs, even according to Mr. Padmanabha Mudaliar, in their affidavit dated 28th January, 1950, before Rajagopalan, J., was the following passage in the affidavit :

" One other feature which makes his judgment unacceptable is that, within 24 hours of the closing of arguments in the case I refused to appear or to be represented by Counsel, he pronounces judgment on a complicated matter and accounts, requiring days of laborious study and research, thus giving room for suspicion that the judgment was a foregone conclusion, and that the Full Bench hearing was a farce. Memorials against such an unjudicial performance have been forwarded to the authorities concerned and we are awaiting their decision and action. In these circumstances, which I beg leave of Court to prove by evidence, the said Full Bench judgment is a nullity and the rights of the parties said to have been acquired thereunder are equally null and void."

It is clear to us that that passage only mentioned a preconceived opinion by the Judges, and that it has not actually covered the point of *fraud* now raised before us, which is much wider and would have been stated in that form had that been the contention relied on, especially seeing that Dicey's rule would have covered it and invalidated the judgment. Section 13 (*d*), Civil Procedure Code, also invalidating it, as the proceedings, in which the judgment was obtained, would then be clearly opposed to natural justice. So, we cannot allow the plaintiff-appellants to raise this point before us, and reject this argument, though, we agree that fraud, if alleged and proved, will, indeed, vitiate every judgment, as held by the House of Lords in *Castrique* v. *Imrie*[3] and accepted by all Courts and those book writers.

The next argument of Mr. Padmanabha Mudaliar, for the plaintiffs-appellants, was that, as per the ruling in *Pemberton* v. *Hughes*[4] a foreign judgment would only be recognised and acted upon in England, notwithstanding any irregularity of procedure under the local law, provided the foreign Court had jurisdiction over the subject-matter and over the persons brought before it and the proceedings did not offend against *English views of substantial justice*. He urged that the clause ' opposed to natural justice ' in section 13 (*d*) would also mean ' opposed to notions of justice entertained in this Court.' He then relied on the rulings in *The King* v. *Sussex Justices* : Ex parte *Mecarthy*[5], *The King* v. *Essex Justice* : Ex parte *Perkins*[6], *Rex* v. *Divine* : Ex parte *Walton*[7] and *The King* v. *Salford Assessment Committee* : Ex parte *Ogden*[8] and urged that, as per those rulings, justice must not only be done, but must also seem to be done, and that a mere apprehension in the minds of the parties that the decision would not be delivered by a Judge impartially, and without bias or partiality, is enough to vitiate a judgment delivered by such a Judge, especially when the party had protested before the Judge himself, as here, against his hearing the case, and that, therefore, the Full Bench judgment of the Mysore High Court would be

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1. (1882) 10 Q.B.D. 295.
2. (1890) Q.B.D. 310.
3. (1870) 4 H.O.L.P. 414 (at p. 433).
4. (1899) 1 Ch. 781.
5. (1924) 1 K.B. 256.
6. (1927) 2 K.B. 475.
7. 143 Law Times 235.
8. (1937) 2 K.B.D. 1.

null and void and would not operate as *res judicata* even regarding the moveables, and that even proof of the alleged acts of bias, partiality, misconduct, preconceived notion, etc., would be unnecessary in such a case. We cannot agree. The rulings relied on by him are all *rulings of a municipal Court* about Courts subordinate to it, and simply vitiated the rulings of subordinate Courts, and *not any foreign judgments.* The learned Advocate-General rightly urged that there is a distinction in this matter between vitiating the judgments of *Courts subordinate to one's jurisdiction* on the grounds of suspected bias; interest, etc., and in vitiating the judgments of *foreign Courts.* As he urged, foreign judgments are recognised by private international law only on the principle of *comity between the nations, reciprocity, acquired rights, acquired obligations, international usage and custom,* etc., and *not as fundamental rights guaranteed by any world Constitution or world Court,* the world not having reached that stage yet. That is why, as already noticed the Privy Council in *Brijlal* v. *Govindram*[1] agreeing with the Bombay High Court, held that a foreign judgment of a competent Court, not falling within the exceptions to section 13, Civil Procedure Code, would be conclusive, even if it gave *no reasons for the judgment,* which, of course, would be unthinkable in the case of Courts subordinate to the High Court or Privy Council. That is also why the Privy Council and the Bombay High Court held in that case an Indian Court cannot go into the question of the misconduct of arbitrators appointed by a foreign Court, by allowing unauthorised persons to approach them and discuss the merits of the arbitration matter with them, to be not vitiating the foreign judgment, as it did not go to the *jurisdiction* of the foreign Court. Needless to say, the decision would have been different if the misconduct was of arbitrators appointed by a Court subordinate to the municipal Courts, and not by a foreign Court, though in *Eckersley* v. *The Mersey Docks and Harbour Board*[2] it was held that the rule which applies to a Judge or other person holding judicial office, namely, that he ought not to hear cases in which he might be suspected of a bias in favour of one of the parties does not apply to an arbitrator named in a contract, to whom both of the parties have agreed to refer disputes which might arise between them under it. The view of the Bombay High Court and the Privy Council in *Brijlal* v. *Govindram*[1] in the case of a foreign judgment, is in favour of the executors, and precludes, in our opinion, an enquiry into mere bias, interest, etc., of the Judges in a *foreign judgment.*

The learned Advocate-General urged that it is *neither expedient nor proper* to apply to judgments of foreign Courts, which may be Courts of U. S. A., United Kingdom, U. S. S. R., or other powerful foreign country, in future (and not merely of nearby Mysore, Pudukkottai, Indore or Bikaner, now part of India), now that India has attained independence and is having ambassadors in those countries and close relations with them, and that, therefore, any principle invalidating *foreign judgments* not warranted by specific rulings or by authoritative text-book writers like Dicey and Wolff, and merely resting on an alleged bias, partiality, pre-conceived opinion, procedural irregularity, or alleged misconduct of Judges, like those raised by Mr. Padmanabha Mudaliar for the plaintiffs and not recognized by any rulings, or responsible text-book writers should not be recognized, by any theory of logical extension, as that would act like a boomerang, recoil on Indian Courts and their judgments when relied on in foreign Courts to the great detriment of private international law and the worsening of relations between nations and countries. On this ground, he vigorously opposed the "logical extension" of the well-established principles of private international law, attempted by Rajagopalan, J., in directing an enquiry into the car episode and the attempt to dissuade Mr. L. S. Raju. There is force in what he says so far as the car episode is concerned. The alleged attempt to dissuade Mr. L. S. Raju for the plaintiff, if proved, will fall within the scope of well-established rules. We are not disposed to agree with Mr. Padmanabha Mudaliar in his extreme contentions. It is well settled that a mere error in procedure in a foreign Court will not affect its conclusive nature under section 13, Civil Procedure Code, provided that error in procedure

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1. (1947) 2 M.L.J. 498 : L.R. 74 I.A. 203 : A.I.R. 1947 P.C. 192 (P.C.).
2. (1894) 2 Q.B.D. 667.

does not amount to a violation of natural justice under section 13 (*d*), Civil Procedure Code, as held in *Pemberton* v. *Hughes*[1]. If a judgment is pronounced by a foreign Court over persons within its jurisdiction and in a matter with which it is competent to deal, it was held in that case that English Courts will never investigate the propriety of the proceedings of the foreign Court unless they offend against the English views of substantial justice. Of course, one of the rules of *substantial justice* all over the world is that *a man shall not be a Judge in his own cause*, and that is the basis of the ruling in *Price* v. *Dewhurst*[2], where a judgment of a Danish Court, consisting of persons interested in the property in dispute, was held to be vitiated and was disregarded by the English Court. That is also the basis of disregarding foreign judgments where a party is not given notice of the hearing of the case, or is not allowed an opportunity of representing his case to the Court. This will all be opposed to natural justice under section 13 (*d*), and will make the Court, in most cases, not a Court of competent jurisdiction also under section 13 (*a*), Civil Procedure Code.

It is, therefore, clear to us that errors in procedure, interest of slight nature (like using cars, eating marriage dinners, etc.) mere suspected bias, pungent observations of Judges at hearings, a non-liberal attitude towards requests for constituting another Bench and not hearing the case themselves, and not granting adjournments for engaging eminent Counsel, will all be *inadequate for vitiating a foreign judgment* of a competent Court, as not affecting the jurisdiction or coming under any other exception mentioned in section 13, Civil Procedure Code. The Full Bench had given its judgment regarding the moveables on the merits of the case, under section 13 (*b*). That judgment was not founded on any incorrect view of international law, or a refusal to recognise the law of British India in cases in which such law is applicable, under section 13 (*c*), it being admitted before us that the Hindu law applicable to the parties and concerning the matter is the same in Mysore State as in Madras. Under the ruling of the Privy Council in *Nataraja* v. *Subbaraya*[3], where the law is the same, the judgment of the foreign Court regarding *moveables*, over which it has jurisdiction, will be *conclusive* under section 13, Civil Procedure Code, unless vitiated by one of the exceptions in section 13, Civil Procedure Code, like being opposed to natural justice, etc.

It follows from the above discussion that we do not agree with the view of Rajagopalan, J., that a *logical extension* can be made of the well-settled principles of private international law on the point, and an enquiry into the motor car incident justified in order to show that Medappa, C.J., had so identified himself with the executors, who were alleged to have allowed him the use of the car, as to make him practically a person deciding his own cause, he having made the plaintiff's cause his own. It is not as if the plaintiffs had alleged that Medappa, C.J., had claimed the Mercedes car to be *his own* and was, therefore, not a person competent to decide on the title to the properties under section 13 (*a*). It was merely alleged that he *used the car* for himself and his wife and children. It was not even stated whether he had used the car *free or for hire*. There was *no claim* by the plaintiffs or others on Medappa, C.J., for any dues in respect of the alleged use of the car. The car itself was alleged to have been used in 1943-1945 when Medappa, C.J., was District Judge, Bangalore Cantonment, and was hearing the probate application. It was sold away in 1945 or 1946, long before Medappa, C.J., sat on this Full Bench. It is too much to say that from these facts, Medappa, C.J., would be *coram non judice*, or had identified himself with the executors and that his taking part in the Full Bench would be opposed to *natural justice*. Nor in our opinion, can the contention that Medappa, C.J. and Balakrishnayya, J., were disqualified to sit on the Full Bench by reason of previous acquaintance with the matters in dispute and forming opinions regarding the matters in dispute, come within any of the exceptions to sections 13, Civil Procedure Code, as interpreted by the Privy Council or our High Courts. Regarding Mallappa, J., nothing was alleged before us, and *he* was the

1. (1899) 1 Ch. 781.
2. (1837) 8 Simons 279 : 59 E.R. 111.
3. (1950) 1 M.L.J. 172 : L.R. 77 I.A. 33 : I.L.R. (1950) Mad. 862 (P.C.).

person who wrote the judgment of the Full Bench in question. Incidentally, that will also militate against the allegation that the judgment of the Full Bench was ready before the hearing began, as it is *this Judge*, against whom nothing is alleged who wrote the judgment, and not Medappa, C.J. or Balakrishnayya, J. However, we entirely agree with Rajagopalan, J., that the matter of the attempt to dissuade Mr. L. S. Raju from appearing for the plaintiffs, and alleged statements to him defaming the plaintiffs, will fall within section 13 (*a*) and section 13 (*b*), Civil Procedure Code, and amount to a denial of an opportunity to a party of presenting his case to the Court properly and make Medappa, C.J., *coram non judice* and vitiate the Full Bench judgment, *if proved.* We cannot agree with Mr. Padmanabha Mudaliar that a *mere allegation* to that effect, without enquiring into it, or proof of it, will do to vitiate the judgment. Allegations and apprehensions will not do to vitiate a judgment (municipal or foreign) under our law. It is one thing for a Judge himself to decide not to hear a case which the party does not want him to hear, because of alleged fears of the party that he will not get an impartial hearing and judgment ; it is quite another thing to hold a judgment to be vitiated when such a request is refused, as here. So too, it is one thing for the executors to decide not to raise the question of *res judicata* in this suit and rely on it but to prove by evidence let in in this suit, that the properties are the self-acquired properties of Ramalinga and not ancestral properties ; it is quite another thing to compel them not to raise and rely on *res judicata.* It is obvious that a party is entitled to rely on *res judicata* and burk a trial, if he can do so under the law, and many reasons will operate on his mind in deciding on his course of action. What the law allows, a Court cannot disallow. So too, *a mere statement* by a party of alleged misconduct disentitling a Judge (like Medappa, C.J.) to sit on a Full Bench on the ground of incompetency or incongruity with natural justice, will not do. As observed by *Jaimini* the Hindu expert on *Mimamsa* and Evidence, two thousand years ago, *mere assertion is not proof*, and *repeated assertions* cannot take the place of *proof.* So, Rajagopalan, J., was fully justified in holding that, even regarding the alleged attempt of Medappa, C.J., to dissuade Mr. L. S. Raju from appearing for the plaintiffs, and presenting their case to the Court, and thus disentitling him from sitting on the Full Bench, *proof was necessary* and *mere allegation or assertion would not do.*

In the end, therefore, we are of opinion that O.S.A. No. 84 of 1950 deserves to be dismissed with costs, and that O.S.A. No. 67 of 1950 deserves to be allowed in part, regarding the deletion of the enquiry ordered by Rajagopalan, J., into the *Mercedes* car incident, but has to be dismissed regarding all other findings, and we do so accordingly. The judgment of Rajagopalan, J., will be modified by deleting the enquiry into the *Mercedes* car episode, and confirmed in all other respects. In O.S.A. No. 67 of 1950, all the parties are directed to bear their own costs.

K.S. *Judgment modified and confirmed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AIYAR.

The State of Madras, represented by the Revenue Secretary .. *Appellant**

v.

North Madras Firewood Trading Company .. *Respondent.*

Madras General Sales Tax Act (IX of 1939), section 8—Commission Agent for procurement of firewood for Government for sale in ration shops—Not liable to sales tax.

Where the Government, instead of themselves buying firewood from the owners (for distribution through ration shops) gave a sort of monopoly to the respondents to procure from sellers the firewood and to supply the Government, and fixed a commission for the respondents, the respondents must be held to be merely commission agents to whom section 8 of the Madras General Sales Tax Act applied and they were not liable to pay the sales tax.

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* C. C. C.A. No. 34 of 1950. 23rd October, 1952.

Appeal against the decree of the City Civil Court, Madras, dated 16th November, 1949, in O.S. No. 933 of 1947.

The Government Pleader (*P. Satyanarayana Raju*) for Appellant.

V. V. Srinivasa Aiyangar and *N. R. Raghavachari* for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The State of Madras is the appellant before us. The appeal arises out of a suit brought by the respondents, a registered firm carrying on business in firewood, for a declaration that the demand for and levy of sales-tax on them by the State for the period ending 31st March, 1945, were illegal and unjustified and for a refund of the amount of such sales-tax paid by them. The learned Additional City Civil Judge decreed the suit, holding that the demand and levy were illegal.

The facts necessary for a disposal of this appeal may be stated briefly as the scope of the controversy in the suit lies within a narrow compass. In or about December, 1943, there was acute scarcity of firewood in the city and the Government were anxious to introduce in the city a system of rationing of firewood. For this purpose it was necessary to provide for a regular and satisfactory supply of firewood. The respondent-firm, who were engaged in firewood business, submitted to the Government that they had been carrying on the business of supplying firewood as commission agents for over 25 years, that if the Government were to get all their supplies direct from the producers it would entail them much expenditure and suggested that they may be employed to procure for the Government such quantity of firewood as the Government may require for distribution in the city. The Government apparently accepted the proposal. On 31st January, 1944, an agreement was entered into between the respondent-firm and the Commissioner of Civil Supplies, Madras, under which the respondents undertook to supply such quantity of firewood as the Commissioner may from time to time require from the private forests and topes in particular areas of Chingleput and Nellore districts. The respondents who were described as the "suppliers" were given exclusive monopoly to transport the firewood from these areas to the city. The firewood was to be supplied at prices which were fixed from time to time by the Government as the wholesale price for firewood within the city of Madras. This price was to be paid by the Collector of Madras to the suppliers. Paragraph 6 of this agreement is as follows :

"It is understood that ordinarily the suppliers will acquire the firewood by contract with the owners of the topes in the said areas . . . . . . The price fixed as the proper price for the same shall be in relation to the sale price such that the suppliers (after paying the purchase price and the expenses of cutting, transport and supply, etc.) will have such margin of profit as the Government may deem fair and proper."

In pursuance of this arrangement, the course of dealings between the three parties, *viz.*, the producers, *i.e.*, the owners of the firewood, the respondent-firm and the Government was as follows : The respondent-firm were transporting the firewood from the areas specified and collecting from the Collector, or to be more accurate from the dealers to whom the firewood was eventually consigned, the cost of firewood supplied by them, and after retaining a sum of Re. 0-13-0 per ton of casuarina and Re. 1-0-0 per ton of junglewood as their commission, paying over the balance to the sellers. It appears from the correspondence, that this rate of commission was fixed by the Government and agreed to by the owners of the firewood, *i.e.*, the sellers. When, however, the respondents attempted to deduct more than the agreed rate of commission the sellers complained to the Government and we find the Board of Revenue passing proceedings warning the respondents against charging more than the agreed and fixed commission. Subsequently, there was another agreement entered into between the State and the respondent firm on 9th October, 1944, Exhibit B-4. Though the terms of this agreement were not identical with the terms of the prior agreement, there was no change in the course of dealings between the parties. A concrete instance of such dealings is to be found in a letter

addressed by the Firewood Movement Officer, Nellore District, to the Collector of Nellore on 11th October, 1944, Exhibit A-19, wherein he states :

> "Casuarina firewood is paid for at Rs. 23-8-0 per ton delivered at Madras wharf. Of this, a sum of Re. 0-13-0 is deducted by the Agency. This commission is authorised by the Government. The net price is therefore Rs. 22-11-0 per ton."

We are not concerned with the subsequent correspondence between the Government and the respondents and the complaints which sometimes the producers were making to the Government against the unauthorised levy of more than the agreed commission by the respondents.

The respondents firm obtained a licence under section 8 of the Madras General Sales Tax Act as commission agents. They returned a turn over of Rs. 8,72,914-15-9 for the year 1944-45 and submitted that they were entitled to the exemption under section 8 of the Act. When the Sales-tax Officers demanded sales tax on this turn over, the respondents objected on the ground that they had been supplying the firewood on behalf of the owners of the firewood who were the principal sellers and they took only such commission as was fixed by the authorities. This objection was, however, overruled. The Deputy Commercial Tax Officer held that having regard to the nature of the transaction and other attendant circumstances the business of the respondents could not be considered to have been done on commission basis and hence their entire turn over was liable to sales tax. The respondents filed an appeal to the Commercial Tax Officer, Madras, but the appeal was dismissed. The appellate authority took the view that though the respondents had been taking only a sum of Re. 0-13-0 or Re. 1-0-0 for every ton of firewood supplied to the Commissioner of Civil Supplies, they really sold the firewood to the Commissioner of Civil Supplies in fulfilment of a contract entered into by them as owners and they could not therefore be treated as selling agents of the persons from whom they got the firewood ; that they were not also buying agents for the Commissioner of Civil Supplies ; and they were therefore clearly liable, as dealers, to be taxed under the Madras General Sales Tax Act. Thereupon the suit out of which this appeal arises was filed.

The application of section 8 to the respondents depends upon a determination of the nature of the concerned transactions, *i.e.*, we have to ascertain whether the respondents were buying or selling for an agreed commission on behalf of known principals. If, from the course of dealings it is clear that the respondents were buying or selling on their own behalf, then of course they will not be entitled to the benefit of the provisions of section 8. In our opinion, on the facts of the case, as to which there is no dispute, only one conclusion is possible, *viz.*, that the respondents were acting merely as commission agents of the owners of the firewood, who were the known seller-principals. Though the language of the agreement, Exhibit B-4, may, taken by itself, support the contention that the respondents were treated by the Government as the sellers, there can be no doubt that the Government never treated the respondents that way. The Government knew, and proceeded throughout, on the basis that the sellers were the persons who owned the firewood. The Government, instead of themselves buying the firewood from the owners, gave a sort of monopoly to the respondents to procure from the sellers the firewood and to supply them, *i.e.*, the Government. It was agreed, or in any event it must be taken as an implied terms of the agreement between the parties, that the respondent should get a commission, which itself was fixed by the Government. Ordinarily no doubt it is the principal who fixes the commission payable to the commission agent ; but it must not be overlooked that we are dealing with a set of circumstances out of the ordinary way. There was an emergency and the Government were acting under extraordinary powers conferred on them by emergency legislation in fixing the prices and in controlling the movement and distribution of essential commodities like firewood. That is, why we find the Government in the interests of all parties, fixing the commission payable to the respondents as agents for the owners of the firewood. The Government having proceeded all along on the assumption that all that the respondents were entitled to was commission at a fixed rate, cannot now claim to treat them as independent dealers.

We agree with the learned trial Judge's finding that the plaintiffs' dealings come within the meaning of section 8 of the Act and that therefore they are not liable to pay the tax.

The appeal therefore fails and is dismissed with costs.

K.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK AND MR. JUSTICE CHANDRA REDDY.

Pattu *alias* Kadirvelu Muthiriyan .. *Appellant.**

Penal Code (*XLV of* 1860), *section* 100—*Right of private defence—Limits.*

Merely because the stab given by the accused is a little deeper than the one caused by the deceased it cannot be said that the accused is guilty of exceeding his right of private defence. It is not correct to say that a person apprehending danger to life or grievous hurt should inflict an injury of the same nature to the assailant as was caused to him. Under section 100, Indian Penal Code, the killing of an assailant is justified when the victim of the assault apprehends either death or grievous hurt. The only restriction imposed is that the person exercising the right should not use more force than is reasonably necessary and should not inflict an injury out of all proportion to the injury with which he was threatened. Where the assailant is killed by the victim exercising his right of private defence a conviction of the victim under section 304, Indian Penal Code, is not justified and he is entitled to an acquittal.

Appeal against the Order of the Court of Session of the Trichinopoly division in S.C. No. 59 of Calendar for 1951, dated 30th July, 1951, etc.

T. S. Kuppuswami Aiyar for Accused.

The Assistant Public Prosecutor (*A. C. Muthanna*) for the State.

The Judgment of the Court was delivered by

Chandra Reddi, J.—Criminal Appeal No. 522 of 1951 is a jail appeal preferred by the first accused in Sessions Case No. 59 of 1951 against the judgment of the learned Sessions Judge of Trichinopoly, convicting him under section 304, Indian Penal Code, and sentencing him to three years' rigorous imprisonment while Criminal Appeal No. 237 of 1952 is by the State against the acquittal of the second accused in the same case. The charge against these two accused and accused 3 and 4, acquitted by the trial Court, was that all of them murdered one Ganesan on the 19th of November, 1950, at about 7 A.M.

The case for the prosecution is briefly this. There was longstanding animosity between the deceased on the one hand and accused 1 to 4 on the other and there were a number of clashes between them resulting in complaints and counter-complaints. Because of this ill-feeling between the parties, the deceased always used to carry a *bitchuva* with him.

On the morning of 19th November, 1950, when the deceased was going from his house towards the Uyyakondan river, the accused accosted him and asked him why he was collecting men to attack them. Not satisfied with this, the four accused beat the deceased with their hands. The reaction of the deceased to this was to meekly submit and to ask them to beat him further, if they so chose. Just at that time, P.W. 8 happened to pass that way when the deceased shouted out to him that the accused were beating him. P.W. 8 went away in order to fetch some help to the deceased. Meanwhile, the third accused taunted the deceased by asking him what would he do if he was beaten by him and followed this up by giving him a slap on his cheek. At once, the deceased pulled out the *bitchuva* (M.O. 1), which he was having in his waist and stabbed the third accused on the left shoulder. The first accused went to the rescue of the latter which led to the deceased stabbing the first accused over the right shoulder, the injury thus caused being $1\frac{1}{4}'' \times \frac{5}{8} \times \frac{1}{2}''$. The second accused, who happened to be nearby, in order to disable the deceased from inflicting any further injuries on the first accused caught the deceased from behind his waist. Immediately, the first accused

*Criminal Appeals Nos. 522 of 1951 and 237 of 1952. 12th September, 1952.

wrenched the *bitchuva* from the hands of the deceased and inflicted an injury on the back of the deceased, which resulted in his death. The accused, thereupon, ran away from the scene.

P.W. 8, who returned to the scene of occurrence with one Olakkan found the deceased lying dead. P.W. 4 informed his brother-in-law, P.W. 5, about this occurrence and the latter gave a report, Exhibit P-1, to the Village Munsif. Upon this, the Village Munsif sent his reports, Exhibits P-5 and P-6 to the Police and the Magistrate. The Sub-Inspector P.W. 17, on receipt of this information, reached the village at about 10-30 A.M. held an inquest and sent the body for *post mortem*. He also recovered the *bitchuva*, which was used to stab the deceased from the house of the second accused on information given by the first accused.

The plea of the accused was that it was the conduct of the deceased that was responsible for the whole incident, that on that morning when the accused met them he questioned them as to why a complaint was filed by the first accused against him and why they showed his house to the police a few days before the occurrence and that he followed it up by stabbing the third accused and that when the first accused went to the rescue of the third accused, the deceased stabbed the first accused also on the back and the latter in the exercise of his right of private defence, stabbed the deceased once.

The Sessions Judge acquitted accused 3 and 4 holding that they did not take any part in the attack on the deceased. So far as the second accused is concerned, he observed that though he caught the deceased, which facilitated the first accused giving the fatal blow, he did it only with a view to prevent the deceased from inflicting any further injuries on the first accused and there was nothing criminal in what he did. For this reason the second accused was also acquitted.

The first accused, in the opinion of the learned Judge, was guilty of an offence under section 304, Indian Penal Code, and was sentenced to three years' rigorous imprisonment. The reasons given by the learned Sessions Judge for holding him guilty under section 304, Indian Penal Code, are rather interesting. The learned Judge, after finding that the whole thing took place in a sudden fight which was unpremeditated and that the first accused did not act in a cruel or an unusual manner or take undue advantage, stated that :

> "The accused dealt a stab in the back just as the deceased had stabbed him in the back and with the same weapon. But the stab of the first accused went deeper than the stab dealt by the deceased. I consider that the 1st accused is also entitled to the benefit of exception (2)."

We do not agree with the learned Judge that merely because the stab given by the first accused is a little deeper than the one caused by the deceased, the first accused is guilty of exceeding his right of private defence. In our opinion, the first accused was entitled to cause the injury which he did in this case in the exercise of his right of private defence. It is not correct to say that a person apprehending danger to life or grievous hurt should inflict an injury of the same nature to the assailant as was caused to him. Under section 100, Indian Penal Code, the killing of an assailant is justified when the victim of the assault apprehends either death or grievous hurt. The only restriction imposed is that the person exercising the right should not use more force than is reasonably necessary and should not inflict an injury out of all proportion to the injury which he received or which he was threatened with. It must be noted here that the learned Sessions Judge found that at the time when the first accused dealt the fatal blow, he was not out of danger as the deceased might get back the *bitchuva* into his hands and also that there was no time for him to think coolly before acting. In these circumstances, we think that the conviction of the first accused under section 304, Indian Penal Code, is not justified and he is entitled to an acquittal. We, therefore, set aside the conviction and sentence passed on the appellant.

As regards the appeal filed by the State, we do not think that the order acquitting the second accused calls for interference. We have found that the first accused was justified in inflicting the injury on the deceased as he was acting in the exercise of

his right of private defence. It should be observed that when the second accused caught the deceased from behind, it was only with a view to prevent the deceased from inflicting any further injuries on the first accused. Hence the second accused cannot be said to have committed any crime in doing so. He did it at great risk to his own person with intent to prevent the deceased from using the *bitchuva* more freely and causing the death of the first accused. We do not think that this deserves any condemnation. On the other hand we feel that he acted quite rightly in the circumstances of the case and that he does not deserve to be branded a criminal and sent to jail. We are told that the second accused, who is a postman, has been dismissed after the case was filed against him. In our opinion there are no grounds so far as this case is concerned to merit his dismissal or for not restoring him to his position. We think, he does not deserve to be punished.

In the result Criminal Appeal No. 237 of 1952 is dismissed.

Criminal Appeal No. 522 *of* 1951 *allowed and*
Criminal Appeal No. 237 *of* 1952 *dismissed.*

K.S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI NAYUDU.

Chokkammal and two others .. *Applicants**

v.

Sambandam Chetty and another .. *Defendants.*

Civil Procedure Code (V of 1908), *Order* 21, *rule* 52—*Scope—Payment out of moneys ordered by Court though actual payment has not yet been made—Attachment of such amount by other creditors—Permissibility.*

When once an order for payment out is made there cannot be any subsequent attachment of the moneys, even though the moneys continue to remain in Court and no cheque has been issued to the party in whose favour the payment out order has been made. Where however the judgment-debtor against whom an order for attachment has been made and the person in whose favour the order for payment out has been made are one and the same person, it cannot be said that the moneys still in the custody of the Court cannot be attached. In such a case the subsequent attachment can be given effect to.

E. R. Krishnan for Applicants.

S. Amudachari and *G. Natarajan* for Defendants.

The Judgment of the Court was delivered by

Krishnaswami Nayudu, J.—This reference raises a question of some importance which comes up frequently for consideration on the Original Side of the High Court.

In and by the decree in Civil Suit No. 423 of 1949, the applicant herein, who is the third plaintiff in the suit, became entitled to a sum of Rs. 3,800-10-0 out of the entire sum standing to the credit of that suit. He asked for payment out of a sum of Rs. 3,753-2-0 being the balance he was entitled to, after retaining a sum of Rs. 47-8-0 being the cost of stamps for engrossing the decree. On 20th April, 1951, the learned Master passed an order ordering payment out. An order of attachment of the moneys standing to the credit of the applicant in this suit was issued by the Court of Small Causes in execution of a decree obtained by one Krishnamurthi Ayyar against the applicant in Small Cause Suit No. 361 of 1951 and the said order of attachment was received in this Court on 26th April, 1951. Attachment was effected by this Court, and the original order was returned after service. Though the attachment was subsequent to the order for payment out, a

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*Civil Suit No. 423 of 1949. 9th November, 1951.
Application No. 1659 of 1951.

cheque was issued in favour of the applicant in pursuance of the order of the learned Master dated 20th April, 1951, after deducting the amount for which the attachment was issued. Objection having been taken to it, the matter is posted before me for orders.

The contention on behalf of the applicant is that once an order has been made for payment out there is no fund in Court available for attachment and that the order of attachment must have been returned with the endorsement that there is no fund in Court available for attachment. In support of this contention, the view expressed by *Kumaraswami Sastri, J.*, on 27th January, 1926, in Civil Suit No. 774 of 1923 in almost similar circumstances is cited which is as follows :—

"I think the correct rule is that, where a Court orders payment to be made, that order must be treated as if the payment had actually been made at the date of the order so as to prevent subsequent attachment on the money in Court. There is always a certain interval between the passing of the order and its issue and the payment being made on the strength of that order and I do not think that the party should be prejudiced simply because there is delay. When he has actually got the order the proper course is to treat the order of payment as an actual payment so far as the rights of third persons to attach are concerned."

A different view was taken by *Rajagopalan, J.*, in Application No. 794 of 1951, in Civil Suit No. 181 of 1948, by his order, dated 26th February, 1951. In that case, in pursuance of a decree passed on 30th January, 1951, in terms of the memorandum of compromise certain payments were directed to be made out of the funds in Court to the parties to the compromise decree. Subsequent to the date of the decree, two attachments were received on 7th February, 1951. A similar reference was made to *Rajagopalan, J.*, and the learned counsel for the applicant in whose favour payment out order had been made relied upon the judgment of *Kumaraswami Sastriar, J.*, in Civil Suit No. 774 of 1923, dated 27th January, 1926. The attaching decree-holder in Civil Suit No. 181 of 1948 took out application No. 794 of 1951 for directions to retain the attached amount, *viz.*, Rs. 1,604-4-0 and send it to the transmitting Court. With reference to the respective contentions of the applicant in whose favour payment out has been ordered and the attaching decree-holder, the learned Judge observed as follows :—

"From the records I find that there was an order of attachment issued by the Registrar, Court of Small Causes, to attach a sum of Rs. 1,604-4-0 and that the attachment was executed and the warrant returned. Mr. D. R. Krishna Rao for the respondent contends that since there was an order passed by this Court that the amount including this amount of Rs. 1,604-4-0 should be paid over to the respondent and since that order was long prior to the attachment effected at the instance of the applicant, the money vested in the respondent on the date of the order of this Court, and that there was therefore nothing still in the custody of the Court which could be attached under Order 21, rule 52, Civil Procedure Code. But I cannot be called upon to pronounce upon the soundness of this contention or otherwise in these proceedings. The attachment was ordered by the Court of Small Causes, and the validity of that attachment will be for the Court of Small Causes to decide. It is perfectly open to the respondent to move the competent Court to decide whether the attachment which had been ordered to be effected and which has been effected in pursuance of that order is valid or not. If the attachment is set aside by the attaching Court, then the money will be available for payment out to the respondent. But I am unable to accept the contention of Mr. D. R. Krishna Rao for the respondent, that it is for this Court to decide whether the order of attachment issued by the Court of Small Causes was validly executed or not."

This view of *Rajagopalan, J.*, apparently proceeds on the language of the proviso to Order 21, rule 52, Civil Procedure Code, which provides that :

"Where such property is in the custody of a Court any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court."

The proviso to Order 21, rule 52 comes into operation only after there has been an attachment of the fund in Court. Only when there is a fund in Court which would be available for attachment in pursuance of an order issued by anotther Court, the claim relating to the fund attached should properly be raised before the Court which issued the order of attachment. Could it, however, be said in the present case that, after an order for payment out had been made on 20th April,

1951, there was any fund in Court available for attachment under the order issued by the Court of Small Causes? Under Order 21, rule 52, if the property to be attached is in the custody of any Court the attachment shall be made by a notice to such Court requesting that such Court may hold the property subject to further orders of the Court from which the notice is issued.

The sum of Rs. 3,753-2-0 ordered to be paid out was no doubt in the custody of the Court on 26th April, 1951, when the order of attachment was received. But it is not sufficient if the property (here money) was in the custody of the Court. It must have been in the custody of the Court to the credit of the judgment-debtor, *i.e.*, the third plaintiff-applicant, or it must be shown that the money was held on his behalf. In view of the order for payment out made on 20th April, 1951, from the date of the order the money must be deemed to have been held on behalf of the person in whose favour the order for payment out has been made. Further, once an order for payment out has been made, it must be treated that the property in these moneys has passed to the person in whose favour the order has been made; and from that date of the order, the person, who has got the payment out order in his favour, becomes the owner of the moneys, notwithstanding that he may not have got actual possession of the same. As was observed by Kumaraswami Sastri, J., once an order for payment out has been made, it must be treated that payment out has been actually made and whatever amount that was ordered to be paid out, belonged to him and it cannot be made available to the claims of third parties to that amount. There can therefore be no valid attachment of these moneys subsequent to the order for payment out. On the passing of the order which is the judicial act, the property is transferred to the person in whose favour the order is made and the issue of a cheque or payment of the money is a ministerial act and any delay in the performance of which could not prejudice the right of the person who has obtained the order for payment out. For instance suppose an immovable property has been in the possession of a receiver appointed by Court, it must be treated to be in the Court's custody. If during the possession of the property in the hands of the receiver, an order for sale is made by the Court and the sale in favour of any purchaser is confirmed and if after such confirmation and before actual delivery of possession of the property by the receiver to the purchaser an attachment order of the property is received, it cannot be said that the property could be validly attached. The circumstance that the possession continued to be with the receiver notwithstanding that the sale in favour of the third party has been confirmed, would not be sufficient to treat the property as the property of the parties on whose behalf the receiver was appointed. The correct and also the reasonable view that could be taken in such cases is that when once an order for payment out is made, there cannot be any subsequent attachment of the moneys, even though the moneys continue to remain in Court and no cheque has been issued to the party.

In the present case the difficulty, however arises in view of the judgment-debtor in the Small Cause suit against whom an order for attachment has been made and the applicant in whose favour the order for payment out has been made are one and the same person, *viz.*, the third plaintiff. If the applicant in the application for payment out is a third party, the principle that is now laid down will be applicable and the third party—applicant would be entitled to the amount once the order for payment out is made, notwithstanding any order of attachment subsequently received on the ground that the funds in Court ceased to be held on behalf of the judgment-debtor under the order of attachment. It is, however, stated by Mr. E. R. Krishnan, learned Counsel for the applicant, that the two persons are different, the decree in the Small Cause Court being against the third plaintiff in his capacity as the executor of Chokkammal, while the payment out order here was in his favour. But a reference to the decree in this Court shows that he was added as an executor of the first plaintiff Chokkammal and the payment out order could only be in his capacity as executor of Chokkammal, who is the first plaintiff in this suit. There is certainly therefore no difference between his position in this suit and his position in the Small Cause suit. So, in this case, the property,

though it ceases to be in the custody of the Court, does not cease to be held by the Court on behalf of the judgment-debtor in the Small Cause suit, who is the very same person as the applicant. The amount would therefore stand to the credit of the applicant—third plaintiff. It cannot therefore be contended that the judgment-debtor who is the third plaintiff-applicant has ceased to have any interest in the amount and therefore the amount cannot be attached. I am of the opinion that in this case the attachment must be given effect to and the payment out could only be in respect of such amount that is available after deducting the amount mentioned in the warrant of attachment.

K.S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Rajaratna Vadugunatha Pillai .. *Petitioner**

v.

Srinivasa Raghava Aiyangar and others .. *Respondents.*

Court-fee—Suit by quondam minor to set aside various alienations made at different times by the guardian—Court-fee is payable separately on the several alienations—Court-Fees Act (VII of 1870), section 17—Applicability.

Where the guardian of the plaintiff when he was a minor alienated the minor's properties in favour of various defendants at various times and places, and the quondam minor sues to set aside such alienations it cannot be said that the cause of action or the subject-matter as against all the defendants is the same. Accordingly court-fee must be paid on the several alienations separately.

Parameswara Pattar, In re, (1930) 59 M.L.J. 469 : I.L.R. 54 Mad. 1 (F.B.) and *Thangaswami Pillai* v. *Dhanabagiammal*, (1949) 2 M.L.J. 565, distinguished.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the Order of the Subordinate Judge's Court of Kumbakonam, dated 19th April, 1951, in O.S. No. 16 of 1946.

N. Rajagopala Aiyangar for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*) for the State.

The Court delivered the following

JUDGMENT.—The order of the learned Subordinate Judge directing court-fee to be paid on the several alienations separately is correct. This is a case where the fourth defendant as guardian of the plaintiff when he was a minor alienated minor's properties in favour of various defendants at various times and places. It cannot be said that the cause of action as against all the defendants is the same. But it is contended on behalf of the petitioner that the subject is the same and therefore section 17 of the Court-fees Act would not be applicable. What that section says is that where a suit embraces two or more distinct subjects court-fee has to be paid separately on the value of each subject and not on the aggregate value of all the reliefs. There is no doubt that each of the alienations is a different subject and court-fee has to be paid on them separately. The learned advocate for the petitioner relies upon two decisions of this Court in *Parameswara Pattar, In re*[1] and *Thangaswami Pillai* v. *Dhanabagiammal*[2]. Neither of these cases is one to set aside the alienations in favour of different persons at different times and in my opinion these cases cannot apply.

This civil revision petition is dismissed with costs. The petitioner will be given two months' time from this date to pay the court-fee.

K.S. *Petition dismissed.*

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* C.R.P. No. 584 of 1951. 16th October, 1952.

1. (1930) 59 M.L.J. 469 : I.L.R. 54 Mad. 1 (F.B.).
2. (1949) 2 M.L.J. 565.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

The Public Prosecutor .. .. *Appellant**

v.

P. V. Audinarayana Chetty .. .. *Respondent (Accused).*

Criminal Procedure Code (V of 1898), *section* 417—*Charges for offences under Penal Code (XLV of* 1860), *section* 161 *and Prevention of Corruption Act (II of* 1947), *section* 5—*Conviction for offence under section* 161, *Penal Code by trial Court and acquittal on appeal—Appeal by State against acquittal under Penal Code, section* 161 *only—Powers of appellate Court to review the evidence at large and come to its own conclusion—Limits.*

Where an appeal is preferred by the State under section 417, Criminal Procedure Code, unlike in a Criminal Revision Petition preferred by a private party against an acquittal, it is open to the High Court to review at large the evidence upon which an order of acquittal is founded and the Code makes no distinction between an appeal from an acquittal and an appeal from a conviction. In an appeal from an acquittal if the Court thinks the lower Court has taken an erroneous view of the evidence it has no jurisdiction to refuse to convict. In reviewing at large the evidence, the court has to consider such matters as (i) the views of the trial Judge as to the credibility of the witnesses, (ii) the presumption of innocence in favour of the accused, (iii) the right of the accused to the benefit of any doubt and (iv) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. Where the lower appellate court without considering these matters has reversed the conviction and sentence of the trial Court, the High Court can itself review the evidence and arrive at its conclusion.

Though the trial Court acquitted the accused in respect of an offence under the Prevention of Corruption Act (II of 1947) and convicted the accused only under section 161, Indian Penal Code and the lower appellate Court acquitted the accused; in an appeal against such acquittal under section 161, Indian Penal Code, only the whole evidence can be looked into for the purpose of finding out whether a charge under section 161, Indian Penal Code, has been made or not for the limited purpose permissible under sections 5 to 9, 11, 14, and 15 of the Indian Evidence Act.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid Respondent (Accused) by the Court of Session of Chittoor Division in Criminal Appeal No. 36 of 1950, preferred against the Order of the Assistant Sessions Judge, Chittoor Division, in S.C. No. 17 of 1950.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the Appellant.

V. Rajagopalachari and *S. Ramachandra Ayyar* for the Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal preferred against the acquittal by the learned Sessions Judge of Chittoor Division Mr. M. A. Azeem reversing the conviction under section 161, Indian Penal Code (*i.e.*, receiving illegal gratification by a Supervisor of Highways) and sentence of one year's rigorous imprisonment awarded by the learned Assistant Sessions Judge of Chittoor Division Sri D. R. Venkatesa Ayyar, M.L., in S.C. No. 17 of 1950.

[His Lordship then sets out the facts elaborately the gist of which was as follows : The accused a Supervisor in the Highways Department, Madras State, was alleged to have been taking bribes as fixed *mamools* from various contractors and on one of such contractors moving in the matter a trap was laid and marked currency notes given by the contractor were recovered from the accused by the Police. There was also other evidence. The accused was charge-sheeted for offences under sections 5 (i) (*a*) and (*d*) and 5 (2) of the Prevention of Corruption Act (II of 1947) and also for an offence under section 161, Indian Penal Code. The Stationary Sub-Magistrate after a preliminary enquiry committed the accused to the Sessions and the accused was tried by the Assistant Sessions Judge.]

The learned Assistant Sessions Judge has after thoroughly analysing the evidence with great care in an elaborate judgment come to the conclusion that the offence regarding the first charge, *viz.*, habitual taking of bribes was not made out because of two reasons, namely, that in regard to these payments these contractors stood in the position of accomplices or willing payers of the bribes and

* Criminal Appeal No. 102 of 1951. 27th February, 1952.

that therefore their evidence required independent corroboration in regard to each of them and that in this case, though he accepted the testimony of the four contractors themselves there was such independent corroboration only as regards the testimony of P.W. 7 in regard to the transaction covered by Exhibit P-5 and that therefore the charge under the Prevention of Corruption Act II of 1947 failed as this solitarily corroborated instance would be inadequate to support the finding of habitual bribe-taking which is contemplated under section 5 (1) (*a*) and (2) of Act II of 1947. In regard to the offence under section 161, Indian Penal Code, the learned Assistant Sessions Judge agreeing with the unanimous opinion of the four assessors in the case came to the conclusion that the charge had been brought home by reliable and corroborative evidence against this accused and convicted him thereunder and sentenced him to one year's rigorous imprisonment.

In appeal, the learned Sessions Judge of Chittoor Mr. M. A. Azeem came to the conclusion that the charge under section 161, Indian Penal Code, had not been brought home to the accused and acquitted him. The State of Madras has thereupon preferred this appeal.

Before discussing the evidence in this case I must briefly point out that this being an appeal preferred by the State under section 417, Criminal Procedure Code, unlike a criminal revision petition preferred by a private party against an acquittal, it is open to the High Court to review at large the evidence upon which an order of acquittal is founded and the code makes no distinction between an appeal from an acquittal and an appeal from a conviction. In an appeal from an acquittal if the Court thinks the lower Court has taken an erroneous view of the evidence it has no jurisdiction to refuse to convict : see *Emperor* v. *Moti Khoda*[1]. This Court has laid down that in reviewing at large the evidence upon an order of acquittal, the High Court has to consider such matters as (i) the views of the trial Judge as to the credibility of the witnesses, (ii) the presumption of innocence in favour of the accused, (iii) the right of the accused to the benefit of any doubt, and (iv) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses : *Sheo Swarup* v. *Emperor*[2]. But in this case we have the opposite, *viz*., the lower appellate Court without considering these matters has reversed the conviction and sentence of the learned Assistant Sessions Trial Judge. And yet, bearing in mind these considerations laid down by this Court I shall review the evidence and arrive at my conclusion.

The other point to be borne in mind is that in regard to two charges based upon several acts of bribe-taking including the receiving of illegal gratification of Rs. 300 the subject-matter of the trap, the trial Court itself on the ground that adequate corroboration was not forthcoming, acquitted the accused in respect of offences under Act II of 1947 and convicted him under section 161, Indian Penal Code. This appeal to the High Court has been preferred only against the acquittal under section 161, Indian Penal Code, and in such a case can the whole evidence be looked into for the purpose of finding out whether the charge under section 161, Indian Penal Code, has been made out or not? This has been answered in the affirmative in a decision of this Court in In re *Rangarao*[3]. In that case an accused was charged for the offence of cheating effectuated by means of forgery, that is to say, for offences under sections 420 and 467, Indian Penal Code. The accused was acquitted in regard to cheating and convicted for forgery. On appeal a reference was made to the High Court by the Sessions Judge and the High Court answered the reference as follows :

"The whole evidence is before the Court. He is entitled if he thinks fit, to express his disagreement with the findings of fact in the acquittal although there being no appeal the acquittal still stands. He is not in the least bound by any finding of facts in the acquittal. The fact that the trial Judge was able to acquit of cheating and convict of forgery makes evident that this is not a case when on precisely the same facts a man is tried for two offences. . . . . The reference will be returned to the learned Sessions Judge with these observations. He can come to his conclusion with regard to the appeal against the conviction under section 467 quite untrammelled by the fact

1. (1923) 26 B.L.R. 183. I.L.R. 56 All. 645 (P.C.).
2. (1934) 67 M.L.J. 664 : L.R. 61 I.A. 398 : 3. (1945) 1 M.L.J. 183.

that the acquittal under section 420 of the Indian Penal Code stands. It may act as a plea in bar to further trial of cheating but does not in the least act as a plea in bar with regard to the facts in so far as they are relevant in considering the charge of forgery."

But fortunately in this case the evidence for the offence under section 161, Indian Penal Code, stands apart from and was not the subject-matter of adjudication in respect of the offences under Act II of 1947. This was so because the habitual bribe-taking constituted the preliminary part and the offence under section 161, Indian Penal Code, constituted the sequel as a result of the trap to catch this habitual bribe-taker. Therefore, it is not necessary in this case to consider or make use of the evidence on which the acquittal of the trial Court was based though I need not point out it can be made use of wherever relevant and proved in the adjudication of this offence under section 161, Indian Penal Code, for the limited purpose permissible under sections 5 to 9, 11, 14 and 15 of the Indian Evidence Act.

There is no dispute regarding the recovery of the three one-hundred rupee currency notes from the person of the accused at the bus stand by P.W. 15, and the only point of dispute is according to the prosecution these notes had been given by P. W. 1 as an illegal gratification in the circumstances set out by them and in order to catch the accused red-handed and according to the accused P.W. 1, Rangiah Naidu gave him the three currency notes at the Koneri near the bus stand in the following circumstances : The explanation of the accused is that when he met Rangiah Naidu the latter expressed inability to leave Tirupathi to Puttur on account of a case in Court and that Rangiah Naidu's son-in-law would be waiting at the Puttur bus stand expecting Rangiah Naidu with money and that Rangiah Naidu requested him to take the three currency notes to be handed over to his son-in-law and that the accused undertook the errand with a view to help the coolies so that the work would not suffer and that at that time one T. Ramakrishnayya (D.W. 1) was in his company.

On a review of the entire circumstances of the case I have come to the conclusion that the prosecution had brought home beyond reasonable doubt that the three currency notes recovered from the accused had been received by him as an illegal gratification as alleged by the P.W.s and in the circumstances set out by them and incidentally that the explanation which the accused has put forward to give an innocent origin for his possession is thoroughly false. I shall now set out my reasons.

The first and foremost point in regard to this explanation by the accused to be borne in mind is that it is a deliberate after-thought and that it was not forthcoming when these three currency notes were recovered from him. This is the evidence of the concerned persons. P.W. 1 states :

" At the direction of the Deputy Superintendent of Police the accused gor down from the bus.

Q.—What did the Deputy Superintendent of Police ask the accused ?

A.—Where is the three hundred rupee notes that Rangiah Naidu (pointing to me) gave you as bribe ? (On objection as to admissibility I hold that the portion of the sentence ' as bribe ' is inadmissible since it is presumption of commission of guilt and invites confession from accused either by express statement or conduct). Accused took out two money purses from his inside coat pocket. From an old money purse M.O. 2 he took out three (one hundred) hundred-rupee currency notes and handed them over to the Deputy Superintendent of Police. He asked Rághava Reddy to verify if the numbers on the currency notes agreed with the numbers in Exhibit P-4 . . . . . . The accused was arrested and taken to his house by the Deputy Superintendent of Police."

P. W. 2 Dr. Simham gave similar evidence and stated :

" The Deputy Superintendent of Police asked the accused to produce the money (portion relating to ' given as bribe ' held inadmissible). The accused stood without talking for a while. He then unbuttoned his coat and took out two purses. . . . ."

P.W. 4 mentioned :

" At Deputy Superintendent of Police's direction he (accused) got down the bus and the Deputy Superintendent of Police asked him where the money he took was (' as bribe ' directed to be omitted being inadmissible). Accused got a fright and after five minutes unbuttoned his coat etc., etc."

P. W. 15 the Deputy Superintendent of Police stated similarly. There was no suggestion in cross-examination of these witnesses about the present explanation

given by the accused. Now, if really this accused had received the three hundred rupee currency notes as a good samaritan to be handed over to the son-in-law of P.W. 1 for disbursement to coolies so that the work would not suffer and public interest would be safe as he says, would he not have pointed out P.W. 1 then and there and told all these people present that the money was given to him by P.W. 1 in the circumstances now mentioned by him. Therefore this explanation is a deliberate after-thought evolved later to suit the exigencies of the evidence.

This accused has examined one Ramakrishnayya as D.W. 1 in support of his explanation. The evidence of that witness was disbelieved by the trial Court, *viz.*, the experienced and learned Assistant Sessions Judge who has analysed the evidence of D.W. 1 in paragraph 31 of his judgment. The evidence of this witness has to be read in order to be disbelieved as a tissue of falsehoods. He is stated to have met this accused by chance and accompanied him to the bus stand. His answers in cross-examination showed that he was not acquainted with this accused at all except on that occasion and in any case excepting as a co-passenger in the buses at some earlier period. It is unlikely that such a person would go along with this accused in the manner mentioned by him. Then the learned Assistant Sessions Judge has not believed him in regard to his having pretended to have remembered this incident of the handing over the three currency notes because he was not present at the subsequent development in the bus stand and which would have fixed in his mind the giving of the currency notes by P.W. 1 to the accused. On the other hand he is said to have left on his own work without going to the bus stand. This witness had no special reason for noting either the handing over of the currency notes or the remembering of the alleged conversation. This witness stated that the accused put the currency notes in a money purse of a particular description which detail on comparison with the actual purse in which the notes were recovered is found to be false. Therefore the learned Assistant Sessions Judge who had the advantage of seeing this witness in the box has declined to accept his testimony and this is a circumstance entitled to weight. I have no doubt that this witness has been giving perjured testimony suborned to on that behalf by the accused.

This need not detain us further because it is not for the accused to prove his innocence and it is for the prosecution to prove his guilt. It is on that footing that we shall examine the rest of the evidence.

In regard to the handing over of the three currency notes as a bribe in pursuance of a trap, we have first of all evidence to show that from this very contractor this accused has been taking other amounts not to speak of other contractors P.Ws. 7, 11 and 12, and whose evidence has not been disbelieved at all. In the case of this P.W. 1 this accused has been pressing him to cough up the money promised to him. This evidence comes from not only P.W. 1, but also from P.W. 5. This P.W. 5 testifies :

"Fifteen days before the accused was arrested he had asked to bring P.W. 1 Rangiah Naidu. I could not find P.W. 1 when I first visited his house. I went a second time and met him in the house. P.W. 1 Rangiah Naidu replied saying that he would come. I went away but he did not come to see the supervisor (accused). About 4 days before arrest accused again wanted P.W. 1 to come. I met P.W. 1 and told him. He asked me to tell the accused that he could not be found."

This evading by Rangiah Naidu to meet the accused, and on the other hand his making arrangements to get the accused trapped, is consistent only with his giving the money to the accused as a bribe in pursuance of a trap and not being handed over to his son-in-law for disbursement to coolies.

Then we have evidence of the petitions put in by P.W. 1 and Venkataraju and the corroboration evidence of the Divisional Engineer Mr. N. T. Gnanaprakasam (P.W. 13) and the Deputy Superintendent of Police P.W. 15 about the bribe-givings to the accused, the accused's pressure to increase the mamool to 10 per cent. and the evading of the payment on the last bills cashed by P.W. 1 and Venkataraju. These facts show beyond doubt that this P. W. 1 could not have employed the accused to take the three currency notes for disbursement to the coolies by his son-in-law.

In fact, the accused's own version is that on account of bitter ill-feelings between himself and this P.W. 1 and other contractors they have foisted this false case on him. If that were so would this accused, as pertinently pointed out by the learned Assistant Sessions Judge, have allowed himself to be saddled with the three hundred-rupee notes by one of his ill-wishers out to ruin him according to the accused and would he have agreed to be the messenger with such tell-tale sum of money.

There is further clear evidence that at that stage no contract work of this Rangiah Naidu was going on at Puttur. In fact, if such work had been going on necessitating the disbursement of a large sum of money this supervisor would have easily proved it. On the other hand the only bit of evidence on which the accused relies is that of P.W. 5 :

"No work on the road was being done during the period of the arrest of the supervisor. Some 10 or 15 coolies were doing stone-blasting work."

In such circumstances would a sum of Rs. 300 be given and that too in the shape of hundred-rupee currency notes for disbursement to coolies and this accused imagining that thereby he would be promoting public interest and non-stoppage of work in progress. This story will not appeal even to the meanest intelligence as a plausible one.

There is no evidence whatsoever that at any time before this, accused has acted as a messenger like this for transmission of money either for this Rangiah Naidu or for any other contractor. The learned Assistant Sessions Judge has pertinently pointed out :

"Nor is it possible to believe that the son-in-law would have been waiting, for witness Rangiah Naidu himself had arranged to go and pay and if the difficulty arose only on account of an unexpected detention in Tirupathi. If no work was actually going on for some days before that date and no wages were therefore due to coolies it is not likely that Rangiah Naidu would have represented that wages had to be paid to the coolies, nor is it probable or likely that accused would have believed any such representation."

In these circumstances the learned Assistant Sessions Judge after a careful and exhaustive enquiry and after bearing in mind the relevant principles laid down by several High Court decisions regarding corroboration, came to the conclusion that the accused received the three currency notes as gratification for himself and that the prosecution in such a case was entitled to ask for a presumption under section 4 of Act II of 1947, *viz.*, that the gratification was a motive or reward such as was mentioned in section 161, Indian Penal Code, and agreeing with the opinion of the four assessors in this case, convicted the accused under section 161, Indian Penal Code.

The learned Sessions Judge has based his acquittal for the reasons given by him in paragraph 11 of his judgment as follows. The first reason is :

"The evidence of P.W. 1 cannot be sufficient for basing a conviction unless it is corroborated in material particulars by other reliable evidence. There is no direct evidence to corroborate P.W. 1 as to the conversation between him and the accused before or at the moment of delivery of M.O. 4 series to the accused."

In advancing this reason the learned Sessions Judge seems to consider that corroboration must consist in the shape of direct oral testimony and which it need not be as laid down in the leading decision of *R.* v. *Basker Ville*[1]. We can look to circumstantial details for such corroboration and how such corroborative evidence has been forthcoming in this case has been indicated above. In fact, the learned Sessions Judge himself very considerably weakens his own reasoning by adding :

"It is true that three one hundred rupee currency notes could not have been used in payment of wages without being changed into smaller currency notes or coins."

The second reason is :

"It cannot be said to be improbable that in order to make the accused take the money and put it into his pocket P.W. 1 made the representations alleged in the accused's statement and that the accused believed the representation and agreed to oblige P.W. 1."

1. (1916) 2 K.B. 658.

This is merely begging the question because the point to be decided itself is when the accused put the money into his pocket did he receive it as a bribe or as an obliging messenger. The third reason given is :

"The fact that P.W. 1 made accusations against the accused in his (P.W. 1's complaints Exhibits P-1, P-2 and P-3 prior to the occurrence cannot by itself be sufficient corroboration of P.W. 1's evidence about the occurrence."

Why not? The learned Sessions Judge does not indicate why he considers this to be so. The fourth reason is of the same variety, *viz.*, that P.W. 1's avoiding to meet the accused is not corroboration. Why not? Once again the learned Ssssions Judge does not indicate. The fifth reason of the learned Sessions Judge is :

"It seems to me that the trap was closed rather too early without giving the accused an opportunity to commit himself by his subsequent dealings with M.O. 4 series. If P.W. 1 had paid the money inside the bus or if the accused had been watched after the payment until he reached Puttur and began to deal with M.O. 4 series some clear corroborative evidence might have been available."

I am unable to follow this reasoning of the learned Sessions Judge who seems to think that he would have arranged the trap more cleverly than the C.I.D. officer, and in any event I am unable to see its relevance or logic. Sixthly, the learned Sessions Judge makes much of the immaterial discrepancy, *viz.*, that when the Deputy Superintendent of Police asked the accused to hand up the money taken as bribe one witness said that the accused got a fright and after five minutes unbuttoned his coat and another witness said that he stood motionless without talking for a while and a third said that he did not tremble. But it is curious that the learned Sessions Judge does not say that on account of these discrepancies he disbelieves these witnesses but merely contents himself with the remark "There are discrepancies" without finding whether they are more apparent than real or cut at the root of the prosecution story. It has been laid down by several High Courts that immaterial discrepancies of this nature do not affect the conclusion one way or the other. See *Emperor* v. *Narotam*[1], *Ghanshyam Singh* v. *Emperor*[2] and *Mahla Singh* v. *Emperor*[3]. It is not surprising that this inconsequential discussion of the evidence of the learned Sessions Judge has been wound up with an observation from the decision in *Hector Huntley* v. *King Emperor*[4], wholly overlooking that the learned Assistant Sessions Judge himself, an officer of great experience and conssiderable ability, has scrupulously weighed the evidence and come to his conclusion in the light of the principles laid down in this very decision. On the other hand it is the treatment accorded to the evidence by the learned Sessions Judge which recalls the dissatisfaction expressed by one of the eminent Judges of this Court the late Mr. Justice Sri V. Bhashyam Aiyengar in *Ramaswami Goundan* v. *King Emperor*[5] about over-subtlising of the law of the country for the protection of corrupt officials and not for the furtherance of justice.

I have therefore not the slightest hesitation in setting aside the acquittal by the learned Sessions Judge of Chittoor, and I find the accused guilty of the offence under the second charge, *viz.*, section 161, Indian Penal Code, and convict him thereunder and sentence him to one year's rigorous imprisonment.

K.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Hoode Venkataramanayya .. *Petitioner**

v.

J. M. Lobo .. *Respondent.*

Contract Act (*IX of* 1872), *section* 23—*Payment for the sake of continuing as* shanbogue *and in consideration of the previous incumbent not reverting to that post—Is opposed to public policy.*

Where money was paid by the petitioner to the mother of *X* only for the sake of continuing as *shanbogue* and in consideration of *X* not reverting to that post the *kaikada* in respect of that amount suffers from the infirmity mentioned in section 23 of the Contract Act as being opposed to public

1. (1922) 24 Cr.L.J. 770 : 74 I.C. 434.
2. (1927) 29 Cr.L.J. 239 : 107 I.C. 305.
3. (1930) 32 Cr.L.J. 528 : 130 I.C. 410.
4. (1944) 1 M.L.J. 503 : 1944 F.C.R. 262 : I.L.R. 23 Pat. 517 (F.C.).
5. (1903) 14 M.L.J. 226.

* C.R.P. No. 135 of 1950. 24th October, 1952.

policy. It is practically trafficking in office and as such void. *Swaminatha Aiyar* v. *Muthuswami Pillai*, (1907) 17 M.L.J. 252: I.L.R. 30 Mad. 530, relied on.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Subordinate Judge's Court, South Kanara, dated 16th April, 1949, in S.C.S. No. 4 of 1949.

M. K. Nambiar for Petitioner.

M. L. Nayak and *K. Vittal Rao* for Respondent.

The Court delivered the following

JUDGMENT.—The learned Subordinate Judge finds as a question of fact that the petitioner paid Rs. 550 to the mother of D.W. 1 only for the sake of continuing as shanbogue and in consideration of D.W. 1 not reverting to that post. On that finding the question is whether the Kaikada suffers from the infirmity mentioned in section 23 of the Contract Act as being opposed to public policy. It has been held in *Swaminatha Aiyar* v. *Muthuswami Pillai*[1], that an undertaking to pay money to a public servant to induce him to retire and thus make way for the appointment of the promisor is practically trafficking in office and as such void under section 23 of the Contract Act. Here a sum of money was paid to the mother of the previous shanbhogue in order that the shanbhogue should not revert to the office. The decision in *Swaminatha Aiyar* v. *Muthuswami Pillai*[1] applies to the facts of the present case. But Mr. Nambiar contends that this defence was not raised in the reply to the lawyer's notice. Even if that is so, when once it is found on the evidence which cannot be disputed here, that the money was paid as consideration for an object, which is opposed to public policy, it cannot be said that the learned Judge erred in dismissing the suit. The civil revision petition is therefore dismissed with costs.

K.S. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE RAJAGOPALAN.

V. Krishnamurthy and another .. *Appellants**

v.

The Ceded District Auto Transport Co., Ltd., Kurnool, represented by its Managing Director at Kurnool and others .. *Respondents.*

Motor Vehicles Act (IV of 1939), *section* 64 (a) *and* (b) *and section* 68—*Rules under—Rule* 208—*Bus route extended—Permit—Order of Regional Authority—Appeal against order to Central Road Traffic Board —Whether appeal lies —Whether Government has jurisdiction to revise order.*

On the questions whether there was a right of appeal to the Central Road Traffic Board against an order of the Regional Transport Authority refusing to grant the application of the appellants to extend the route of their bus service, and whether the Government's order passed in the exercise of their revisional jurisdiction confirming the order of the Central Road Traffic Board was void,

Held, that under clause (*b*) of section 64 of the Motor Vehicles Act and rule 208 of the Rules framed by Government under the Act by virtue of section 68 of the Act, the order of the Regional Transport Authority will not be appealable.

The rule-making authority would not be within their powers in conferring a new right of appeal expressly or by implication. Rule 208, therefore could not be construed in such a manner as to transgress limits of the power of the rule-making authority as laid down and circumscribed in section 68 of the Act. *R. and W. Paul, Ltd.* v. *Wheat Commission*, (1937) A.C. 139, applied.

The application of the procedure applicable to the disposal of the applications for grant of a permit to cases of variation of the condition of a permit, does not even by implication carry with it a right of appeal.

Case-law reviewed.

The Central Road Traffic Board had no jurisdiction to entertain the appeal against the order of the Regional Transport Authority, nor was the Government right in confirming the order in its exercise of revisional jurisdiction.

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1. (1907) 17 M.L.J. 252: I.L.R. 30 Mad. 530.

* L. P. A. No. 160 of 1951. 8th September, 1952.

Appeal under clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Subba Rao, dated 12th September, 1951, and made in W. P. No. 282 of 1951.

T. R. Srinivasan and *V. V. Raghavan* for Appellants.

The Government Pleader (*P. Satyanarayana Raju*) and *S. Obul Reddi* for Respondents.

The Judgment of the Court was delivered by

Satyanarayana Rao, J.—This Letters Patent Appeal is against the judgment of our learned brother, Subba Rao, J., setting aside the order of the Government and that of the Central Road Traffic Board and allowing writ petition No. 282 of 1951 to quash the orders. The only question, that was debated before him and now before us, is whether there was a right of appeal to the Central Road Traffic Board against the order of the Regional Transport Authority dated 31st August, 1950, refusing to grant the application of the appellants to extend the route of the bus service from Atmakur to Velgode. The learned Judge held that the appeal was incompetent, that therefore the order of the Central Road Traffic Board extending the permit in favour of the appellants to Velgode was without jurisdiction, and that the order passed by the Government in the exercise of their revisional jurisdiction confirming the order of the Central Road Traffic Board was also void.

In order to appreciate the contention that the appeal to the Central Road Traffic Board is incompetent, it is necessary to state a few relevant facts. The appellants, two in number, were running buses along the route Kurnool-Atmakur from the year 1944 under permits granted by the Regional Transport Authority in that year. In 1949, it was decided by the Regional Transport Authority to extend the route to Velgode, *i.e.*, a place beyond Atmakur. Applications for that route were filed by the first respondent and also by the appellants. On 16th June, 1950, the Regional Transport Authority called for objections to grant the permits for the extended route to the applicants. By an order of 28th June, 1950, the Regional Transport Authority granted a permit to the first respondent to run his buses up to Velgode. The application by the appellants, however, was not disposed of till 31st August, 1950, when the Regional Transport Authority made an order rejecting their application. The order of 28th June, 1950, granting a permit to the first respondent was not carried on appeal by the appellants. The order made on their application was the subject-matter of an appeal to the Central Road Traffic Board, and notwithstanding the objection of the first respondent that the appeal was incompetent, the Central Road Traffic Board, overruling the objection, set aside the order of the Regional Transport Authority and granted permits in favour of the appellants also, extending their service to Velgode. The first respondent carried the matter unsuccessfully in revision to the Government, and thereafter he filed a writ petition, which was disposed by Subba Rao, J. As stated above, he allowed the application and held that the appeal to the Central Road Traffic Board by the appellants against the order of the Regional Transport Authority dated 31st August, 1950, was incompetent.

In this appeal by the appellants their learned counsel, Mr. Bhashyam, adopted a line of argument which was not the one adopted by him before Subba Rao, J. It is unnecessary therefore to deal in detail with the reasoning of the learned Judge by which he arrived at the conclusion, that the appeal to the Central Road Traffic Board was incompetent. It will be sufficient if we deal in this appeal with the arguments as presented before us by Mr. Bhashyam, the learned counsel for the appellants. He attempted to maintain his position that the appeal was competent by relying upon clauses (*a*) and (*b*) of section 64. He further relied on rule 208 of the Rules framed by the Government under the Motor Vehicles Act by virtue of the power conferred upon the Provincial Government by section 68 of the Act. His contention based on the said rule was that the applications made by the appellants should be treated as applications for the grant of a permit as laid down by that

Rule, and if so treated, the refusal to grant the extension should be deemed to be a refusal to grant a permit, which order would be appealable under section 64 (*a*) of the Act. It is therefore necessary to deal with these contentions in the order in which they were stated above.

Learned Counsel of the appellants relied upon the second part of clauses (*a*) and (*b*) of section 64. It is as well that the two clauses (*a*) and (*b*) are quoted here :

" (*a*) Any person aggrieved by the refusal of the Provincial or a Regional Transport Authority to grant a permit or by any condition attached to a permit granted to him, or

(*b*) aggrieved by the revocation or suspension of the permit or by any variation of the conditions thereof may within the prescribed time and in the prescribed manner, appeal to the prescribed authority, who shall give such person and the original authority an opportunity of being heard."

Rule 147 lays down that :

" An appeal under section 64 of the Act against an order of the Road Traffic Board or against an order of the Secretary of the Board, shall lie to the Central Board within thirty days of the date of despatch of the order appealed against."

Rule 148 deals with appeals to the Government against an original order of the Central Board or against an order of the Secretary of that Board, with which we are not concerned. It was contended that the refusal to grant the application of the appellants amounted in substance to a refusal to alter the original condition of the permit restricting the route from Kurnool to Atmakur and declining to extend it to Velgode. The appellants therefore, it is claimed, are aggrieved by the condition attached to the permit that the route should be restricted to Kurnool-Atmakur, which was the effect of the decision of the Regional Transport Authority. If the order is so construed, it is urged that under the second part of section 64 (*a*) the appellants can be treated as persons aggrieved by the condition attached to the permit granted to them, and that the order will therefore be appealable. This argument, in our opinion, proceeds on an erroneous view of the clause in question. The clause, in our opinion, applies only to cases where by reason of the existence of a condition attached to a permit the grantee of the permit was aggrieved by that condition at the time of the grant of the permit. If he was so aggrieved, it was open to him to have the condition removed or modified by an appeal under clause (*a*) of section 64. It is not claimed on behalf of the appellants that the condition that the route should be restricted to Kurnool and Atmakur was, at the time it was imposed, prejudicial to them, and that they were aggrieved by it. Under section 48-A of the Act it is open to the Regional Transport Authority when granting a permit to attach a condition that the stage carriages shall be used only on specified routes or in a specified area. In 1944 when the original permit was granted to the appellants the only route that was declared was the route between Kurnool and Atmakur, and they were perfectly satisfied at the time of the grant of the permit with the condition or restriction that they should be confined to the route between Kurnool and Atmakur, and they were not in any manner aggrieved by such condition. It is, however, now curiously claimed that by subsequent events, the proposed extension of the route to Velgode and the restriction or the condition in the original permit act adversely to their interests, and that therefore they are aggrieved by the condition now. It is not, in our opinion, the intention of the Legislature when it enacted clause (*a*) to give a right of appeal in such circumstances. The right of appeal is to be exercised within the period of thirty days from the date of the order granting the permit, under rule 147, and the grievance if any, regarding the condition that exists in the permit must be one that existed by the date of the grant of the permit. It is not a grievance which accrued or which arose subsequent to the grant of the permit, that can be agitated in an appeal. According to the learned Advocate if the grievance is by reason of subsequent events long after the grant of the permit it does not matter. To read the clause in the manner suggested by the learned Advocate for the appellants would be to put upon it an unnatural construction not intended by the Legislature when that clause was enacted. The contention therefore that the right of appeal could be justified under clause (*a*) of section 64 cannot be upheld.

The next argument was that when the Legislature conferred a right of appeal under clause (*b*) to a person aggrieved by any variation of the conditions of the permit, it implied and carried with it also a right of appeal in a case where the Regional Transport Authority refused to vary the conditions of the permit. The power to vary the conditions of a permit, it was argued, carried with it the power to refuse to vary the conditions in other words, to reject the application for variation or alteration. In support of his argument learned counsel relied strongly upon two decisions, one of the Federal Court and the other of this Court, both of which related to the right of appeal under the Civil Procedure Code against an order refusing to appoint a receiver. Under the present Order 43, rule 1, clause (*s*) an order under rule 1 or rule 4 of Order 40 except an order under the proviso to sub-rule (2) of rule 4 is appealable. When we turn to rule 1 of Order 40, the orders contemplated therein are an order appointing a receiver or removing any person from the possession or custody of the property, an order committing the same to the possession, custody or management of the Receiver and an order conferring upon the receiver the powers enumerated in clause (*d*) of rule 1 of Order 40. In none of these orders is an order refusing to appoint a receiver included expressly. It was however ruled by the Federal Court in *Rayarappan* v. *Madhavi Amma*[1], in an appeal against a decision of this Court that when the Code refers to the power to appoint a receiver, it includes within it the power of removal of a receiver as a matter of construction of the rule, bearing in mind section 16 of the General Clauses Act. It was therefore held that though the Legislature did not specifically and expressly refer to an order removing a receiver as appealable, such order was made appealable by adopting the rule of construction enacted in section 16 of the General Clauses Act. Though no express reference is made in the earlier decision of the Full Bench in *Venkitasami* v. *Stridhavamma*[2], to section 16 of the General Clauses Act, the reasoning of the learned Judges in that case is more or less on the same lines, namely, that as a matter of interpretation of sections 503 and 588 of the Code of Civil Procedure then in force (the Code of 1882) the power to appoint carried with it also the power to refuse to appoint, and therefore both orders were appealable, though the latter order was not expressly mentioned either in section 503 or section 588. In our opinion, these decisions and the reasoning underlying them do not at all help the appellants and support their argument. No general rule of construction of the kind invoked and applied in the decision of the Federal Court is available to support the interpretation now sought to be placed upon the second part of clause (*b*). No doubt, an application to vary the conditions of a permit may be granted or refused, but the Legislature for reasons best known to itself, thought fit to make an order which varies the conditions of the permit alone appealable. If one may attempt to find the reason, it seems to be this: If the original conditions of the permit were not such as would be prejudicial to the grantee, he would accept the permit; if not, he would have carried the matter in appeal to the Central Road Traffic Board under clause (*a*) of section 64 within the time prescribed by rule 147. If he did not carry the matter in appeal, it must be presumed that he was satisfied with those conditions. If, however, at any later stage those conditions are varied by the concerned authority to the detriment of the grantee of the permit, it is but legitimate and reasonable that he should be given a right of appeal to have the matter agitated in a higher forum. There is no reason to allow a right of appeal if the conditions are not varied, because so long as the permit lasts, those conditions will continue to attach to the permit, particularly as the grantee did not feel aggrieved at the time of the grant of the permit by the existence of those conditions in the permit. That is the reason why we think no right of appeal was conferred by the Legislature in cases where the variation was refused. The analogy, therefore, of the decision of the Federal Court and of this Court in *Venkitasami* v. *Stridhavamma*[2], cannot be extended to the present case, and we are therefore unable to accept the argument of the learned counsel for the appellants based on the interpretation of the latter part of clause (*b*) of section 64.

1. (1949) F.C.R. 667: (1950) S.C.J. 567 (F.C.). 2. (1886) I.L.R. 10 Mad. 179 (F.B.).

Reliance was strongly placed on rule 208, which lays down the procedure to be followed in applications to vary the conditions of the permit. That rule consists of two parts and reads as follows:

> "Rule 208. (*a*) Upon application made in writing by the holder of any permit, the Transport Authority may, at any time, in its discretion, vary the permit or any of the conditions thereof subject to the provisions of sub-rule (*b*).
>
> (*b*) If the application is for the variation of the permit by the inclusion of an additional vehicle or vehicles or if the grant of variation would authorize transport facilities materially different from those authorised by the original permit the Transport Authority shall deal with the application as if it were an application for a permit."

The argument is that the application for variation by reason of this Rule should be treated as an application for a permit and the refusal to grant it is a refusal to grant a permit, which order is appealable under section 64-A of the Act. In other words, the argument amounts to this, that by implication a right of appeal is conferred by this Rule against orders refusing to vary the conditions of a permit. There are very many difficulties in the way of accepting this argument. In the first place, it is well-settled law that a right of appeal is a substantive right and not a matter of procedure and should be created or conferred expressly by a statute. It cannot be inferred by implication. In the very illuminating speech of the Lord Chancellor (Lord Westbury) in the case in *The Attorney-General* v. *Sillem and others*[1], the learned Lord Chancellor expressed thus:

> "The creation of a new right of appeal is plainly an act which requires legislative authority. The Court from which the appeal is given, and the Court to which it is given must both be bound and that must be the act of some higher power. It is not competent to either tribunal, or to both collectively, to create any such right. Suppose the Legislature to have given to either tribunal, that is, to the Court of the First Instance, and to the Court of Error or Appeal respectively, the fullest power of regulating its own practice or procedure, such power would not avail for the creation of a new right of appeal, which is in effect a limitation of the jurisdiction of one Court, and an extension of the jurisdiction of another. A power to regulate the practice of a Court does not involve or imply any power to alter the extent or nature of its jurisdiction."

In the well-known case of the Judicial Committee, *Colonial Sugar Refining Company* v. *Irving*[2], it was pointed out by Lord Macnaghten that a right of appeal was a substantive right and not a mere matter of procedure, for the learned Lord observed at page 372:

> "It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

Rule 208, in term, does not purport to confer a right of appeal; it purports to lay down the procedure applicable to applications for the variation of the conditions of a permit. It has been pointed out already that the substantive provision in the Act conferring a right of appeal in certain specified cases does not include within it a right of appeal against an order refusing to vary the conditions of a permit. If the rule in question does not in terms confer a right of appeal against an order refusing to vary the conditions of a permit, can it be said that it impliedly confers such a right? As has been pointed out above, a right of appeal must be expressly conferred by a statute and cannot be inferred by implication. It is not within the competence of the rule-making authority constituted under section 68 of the Act to confer a new right of appeal not recognised or granted by section 64 of the Act. The Legislature would not have intended by implication, if from the language of section 69 it could be implied at all, to have conferred a power on the rule-making authority to enlarge and extend the scope of section 64, so as to confer a right of appeal not recognised by section 64. As has been rightly pointed out by the learned Government Pleader in the course of the arguments, all that section 68 lays down with reference to appeals is that in clause (*j*) of sub-section (2) of that section it is stated that the rule-making power extends to indicate the authorities to whom, the time within which and the manner in which the appeals may be made. This

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1. (1864) 10 H.L. 704, 720.
2. (1905) A.C. 369.

does not in terms confer a power to extend the right of appeal in cases not governed by section 64 of the Act. It was claimed, however, on behalf of the appellants by Mr. Bhashyam that the generality of the language in clause (1) of section 68 might be construed as implying such a power for section 68 (1) states :

"A Provincial Government may make rules for the purpose of carrying into effect the provisions of this Chapter,"

the Chapter in which the provision relating to the right of appeal, section 64, is also included. From such a language a power to lay down by rules and confer a right of appeal cannot be inferred is gatherable from the decision of the House of Lords in *R. & W. Paul, Ltd.* v. *The Wheat Commission*[1]. The by-law there was made by the Wheat Commission under the Wheat Act of 1932. The power to make by-laws therein was conferred among other grounds for giving effect to the provisions of the Act. Notwithstanding the generality of such a provision it was held by the House of Lords that by-law No. 20 made by the Wheat Commission in 1933 excluding the application of the Arbitration Act, 1889, to arbitration proceedings contemplated by by-law No. 20 was *ultra vires*. Lord Macmillan in his speech at page 154 observed :

"The Arbitration Act is a Statute of general application and it confers a valuable and important right of resort to the Courts of law. To exclude its operation from an arbitration is to deprive the parties to the arbitration of the rights which the Act confers. When a public general statute provides for the reference of disputes to arbitration it is to be presumed that it intends them to be referred to arbitration in accordance with the general law as to arbitrations, with all the attendant rights which the general law confers. I do not think that when Parliament enacts by one statute that disputes under it are to be referred to arbitration it can be presumed to have empowered by implication the abrogation of another statute which it has enacted for the conduct of arbitration. Rather the contrary. If this is intended, express words to that effect are in my opinoin essential, and there are here no such express words. I am accordingly of opinion that the Wheat Commission exceeded their powers when they made a by-law that every dispute as to whether any substance is flour should be determined by an arbitration to which the Arbitration Act should not apply. I have only to add that the by-law must, in my opinion, be condemned as a whole and that it cannot be solved by the excision of the objectionable provision, which is not a severable but a vital part of the by-law."

These observations of the learned Lord apply with equal force to the present case, unless the statute by its enacting provisions has expressly conferred a right of appeal. The rule-making authority would not be within their powers in conferring a new right of appeal expressly or by implication. It therefore follows that rule 208 cannot be construed in such a manner as to transgress the limits of the power of the rule-making authority, which have been laid down and circumscribed by section 68 of the Act.

In *The Attorney-General* v. *Sillem and others*[2] already cited, by the 26th section of the Queen's Remembrancer's Act (22 and 23 Vict., C. 21) the Chief Baron and two or more Barons of the Court of Exchequer were empowered to make all such rules and orders as to the process, practice and mode of pleading on the Revenue Side of the Court and also to extend, apply or adapt any of the provisions of the Common Law Procedure Act, 1852 and the Common Law Procedure Act, 1854, and any of the rules of pleading and practice on the plea side of the said Court to the Revenue Side of the said Court. In exercise of this power the Chief Baron and two other Barons of the Court of Exchequer purported to confer a right of appeal, and the power was sought to be justified by placing reliance on section 26 of the Act. Notwithstanding the very wide language employed in that section of making rules and orders as to the process, practice and mode of pleading on the Revenue Side of the Court it was held by the House of Lords that the Chief Baron and the two Barons of the Court of Exchequer had no power of authority to confer a right of appeal where it did not otherwise exist.

"These rules"

said Lord Westbury, Lord Chancellor at page 725,

"are so many legislative enactments purporting to create a new jurisdiction in the Court of Exchequer Chamber and House of Lords, and prescribing the mode in which such a new jurisdiction

1. (1937) A.C. 139. 2. (1864) 10 H.L. 704.

shall be exercised. It is simply an incorrect use of language to call such enactments provisions respecting the process, practice, or mode of pleading in the Court of Exchequer; but unless they can be properly and strictly so denominated, there is not, in my opinion, any authority to make such rules conferred by the 26th section of the Act in question."

The application therefore of the procedure applicable to the disposal of the applications for grant of a permit to cases of variation of the conditions of a permit does not even by implication carry with it a right of appeal, assuming that otherwise the rule-making authority had the power to create a new right of appeal which, as already stated, did not, in fact, exist under section 68. The reliance therefore placed by Mr. Bhashyam on rule 208 in support of the right of appeal cannot be justified by authority or by principle.

Strong reliance was placed by learned counsel for the appellants on the decision of the House of Lords in *National Telephone Company, Ltd.* v. *Postmaster-General*[1]. It is a well-recognised principle established by authority that if a new power or new jurisdiction is conferred upon a Court which is regulated by a Code containing the procedure as well as a right of appeal, the exercise of that new jurisdiction by that Court will carry with it the ordinary incidents of procedure applicable thereto as well as the general right of appeal from its decisions. It is this principle that is illustrated by the decision in *National Telephone Company, Ltd.* v. *Postmaster-General*[1]. The same principle was again reiterated by the Judicial Committee in a very recent case which went up on appeal from this Court in *Adaikappa Chettiar* v. *Chandrasekhara Thevar*[2], a decision under Madras Act IV of 1938. Lord Simonds in delivering the judgment stated at page 513 the principle in these terms:

"The true rule is that where a legal right is in dispute and the ordinary Courts of the country are seized of such dispute the Courts are governed by the ordinary rules of procedure applicable thereto and an appeal lies, if authorized by such rules, notwithstanding that the legal right claimed arises under a special statute which does not in terms confer a right of appeal—see *Secretary of State for India* v. *Chellikani Rama Rao*[3] and *Hem Singh* v. *Mahant Basant Das*[4]."

It is difficult to see how this principle would help the appellants. This is not a case where to an existing Court a new jurisdiction has been added by the Act. The Act, it must be mentioned, is a self-contained Code, and creates new rights and also provides for the adjudication of the disputes arising in respect of such rights. In such a case the remedy provided by the Statute alone must be followed as pointed out by the Judicial Committee in *Secretary of State for India* v. *Mask & Co.*[5], quoting from Willes, J.'s judgment in *Wolverhampton New Waterworks Company* v. *Hawkesford*[6]:

"Where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it . . . . . With respect to that clause it has always been held, that the party must adopt the form of remedy given by the statute."

In order to determine whether a right of appeal on the facts of the case exists or not, one has to look to the provisions contained in section 64 of the Act, and if a party claiming a right of appeal is not able to bring himself within any of the clauses enumerated in section 64 he has no right of appeal. If the jurisdiction had been conferred upon an ordinary Civil Court to adjudicate upon disputes of the nature contemplated by the Act without providing a right of appeal in the Act itself, the position would have been different. Probably to such a situation the principle of the decisions in *National Telephone Company, Ltd.* v. *Postmaster-General*[1] and *Adaikappa Chettiar* v. *Chandrasekhara Thevar*[2], may be applied, but such is not the situation in the present case. The mere fact that in the last part of rule 208 (*b*) the Transport Authority is directed to deal with the matter *as if it were an application for a permit* does not carry with it by implication even a right of appeal, as if it was a refusal to grant a permit within the meaning of section 64 (*a*) of the Act.

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1. (1913) A.C. 546.
2. (1948) 1 M.L.J. 41: L.R. 74 I.A. 264: I.L.R. (1948) Mad. 505 (P.C.).
3. (1916) 31 M.L.J. 324: L.R. 43 I.A. 192: I.L.R. 39 Mad. 617 (P.C.).
4. (1936) L.R. 63 I.A. 180: I.L.R. 17 Lah. 146 (P.C.).
5. (1940) 2 M.L.J. 140: L.R. 67 I.A. 222: I.L.R. (1940) Mad. 599 (P.C.).
6. (1859) 6 C.B. (N.S.) 337: 141 E.R. 486.

For these reasons we agree with the learned Judge that the Central Road Traffic Board had no jurisdiction to entertain the appeal against the order of the Regional Transport Authority dated 31st August, 1950. The decision appealed against is correct, and this Letters Patent Appeal must therefore be dismissed with costs.'

Advocates fee Rs. 100 one set.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Special Original Jurisdiction.]

PRESENT :—MR. JUSTICE SUBBA RAO.

R. Pushpam and another ... *Petitioners**

v.

The State of Madras represented by the Secretary, Local Administration Department, Fort St. George, Madras and another .. *Respondents.*

Madras District Municipalities Act (V of 1920), section 43—Scope—Allotment of reserved seat—Duty of Government to 'consult' the Municipal Council—"Consult"—Interpretation, section 351-B, Municipalities Act—If bars High Court's power to issue writs.

Under section 43 of the Madras District Municipalities Act allotment of reserved seats to any ward in a Municipal election can only be made after consulting the municipal council. The statutory condition of consulting was conceived in public interests and expressed in clear terms. It is therefore the duty of the High Court to ensure that there is a full and fair compliance with the statutory condition. The Court will have to scrutinise in each case whether the requisite consultation has taken place, having regard to the substance of the events. The words "consult" implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct or at least a satisfactory solution. Such a consultation may take place at a conference table or through correspondence. The form is not material but the substance is important. It is necessary that the consultation shall be directed to the essential points and to the core of the subject involved in the discussions. The consultation must enable the consultor to consider the pros and cons of the question before coming to a decision. A person consults another to be elucidated on the subject-matter of the consultation. A consultation may be between an uninformed person and an expert or between two experts. The final decision is with the consultor, but he will not generally ignore the advice except for good reasons. In the case of a public authority directed to perform a duty in consultation with another authority which is qualified to give advice in respect of that duty, though the final order is made and the ultimate responsibility rests with the former authority, it will not and cannot be a performance of duty if no consultation is made, and even if made, is only a formal compliance with the provisions.

Under section 43 of the District Municipalities Act the consultation referred in sub-section (1) must be read distributively. The local Government shall consult the municipal Council for dividing the municipality into wards and also shall consult the municipality for determining the wards in which the seats, if any, reserved under sub-section (3) of section 7 shall be set apart. If so read, the consultation also must be with reference to the allotment of the reserved seats to the particular wards. [It was found that there was no consultation as to allotment of reserved seat in a ward and therefore it was illegal.]

Section 351-B of the Madras District Municipalities Act cannot affect the power of the High Court to issue suitable writs under Article 226 of the Constitution of India. Under Article 245 of the Constitution the power of the Parliament or the Legislature of a State to make laws is subject to the provisions of the Constitution. So long as Article 226 stands in the Constitution, neither the Parliament nor the Legislature of a State can make laws depriving or limiting the power of the High Court to issue writs.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to G.O. Ms. No. 1544, Local Administration Department, dated 29th July, 1952, from the Secretary to Government Local Administration Department, Fort St. George, Madras, regarding the reservation of seats for women for wards 2 and 12 of the Arupppukottai Municipality.

S. Mohan Kumaramangalam and *Messrs. Row and Reddy* for Petitioners.

The Government Pleader (*P. Satyanarayana Raju*) for the State.

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* Writ Petition No. 648 of 1952. 6th October, 1952.

The Court made the following

ORDER.—This is an application under Article 226 of the Constitution of India for issuing a writ of *certiorori* to call for the records and quash the order, dated 29th July, 1952, of the the first respondent, the State of Madras. The first petitioner is the Secretary of the Progressive Women's Association, Aruppukkottai; the second petitioner is a Municipal Councillor of the Arupukkottai municipality. The elections to the said council are now in progress. Under the programme of elections issued by the second respondent Commissioner of the municipality, the last date to file nominations is the 6th and 8th September, 1952 and the date of the polling is fixed on the 6th October, 1952. The municipality is divided into 24 wards with 28 councillors; one reserved seat for women is allotted to Ward No. 2 and another to Ward No. 12. The said allotment was made by the order of the Government, dated 29th July, 1952. The petitioners seek to get that order quashed for the reasons *inter alia* that it is vitiated by *mala fides* on the part of the Government and also on the ground that the Government did not comply with the provisions of the District Municipalities Act in issuing the said order.

The contention of the learned counsel for the petitioners that the Government did not comply with the provisions of section 43 of the District Municipalities Act may be taken up first. Section 43 reads:

"For the purposes of election of councillors to a municipal council, the State Government after consulting the municipal council, may, by notification

(*a*) divide the municipality into wards;

(*b*) determine the wards in which the seats, if any, reserved under sub-section (3) of section 7 shall be set apart; and

(*c*) declare for whom such seats are reserved".

Under section 7 (3) the local Government may in their discretion by notification reserve seats for women and determine the number of such seats. The Government accordingly determined to give two seats for women and allotted the said reserved seats to Wards Nos. 2 and 12. Under section 43 such allotment of the reserved seats can only be made after consulting the municipal council. The statutory condition of consulting was conceived in public interests and expressed in clear terms. It is therefore the duty of this Court to ensure that there is a full and fair compliance with the statutory condition. The question therefore is whether the Government consulted the municipal council before determining the wards in which the said seats were set apart. This turns upon the construction of the words "after consulting" in the section. The word "consult" is so familiar that it often eludes the grasp of easy and exact definition. In the Law Lexicon by P. Ramanatha Ayyar it is stated as follows:

"Consultations always require two persons at least; deliberations may be carried on either with a man's self or with numbers; an individual may consult with one or many; assemblies commonly deliberate; advice and information are given and received in consultations; doubts, difficulties, and objections are started and removed in deliberations. Those who have to co-operate must frequently consult together; those who have serious measures to decide upon must coolly deliberate".

The word "consult" was subject of a judicial scrutiny in *Fletcher* v. *Minister of Town Planning*[1]. The question arose in connection with an application taken out for quashing the order made by the Minister for Town and Country Planning. The Minister designated an area of land as the site of a proposed new Town. It was contended that the requirements of the New Towns Act, 1946, had not been complied with in relation to the making of the order, in that there was no "consultation" within the meaning of section 1 (i) of the Act between the Minister and the local authorities before the making of the order designating the area of land in question as the site of the proposed new town. On the facts the learned Judge held that there was the requisite consultation, but in dealing with the question, at page 500 the learned Judge observed:

1. (1947) 2 A.E.L.R. 496.

"The word 'consultation' is one that is in general use and that is well understood. No useful purpose would, in my view, be served by formulating words of definition. Nor would it be appropriate to seek to lay down the manner in which consultation must take place. The Act does not prescribe any particular form of consultation. If a complaint is made of failure to consult, it will be for the Court to examine the facts and circumstances of the particular case and to decide whether consultation was, in fact, held. Consultations may often be a somewhat continuous process and the happenings at one meeting may form the background of a later one."

It is clear from the aforesaid observations that the Court will have to scrutinise in each case whether the requisite consultation has taken place, having regard to the substance of the events. The word "consult" implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct, or at least, a satisfactory solution. Such a consultation may take place at a conference table or through correspondence. The form is not material but the substance is important. It is necessary that the consultation shall be directed to the essential points and to the core of the subject involved in the discussions. The consultation must enable the consultor to consider the *pros* and *cons* of the question before coming to a decision. A person consults another to be elucidated on the subject matter of the consultation. A consultation may be between an uninformed person and an expert or between two experts. A patient consults a doctor; a client consults his lawyer; two lawyers or two doctors may hold consultations between themselves. In either case the final decision is with the consultor, but he will not generally ignore the advice except for good reasons. So too in the case of a public authority. Many instances may be found in statutes when an authority entrusted with a duty is directed to perform the same in consultation with another authority which is qualified to give advice in respect of that duty. It is true that the final order is made and the ultimate responsibility rests with the former authority. But it will not, and cannot be, performance of duty if no consultation is made, and even if made, is only in formal compliance with the provisions. In either case the order is not made in compliance with the provisions of the Act. Having regard to the aforesaid observations let me now consider the correspondence which ended in the order made by the Government. On 27th June, 1952, the first respondent wrote to the Municipality intimating their proposal to divide the Aruppukkottai municipality into 24 electoral wards and also to reserve two seats for women and allot the same to Wards Nos. 5 and 12. The Chairman, Municipal Council, was also requested to place the above proposals at an urgent meeting of the council within two weeks. He was also informed that any suggestions which the Municipal Council may have to make before the expiry of three weeks would be considered by the Government. On 9th July, 1952 the Municipal Council passed a resolution recommending to the first respondent that the two seats for women be reserved in Wards Nos. 5 and 7 respectively instead of Wards Nos. 5 and 12 as suggested by the Government. The letter of the Chairman of the Municipal Council sent to the three councillors who had dissented from the proposal of the Council, a copy of which was sent to the Government, gives the reasons for preferring Wards Nos. 5 and 7 instead of 5 and 12. It reads:

"the allotment of a woman's seat to Ward No. 12 as now proposed would mean allotting both the women's seats to a single community, the Devangar Community, which is already the biggest single community in the municipality resulting in the distribution of the wards on an unfair basis. Besides this legitimate claim for a woman's seat the Nadar Community has a more reasonable claim to representation of the women in this town because the Nadar women are more than 75 per cent educated and under the auspices of their Lady's Association containing more than 200 members they are taking a leading part in all the activities in this town, which are calculated to further the interests of women educationally and socially. I consider that for this important reason also the Nadar Community deserves to have a woman's seat. The ward committee and the council took this aspect also into consideration in allotting one of the women's seats to Ward No. 7".

The reason given by the Municipality for suggesting a modification of the proposal made by the Government was that if the Government's proposal was carried out, the two women's seats would be captured by women belonging to the Devangar Community and the woman of the Nadar Community would be deprived of their right to be represented in the council. The Government did not accept the proposal of the municipality but instead the two seats for women were reserved in Wards Nos. 2 and 12.

Relying upon the aforesaid correspondence, learned counsel for the petitioners argued generally that though the Government went through the formality of a consultation, they did not, in fact, consult the municipality. It was said than an authority consulting another should at least give reasons for the proposals so that the other may give its considered opinion in regard to the proposals made, for any proposal unaccompanied by such reasons could not afford any opportunity to the other to advice for or against the proposal. It is true that the giving of reasons by the Government would enable the municipality to scrutinise them and offer advice or counter-proposals. But I cannot say that the procedure adopted is not "consultation" in respect of the matters referred within the meaning of the section. The Government sent their proposals. Though the Government did not disclose their mind by giving reasons, nothing prevented the municipality from making their suggestions in respect of the allotment of the reserved seats to Wards Nos. 5 and 12. They could give reasons, as they had given in this case, why the proposal was not conducive in the interests of the women voters and how it could be suitably modified. The Government and the municipality had a "consultation" in respect of the allotment of reserved seats for women of Wards Nos. 5 and 12. The Government wanted to allot to Ward Nos. 5 and 12; the municipality, for reasons given, suggested they should be allotted to Ward Nos. 5 and 7. It is therefore manifest that the Government consulted the municipality in respect of Ward No. 12, and though the municipality did not agree, they allotted the reserved seat to that ward. So far as Ward No. 12 is concerned, the provisions of section 43 have been complied with. But I find it very difficult to say the same in respect of the allotment of the reserved seat to Ward No. 2. Learned Government Pleader contended that the Government consulted the municipality in respect of the division of the municipality into wards and the allotment of the reserved seats to the different wards and it is not necessary that they should have consulted the municipality in respect of the suitability of the allotment of a reserved seat to a particular ward. To put in other words, his argument was that a general consultation would be in compliance with the provisions of the Act and the fact that the allotment of a woman's seat to Ward No. 2 was not referred to the municipality could not invalidate the allotment. This argument, in my view, is not only contrary to the provisions of section 43 but defeats the purpose for which the said section was enacted. Under section 43 the consultation referred in sub-section (i) must be read distributively. The local Government shall consult the municipal council for dividing the municipality into wards and also shall consult the municipality for determining the wards in which the seats, if any, reserved under sub-section (3) of section 7 shall be set apart. If so read, the consultation also must be with reference to the allotment of the reserved seats to the particular wards. If the Government proposed Ward No. 5 for the allotment of a reserved seat and after consulting the municipality in respect of that proposal, alloted the same to Ward No. 2, it is impossible to hold that the Government consulted the municipality in determining the wards for alloting the reserved seats. If the Government asked the municipality to send their proposals in tespect of all the wards for allotment of reserved seats and thereafter allotted a reserved seat to a particular ward, it may perhaps be argued on which question I do not express my opinion that the Government has consulted the municipality; but where, as in this case, the attention of the municipality is focussed only to a particular ward and their advice in respect of that ward obtained, I find it very difficult to hold that the Government consulted the municipality in respect of the allotment of the seat to a different ward. I therefore hold that the Government in contravention of the provisions of section 43 (*b*) did not consult the municipality and, in respect of Ward No. 2, therefore, the said allotment is illegal.

Learned counsel for the petitioners then contended that the Government in allotting the reserved seats to Ward Nos. 2 and 12 were actuated by *mala fides*. It was said that in the elections for these two wards held in 1948 the successful candidates were both from the Congress Party and therefore the present Congress Government allotted those two reserved seats to women so that their party candidates might be selected. In my view there is not even a slender basis for this grave

allegation. The fact that Congress candidates were elected in the year 1948 is not a guarantee that the candidates of the same party would be elected in the year 1952. Further, it is not the case of the petitioners in the affidavit that the Congress candidates were elected only for these two wards. Nor is it suggested that in these two wards alone they had an overwhelming majority, whereas they had lost or scraped through in other wards. Assuming that the Congress was successful in these two wards in 1948, it is impossible to hold from that fact alone that the Government allotted the reserved seats to these two wards to help their party candidates. The petitioners fail to establish *mala fide* in this case.

The learned Government Pleader raised a preliminary objection against the maintainability of the present application on the basis of section 351-B of the Madras District Municipalities Act which reads:

"Notwithstanding anything contained in the Civil Procedure Code, 1908, or in any other law for the time being in force, no Court shall grant any permanent or temporary injunction or make any interim order restraining any proceeding which is being or about to be taken under this Act for the preparation or the publication of the electoral rolls or for the conduct of any election".

This section obviously cannot affect the power of the High Court to issue suitable writs under Article 226 of the Constitution of India. Under Article 245 of the Constitution, the power of the Parliament or the Legislature of a State to make laws is subject to the provisions of the Constitution. So long as Article 226 stands in the Constitution, neither the Parliament nor the Legislature of a State can make laws depriving or limiting the power of the High Court to issue writs. I therefore hold that the provisions of section 351-B cannot in anyway affect the power of the High Court to issue writs in suitable cases. For the aforesaid reasons I hold that the order of the Government allotting the seat reserved for women to Ward No. 2 is illegal and I therefore issue a direction restraining the respondents from holding the election in respect of the said reserved seat. This will not preclude the Government from allotting the said seat reserved for women to any of the wards after complying with the provisions of the Act. As the parties fail and succeed in part, there will be no order as regards costs.

K.S. — *Petition allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMASWAMI.

Subbaiah Maistry .. *Petitioner**

v.

The Corporation of Madras by its Sanitary Inspector, S. Brady, 21st Division, Ayanavaram .. *Respondent.*

Madras City Municipal Act (IV of 1919)—Sum of Rs. 5 levied on every dhoby inside Madras Corporation—If tax or licence fee.

The sum of Rs. 5 levied upon every dhoby inside the Madras Corporation is a licence fee within the ambit of the decision in *Varadachari v. State of Madras*, (1952) 2 M.L.J. 410 and not a tax and is not repugnant to fundamental rights under the Constitution.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the VIIth Presidency Magistrate, Egmore, dated 14th May, 1952, in M. No. 2762 of 1952.

S. Mohan Kumaramangalam and *A. Madhavan* for the Petitioner.

The State Prosecutor (*S. Govind Swaminathan*) for the State.

The Court made the following

ORDER.—The point taken by Mr. Mohan Kumaramangalam in this case is whether the fee of Rs. 5 levied upon every dhoby inside the Madras Corporation is a licence fee or a tax.

*Cr.R.C. No. 505 of 1952. (Cr.R.P. No. 474 of 1952). 5th November, 1952.

There is no dispute before me that if this levy is construed as a tax this revision has got to be allowed and if this is construed as a licence fee this revision has got to be dismissed.

In order to determine whether this sum of Rs. 5 levied is a licence fee or a tax—I need not point out that this sum of Rs. 5 is levied as a licence fee—we have got certain tests which have been elaborately gone into and laid down by my Lord the Chief Justice in *Varadachari* v. *State of Madras*[1]. The learned Chief Justice has reviewed the entire case-law on the subject and has delimited the boundary line between a licence fee and a tax.

The learned Chief Justice points out :

> " It is now well established that there is a fundamental difference between a tax and a licence fee. The issue of licences to regulate particular branches of business or specified trades or occupations and other matters is part of what in American Constitutional Law is called the ' police power ' of the State. See *Anantakrishnan* v. *State of Madras*[2]. For the grant of a licence a fee may be charged to cover probable expenses, which may have to be incurred for the regulation of the particular trade or business or calling in respect of which the licence is required. The licence fee is not intended to raise revenues for the general purpose of the authority levying the fee. For such purposes the levy should be in the shape of a tax. The licence fee must be reasonable, whereas, a tax need not be."

Courts have often dealt with the question whether a particular licence fee is reasonable or not. Though, ultimately the decision in each case must depend upon the particular facts of that case, certain general tests have been formulated to decide whether a particular fee is reasonable in the circumstances. In laying down these general principles courts have always kept in view the essential difference between a licence fee and tax, namely, that in the case of a licence fee imposition is intended to reimburse the authority in any amount expended by it in respect of the particular business or matter which is intended to be regulated, whereas a tax is the recognised method of raising revenues for general purposes. It is useful to refer to some of the decided cases, on the point and we shall begin with the ruling of the Privy Council in *Pazundaung Bazar Co., Ltd.* v. *Municipal Corporation of the City of Rangoon*[3]. That was given on an appeal from the judgment of the Rangoon High Court reported in *Municipal Corporation, Rangoon* v. *Pazundaung Bazar Co., Ltd.*[4]. Under the City of Rangoon Municipal Act the Corporation had power to charge licence fees for private markets. The question was whether the licence fee imposed was unreasonable. Heald, Officiating Chief Justice rejected the contention of the owners of the private markets who were protesting against the levy that the only charges recoverable by way of licence fees were the cost of the papers on which the licences and receipts were printed together with the costs of printing and writing thereon and the cost of such inspection as was directly connected with the licences themselves. He held (and Mya Bu, J., concurred with him) that the licence fee may reasonably cover the cost of all special services necessitated by the duties and liabilities imposed on the Corporation in respect of the supervision and regulation of private markets. The Privy Council agreed with this statement of law.

In *Corporation of Madras* v. *Messrs. Spencer & Co., Ltd., Madras*[5], this Court held that a licence fee imposed by the Corporation of Madras for storing spirits was unreasonable because the imposition was not with a view to pay for the expenses in connection with the licence but was obviously done to increase the revenue of the Corporation from liquor. The learned Judges accepted the view of the trial Judge, Beasley, J., (as he then was) that licence fees were leviable as compensation to the Corporation for the expenses incurred in the issue of licences and the general regulation of the trades and other occupations which were licensed and that there must be some relation between these expenses and the amount of fees leviable. In the case before them they found on the evidence which had been adduced that the expenses of supervising the places where foreign liquor was stored were practically

1. (1952) 2 M.L.J. 410.
2. (1952) 1 M.L.J. 208.
3. (1931) 61 M.L.J. 740 : L.R. 58 I.A. 313 : I.L.R. 9 Rang. 440 (P.C.).
4. (1929) I.L.R. 8 Rang. 143.
5. (1929) 57 M.L.J. 71 : I.L.R. 52 Mad. 764.

nil. Reilly, J., enunciated two general principles which may be useful to determine whether licence fees can be held to be reasonable or not, namely :

"If we accept the proposition that the power of charging licence fees cannot be used for taxation, then we must say that as a whole the fees charged by the Corporation must not be very much in excess of what the duties cast upon them and their staff in connection with the licences cost them. There is the cost of issuing the licences ; there is the cost of inspecting the premises to see whether they are suitable for the purpose proposed ; and there is the subsequent cost of inspecting the premises to see that they are being used properly and that the conditions and restrictions imposed by the Commissioner are observed. But, roughly speaking, if the fees are charged at so high a rate that as a whole they bring in very much more than the cost of these operations to the Corporation, then I think, we can rightly say that they are unreasonable. There is another principle. Although it is almost impossible for the Corporation itself to ascertain, when they are issuing a number of licences to persons engaged in different trades and occupations, exactly what is the cost of any particular licence or of licences for persons engaged in particular trades or occupations—and certainly we could not attempt anything of that sort—yet, surely, it would be unreasonable if they so fixed the fees and that the whole cost incurred by them in connection with all the licences or a grossly disproportionate part of it was imposed on one particular trade or a few particular trades. These principles, I think, may be of help in ascertaining whether a particular fee is reasonable or not."

Of course it is not for a Court to minutely assess and fix what in its opinion is the proper fee. All that the Court can do is to hold whether a particular fee is reasonable or not.

Practically the same principles were reiterated in a subsequent decision of this Court in the *Municipal Council, Kumbakonam* v. *Messrs. Ralli Bros.*[1]. It was held that the licence fee should be commensurate with the extra cost entailed by granting the licences and exercising such supervision as was necessary to see that its terms were complied with. But the fees should not be so assessed as substantially to contribute to the general revenues of the local body.

The decisions above cited were all discussed in *Kunhambu* v. *Local Fund Overseer, Chirakkal*[2], in which it was again laid down that the licence fee should not be converted into a tax for the purpose of raising revenue and the licence fee should bear a definite and well-recognised relation to the expenses incurred by the licencing authority.

The decision in *Indian Sugars and Refineries, Ltd.* v. *Municipal Council, Hospet*[3], relied upon by the learned Advocate-General does not lay down any different principle. The following observations of Wadsworth, J., are apposite :

"It is, we think, well settled that a licence fee for carrying on a particular trade or industry should not be regarded a form of taxation the extent of which is to be governed purely by revenue considerations. The licence fee should bear as nearly as possible a relation to the cost of issuing the licence and the cost of supervising the trade or of any special measures rendered necessary by the character of that trade. We doubt whether the municipality would be justified in increasing the licence fee chargeable upon a particular industry merely by reason of the cost of ordinary municipal services to which that industry is entitled by virtue of its position as a tax-payer in the Municipality. But if the industry involves special sanitary precautions, a special supervising agency or such like expenditure, it is, we think, reasonable to take this expenditure into account in fixing the amount of the fee. When a supervision agency is necessary for a number of industries, it will always be difficult to say how the cost is to be apportioned and, so long as the apportionment is to be made on a reasonable basis it is not for the courts to interfere with the way in which it has been achieved."

Substantially similar principles have been laid down by the Supreme Court of the United States. It is sufficient to cite one instance, namely, the decision in *Ingles* v. *Morf*[4], in which a permit fee was held to be invalid because it bore no reasonable relation to the total cost of regulation to defray which it was collected.

Bearing these principles in mind, let us examine the facts of the present case on the footing of the additional evidence which was called for and which has been submitted.

The evidence on record clearly shows the following facts. Individual dhobies are not being licensed. But when soiled and washed clothes are stored and clothes are ironed, a licence fee is imposed with reference to the premises wherein this

1. (1930) 61 M.L.J. 748. Mad. 521.
2. (1932) M.W.N. 873.
3. (1942) 2 M.L.J. 663 : I.L.R. (1943)
4. 300 U.S. 280 : 81 L.Ed. 653.

laundry business is carried on. The authority for the Madras Corporation for doing so is to be found in the publication filed by the learned State Prosecutor under the style and name of "*Corporation of Madras, By-laws and Rules under the Madras City Municipal Act and the Public Health Act*", printed at Rathnam Press, University Printers, 11, Badrian Street, G.T., Madras, in which, at page 66, we find printed the by-laws under section 349 (13) of the Madras City Municipal Act, 1919, regulating the premises used for washing soiled clothes and keeping soiled clothes for the purpose of washing them and keeping washed clothes. There is no doubt that the accused Subbiah Maistry in this case, on 16th February, 1952 and subsequently, had run a laundry in a hut at S. S. Devar, 3rd Street, wherein he resides, without a licence from the Commissioner of the Madras Corporation as required by section 287 of the Madras City Municipal Act and that he thereby committed an offence punishable under section 357 of the said Act. Mr. S. Brady, the Sanitary Inspector attached to Division No. 21, Ayanavaram, has given evidence that he inspected the hut occupied by the accused and he found that the accused was storing soiled and washed clothes and that he was also ironing the clothes. A notice was therefore issued and the accused not having taken out a licence this prosecution has been launched. Therefore, the only point for determination is whether the fee of Rs. 5 imposed has to be construed as a licence fee or a tax.

The evidence in this case clearly shows that this sum of Rs. 5 is only a licence fee and not a tax and here are the reasons.

The Corporation has filed a statement, Exhibit P-2, which shows (i) the designation and number of officers employed or connected with the licensing of trades ;

(ii) The total amount of expenditure incurred by the Corporation by way of pay and allowances ;

(iii) the percentage of work attributable to licensing ;

(iv) The proportionate cost for the work rendered by them ; the figures being taken out of the budget estimate for 1952-53 (Exhibit P-3). Exhibit P-2 does show the amount derived from building licences. Exhibit P-5 is the schedule of licence fees now in force. The substance of this information can be summarised as follows : There are 724 licensed laundries in Madras. The total fee collected from them at Rs. 5 per laundry is Rs. 3,620. The total fee collected by way of licence fees in respect of all trades except private markets is Rs. 6,35,994. The total expenditure involved in the licensing of trades, businesses, etc., is Rs. 7,10,000 as shown in Exhibit P-2. The percentage of expenditure connected with the licensing and supervision resulting therefrom shown in these statements makes out clearly that the licence fee collected does not result in raising revenue for the general purposes of the Corporation but covers only the probable expenses which are being incurred for the regulation of this particular calling for which licence is required.

The Corporation through P.W. 2 has indicated the services rendered in the shape of granting of licences and exercising such supervision as is necessary to see that its terms are complied with and these give us an indication of the cost entailed. The evidence of P.W. 2, the Assistant Revenue Officer, shows the elaborate and multifarious work entailed in the issue of licences and the supervising work relating thereto which falls upon the Health Department, the Revenue Department, the Electricity Department, and the Works Department. Issue of licences entails previous enquiries, inspections, verification and serving of various processes, considerable expenditure of stationery and printing and book-keeping are involved. Then after the issue of licences the premises are inspected frequently throughout the year to see that the conditions of the licence are observed. In the case of refusal of licence, the party can appeal to the Standing Committee whose members use the Corporation motor-van for the purpose of inspection. Then when there is failure or non-compliance with the terms of licence or when licences are not taken out, again much work is involved on the supervising agency. In the matter of laun-

ching prosecutions and carrying them through various Courts. In other words, the evidence of P.W. 2 shows and the figures given by the Corporation indicate that the licence fee collected does not cover more than the expenses involved in the licensing of the business and that no part of this amount becomes a part of the general revenue of the Corporation, thereby making a licence fee a substitute for a tax.

In the result, on the evidence on record, I have come to the conclusion that the sum of Rs. 5 levied upon every dhoby inside the Madras Corporation is a licence fee within the ambit of the decision in *Varadachari* v. *State of Madras*[1] and is not a tax.

This revision is dismissed.

K.S. —————— *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Gandavani Lakshmana Naidu .. *Appellant**

v.

Maddini Kannayya Naidu .. *Respondent.*

Madras Agriculturists' Relief Act (IV of 1938), section 9-A (7) (ii) (a)—Usufructuary mortgagor selling subject-matter of mortgage to another in 1941—Amount payable to mortgagee kept with vendor who agreed to put the vendee in possession after paying the mortgagee—Mortgagor if can apply for scaling down the decree debt.

To get the benefi s of the provisions of the Madras Agriculturists' Relief Act the usufructuary mortgagor must establish that the property had not devolved by transfer *inter vivos*. Where the mortgagor sells the subject-matter of the mortgage to another between 30th September, 1937 and 30th January, 1948, and there was no reservation of any interest in the vendor, section 9-A (7) (ii) (a) of Madras Act IV of 1938 directly applies and the mortgagor has no right to apply for scaling down the decree debt. The fact that a portion of the consideration was kept with the vendor to enable him to pay the usufructuary mortgagee or the circumstance that the vendor agreed to put the vendee in possession after the amount was paid to the mortgagee would not confer on him any interest in the immovable property to entitle him to apply for scaling down.

Appeal against the Order of the District Court of Chittoor, dated the 24th October, 1950 and made in A.S.No. 423 of 1949 (I.A. No. 111 of 1949 in O.S. No. 284 of 1941 on the file of the Court of the District Munsif of Sholinghur).

S. A. Seshadri Aiyangar for Appellant.

M. Natesan for Respondent.

The Court delivered the following

JUDGMENT.—This Civil Miscellaneous Second Appeal arises out of an application filed by the appellant under section 19 of the Madras Agriculturists' Relief Act to scale down the decree debt. The appellant is the third defendant in the Suit. He along with others executed a usufructuary mortgage deed in favour of the respondent for a sum of Rs. 400. On 15th May, 1941, he sold the property, the subject-matter of the usufructuary mortgage, in favour of Yengamma for a consideration of Rs. 600. A petition for amendment of the decree was filed on the basis of section 9-A of the Madras Agriculturists Relief Act. The relevant sub-section, *viz.*, 9-A (7) reads as follows :

"(7) Nothing contained in this section except sub-section (i) shall apply to any usufructuary mortgage—

(i) . . . .

(ii) in respect of property situated in any other area, in the cases mentioned below :—

(a) Where during the period after the 30th September, 1937 and before the 30th January, 1948 the equity of redemption in the property subject to the usufructuary mortgage has devolved either wholly or in part on a person by or through *inter vivos* either from the original mortgagor or from person deriving title from or through such mortgagor otherwise than by a transfer *inter vivos* then, to the whole of such part, as the case may be."

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1. (1952) 2 M.L.J. 410.

* A.A.A.O. No. 154 of 1951. 13th August, 1952.

Section 9-A will not therefore apply to a case where the equity of redemption was transferred between 30th September, 1937 and 30th January, 1948. Exhibit A-2 whereunder the petitioner sold the property in favour of Yengamma is dated 15th May, 1941. *Prima facie* therefore section 9-A (7) (ii) (*a*) will apply and the appellant is not entitled to have his debt scaled down. But the learned counsel for the appellant argued that though the appellant sold the property in favour of Yengamma for a consideration of Rs. 600, as Rs. 400 out of the amount was kept with him to enable him to pay the same to the usufructuary mortgagee and as he agreed to give possession only after the said amount was paid to the mortgagee, it must be held that notwithstanding the transfer he continued to possess an interest in the equity of redemption. Under Exhibit A-2 the appellants sold the property to Yengamma for consideration. No interest in the property sold was reserved. The fact that a portion of the consideration was kept with the vendor or the circumstance that he agreed to put the vendee in possession after the amount was paid to the mortgagee would not confer on him any interest in the immovable property. Under the sale the entire property devolved on Yengamma within the meaning of section 9-A (7) (ii) (*a*) of the Act. The decision of Ramesam, J., in *Ratnam Pillai* v. *Kamalambal Ammal*[1], relied upon by the learned counsel, in my view, will not support him. There the question was whether the mortgagor who had sold the property but agreed with the vendee to redeem the mortgage was entitled to redeem the mortgage. It is unnecessary to express any view on the correctness of the decision; but the learned Judge did not say that by reason of such an arrangement the vendor continued to have any interest in the immovable property conveyed absolutely by him to another. In the instant case, in order to get the benefit of the provisions of the Madras Agriculturists' Relief Act, the appellant must establish that the property had not devolved by transfer *inter vivos* on the vendee under Exhibit A-2. As I have already said, under the sale deed the entire property was sold and there was no reservation of any interest in the vendor. Section 9-A (7) (ii) (*a*) of the Act directly applies and the court below rightly dismissed the application.

The appeal fails and is dismissed with costs.

No leave.

K.S. — *Appeal dismissed.*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT:—B. K. MUKHERJEA, N. CHANDRASEKHARA AIYAR AND N. H. BHAGWATI, JJ.

Payyavula Vengamma .. *Appellant**

v.

Payyavula Kesanna and others .. *Respondents.*

Arbitration Act (X of 1940)—Arbitrator examining each party behind the back of the opposite party and giving his award—Amounts to legal misconduct sufficient to vitiate the award.

Where an arbitrator examines each party in the absence of the other and gives his award the course adopted by the arbitrator is contrary to the principles of natural justice. The arbitrator is guilty of legal misconduct which is sufficient to vitiate the award. The fact that no prejudice was caused to the plaintiff by reason of the arbitrator having obtained a statement from the defendant behind the back of the plaintiff does not make it any the less a legal misconduct.

On appeal from the Judgment and Decree dated the 24th September, 1948, of the High Court of Judicature at Madras (Menon and Mack, JJ.) in A. A. O. No. 688 of 1945 arising out of Judgment and Decree dated the 1st October, 1945, of the Court of the District Judge of Anantapur in Original Petition No. 15 of 1945.

D. Munikaniaha, Senior Advocate (*J. B. Dadachanji*, Advocate, with him), for Appellant.

1. (1924) 48 M.L.J. 213.

* Civil Appeal No. 37 of 1952. 29th October, 1952.

S. P. Sinha, Senior Advocate (*M. O. Chinnappa Reddy* and *K. R. Choudhury*, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Bhagwati, J.—The plaintiff filed O. P. No. 15 of 1945 in the Court of the District Judge of Anantapur for setting aside an award on the ground *inter alia* of legal misconduct of the arbitrator. The trial Court set aside the award. The High Court on appeal reversed the judgment of the trial Court and dismissed the plaintiff's suit. This appeal has been filed by the plaintiff with the certificate of the High Court against that decision.

One P. Narayanappa died in 1927 leaving him surviving the plaintiff his widow, the defendant 1 his undivided brother, the defendant 2 a son of his another pre-deceased brother and defendant 3 his son by his pre-deceased wife. The deceased had purported to make a will dated 1st May, 1927, under which he had made certain provision for her maintenance and residence. The plaintiff stayed with the family for some time but had to leave the family house owing to disputes which arose between her and the senior wife of defendant 1. She lived with her mother for eleven years and ultimately filed a suit *in forma pauperis* O.S. No. 19 of 1943 in the Court of the District Judge of Anantapur, for maintenance, arrears of maintenance, residence and household utensils as also recovery of some jewels and clothes as her stridhanam properties. The defendants contested the claim of the plaintiff contending that sufficient arrangement had been made for her maintenance and residence under the will dated the 1st May, 1927, that she had accordingly been in possession and enjoyment of the property and that her claim was unsustainable. The defendants also denied her claim for jewels and clothes.

The suit came on for hearing and final disposal before the Subordinate Judge of Anantapur. When the plaintiff was being examined as P.W. 1, in the suit on the 27th February, 1945, all the parties filed a petition under section 21 of the Arbitration Act agreeing to appoint Sri Konakondla Rayalla Govindappa Guru' as the 'sole arbitrator' for settling the disputes in the suit and to abide by his decision, and asking the Court to send the plaint, written statement and other records to the arbitrator for his decision. A reference to arbitration was accordingly made by the Court. The arbitrator entered upon the reference and on the 6th March, 1945, examined the plaintiff and got from her a statement which is Exhibit No. 4 in the record. He similarly examined the defendant 1 on the 10th March, 1945, and got from him the statement which is Exhibit No. 5 in the record. After obtaining the two statements, the arbitrator made and published his award on the 12th March, 1945. It was this award that was challenged by the plaintiff.

The legal misconduct which was alleged against the arbitrator was that he examined each party in the absence of the other. It was contended on behalf of the plaintiff that even though the petition for reference to arbitration as also the statements Exhibits Nos. 4 and 5 authorised the arbitrator to settle the disputes according to law after perusing the plaint and the written statements, the arbitrator examined defendant 1 in the absence of the plaintiff and also perused what was called the settlement of the 1st May, 1927, without giving an opportunity to the plaintiff to have her say in the matter and was thus guilty of legal misconduct. It was contended on the other hand by the defendants that what was done by the arbitrator was merely to obtain from the parties a reiteration of their request contained in the petition that he should give his award on the basis of the pleadings, that not a single fact was recorded by the arbitrator from the defendant 1 which did not find a place in his written statement and that therefore the arbitrator was not guilty of legal misconduct.

The petition filed by the parties on the 27th February, 1945, did not give any special powers to the arbitrator. The arbitrator was appointed for settling the disputes in the suit and the parties agreed to abide by his decision. The plaint, the written statement and the other records were agreed to be sent to him for his decision, and if the arbitrator was thus directed to make his award after perusing the plaint

and the written statement which were given to him by the Court along with the order, we do not see why the arbitrator went to the plaintiff and defendant 1 and recorded their statements. The statement given by the plaintiff to the arbitrator did not mention anything beyond the request that he should peruse the plaint and written statement and give his decision according to law and justice. The statement which was obtained from the defendant 1 however did not merely repeat this request but contained several statements of fact, which did not find a place in his written statement. These statements were as follows :—

"(1) She felt glad with what was given to her by her husband."

"(2) It is seen from the Government accounts that as per the settlement made by her husband, the lands given to her have been in her possession."

"(3) Just like the plaintiff has her jewels in her possession, the other females in the house have their jewels in their respective possession only. The undivided family has no manner of right therein."

"and (4) Considering the domestic circumstances, our elder brother provided maintenance for the third wife, the plaintiff just as he had provided maintenance for his second wife."

These statements constituted evidence given by the defendant 1 in addition to the averments contained in his written statement and it is futile for the defendant 1 to contend that in obtaining the statement Exhibit No. 5 from him the arbitrator merely obtained from him a narration of what was already found in his written statement.

This position is confirmed when one turns to the award. The arbitrator stated that the Court had directed him to make the award after perusing the plaint and the written statements of the Plaintiff and the Defendant and that it had given him the plaint and the written statement along with the order. He however proceeded to state that in pursuance of the order he took statements from the Plaintiff as well as the Defendant 1 who was the manager of the Defendant's family. He further stated that he had perused the settlement which the Defendant 1 alleged as having been made on 1st May, 1927, in favour of the Plaintiff and proceeded to award to the Plaintiff 8 acres 17 cents of land bearing Survey No. 507 in addition to the 40 acres of land already given by the deceased to her. It is clear from the terms of this award that the arbitrator took into consideration not only the plaint and the written statements of the parties but also the statement which he had obtained from the Defendant 1 and the will dated 1st May, 1927.

There is thus no doubt that the arbitrator heard the Defendant 1 in the absence of the Plaintiff. No notice of this hearing was given by the arbitrator to the Plaintiff nor had she an opportunity of having the evidence of the Defendant 1 taken in her presence so that she could suggest cross-examination or herself cross-examine the Defendant 1 and also be able to find evidence, if she could, that would meet and answer the evidence given by the Defendant 1. As was observed by Lord Langdale, M.R., in *Harvey* v. *Shelton*[1].

"It is so ordinary a principle in the administration of justice, that no party to a cause can be allowed to use any means whatsoever to influence the mind of the Judge which means are not known to and capable of being met and resisted by the other party, that it is impossible, for a moment, not to see that this was an extremely indiscreet mode of proceeding, to say the very least of it. It is contrary to every principle to allow of such a thing and I wholly deny the difference which is alleged to exist between mercantile arbitrations and legal arbitrations. The first principles of justice must be equally applied in every case. Except in the few cases where exceptions are unavoidable, both sides must be heard, and each in the presence of the other. In every case in which matters are litigated, you must attend to the representations made on both sides, and you must not, in the administration of justice, in whatever form, whether in the regularly constituted Courts or in arbitrations, whether before lawyers or merchants, permit one side to use means of influencing the conduct and the decisions of the Judge, which means are not known to the other side."

This case of *Harvey* v. *Shelton*[1] is the leading case on this point and it has been followed not only in England but in India. (See *Ganes Narayan Singh* v. *Malida Koer*[2].) She had also no opportunity to have her say in the matter of the settlement of 1st May, 1927. The course of proceeding adopted by the arbitrator was obviously contrary to the principles of natural justice.

1. (1844) 7 Beav. 455 at p. 462.

2. (1911) 13 C.L.J. 392 at pages 401, 402.

Shri S. P. Sinha however urged before us that no prejudice was caused to the Plaintiff by reason of the arbitrator having obtained the statement Ex. No. 5 from Defendant 1 and that therefore the arbitrator was not guilty of legal misconduct. This contention is unsound. The arbitrator may be a most respectable man; but even so, his conduct cannot be reconciled to general principles. "A Judge must not take upon himself to say, whether evidence improperly admitted had or had not an effect upon his mind. The award may have done perfect justice; but upon general principles it cannot be supported." [Per Lord Eldon, Lord Chancellor in (1801) 6 Ves. Jun. 70 at page 72: 31 E.R. 943].

To the same effect are the observations of Lord Justice Knight Bruce in *Haigh* v. *Haigh*[1]:

"It is true that he states in his affidavit that he did not allow those explanations to influence him in his report upon the accounts, and I have no doubt he honestly intended this to be the case; but it is impossible to gauge the influence which such statements have upon the mind."

We must hold without meaning the least reflection on the arbitrator, that he was guilty of legal misconduct and that was sufficient to vitiate the award.

Shri S. P. Sinha then urged that the plaintiff had waived her right if any to challenge the award on the ground of legal misconduct. No waiver however was pleaded by the Defendant 1 and it was not competent to him to urge this contention at this stage before us.

The result therefore is that the judgment of the High Court cannot stand. We allow the appeal, set aside the judgment and decree passed by the High Court and restore the judgment and decree passed by the trial Court with costs throughout.

Agent for Appellant : *Naunit Lal.*

Agent for Respondents : *M. S. K. Aiyangar.*

G.R./K.S. *Appeal allowed.*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT :—MEHRCHAND MAHAJAN, S. R. DAS, VIVIAN BOSE AND GHULAM HASAN, JJ.

Keshardeo Chamria .. *Appellant**

v.

Radha Kissen Chamria and others .. *Respondents.*

Execution—Refusal of petitioner's application for adjournment and dismissal of execution petition without informing petitioner or his advocate—Court correcting the error in exercise of its inherent powers and setting aside the dismissal—Jurisdiction—Order if appealable—Revision if lies—Civil Procedure Code (V of 1908), sections 47, 115 and 151—Scope.

Where a Subordinate Judge after dismissing an application for adjournment at the same time dismissed the execution petition without informing the decree-holder's Counsel that the request for adjournment had been refused and without calling upon him to state what he wanted done in the matter in those circumstances, the Subordinate Judge has jurisdiction on his own initiative, in the exercise of his inherent powers to correct his own error. It was not necessary for him to investigate into the correctness of the various allegations and counter-allegations made by the parties. He was the best judge of the procedure that was usually adopted in his Court in such cases.

The High Court had no jurisdiction in the exercise of its appellate jurisdiction to reverse this decision. The proceedings that commenced with the decree-holder's application for restoration of the execution and terminated with the order of revival can in no sense be said to relate to the determination of any question concerning the execution, discharge or satisfaction of the decree. Such proceedings are in their nature collateral to the execution and are independent of it.

An order under section 151 of the Civil Procedure Code, *simpliciter* is not appealable and such an order is not included in the category of appealable orders mentioned in section 104 and Order XLIII, rule 1 of the Code.

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1. (1861) 31 L.J. Chan. (N.S.) 420 at p. 423 : 3 De G. F. and J. 157.

* C. A. Nos. 12 and 13 of 1951. 30th October, 1952.

Nor is it proper for the High Court to entertain an appeal in the guise of a revision. The errors contemplated in section 115 of the Code of Civil Procedure relate to the material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes have been complied with. They do not refer to the decision arrived at but to the manner in which it is reached.

On appeal from the Judgment and Decree dated the 17th/21st February, 1947, of the High Court of Judicature at Calcutta (Mukherjea and Biswas, JJ.) in Appeal from Original Order No. 62 of 1946 with cross-objection and Civil Revision Case No. 657 of 1946 arising out of Judgment and Order dated the 13th March, 1946, of the Court of the Subordinate Judge, Howrah, in Title Execution Case No. 68 of 1936.

M. C. Setalvad, Attorney-General for India and *Purushottam Chatterjee,* Senior Advocate (*S. N. Mukherjee,* Advocate, with them), for Appellants.

C. K. Daphtary, Solicitor-General for India and *N. C. Chatterjee,* Senior Advocate (*C. N. Laik* and *A. C. Mukherjea,* Advocates, with them), for Respondents.

The Judgment of the Court was delivered by

Mahajan, J.—These are two cross-appeals from the decision of the High Court at Calcutta in its appellate jurisdiction dated 17th February, 1947, modifying the order of the Subordinate Judge of Howrah in title execution case No. 68 of 1936.

The litigation culminating in these appeals commenced about thirty years ago. In the year 1923, one Durga Prasad Chamria instituted a suit against the respondents, Radha Kissen Chamria, Motilal Chamria and their mother Anardevi Sethani (since deceased) for specific performance of an agreement for sale of an immoveable property in Howrah claiming a sum of Rs. 11,03,063-8-3 and other reliefs. The suit was eventually decreed on compromise on the 19th April, 1926. Under the compromise decree the plaintiff became entitled to a sum of Rs. 8,61,000 from the respondents with interest at 6¾ per cent. with yearly rests from the date fixed for payment till realisation. Part of the decretal sum was payable on the execution of the solenama and the rest by instalments within eighteen months of that date.

Within fifteen months from the date of the decree a sum of Rs. 10,00,987-15-6 is said to have been paid towards satisfaction of it. No steps were taken either by the judgment-debtors or the decree-holder regarding certification of most of those payments within the time prescribed by law. The judgment-debtors after the expiry of a long time made an application for certification but the decree-holder vehemently resisted it and declined to admit the payments. The result was that the Court only recorded the payment of the last three instalments which had been made within ninety days before the application and the judgment-debtors had to commence a regular suit against the decree-holder for recovery of the amounts paid, and not admitted in the execution proceedings. In the year 1929 a decree was passed in favour of the judgment-debtors for the amount paid by them and not certified in the execution. In the meantime the decree-holder had realized further amounts in execution of the decree by taking out execution proceedings on two or three occasions. The amount for which a decree had been passed against the decree-holder was also thereafter adjusted towards the amount due under the consent decree.

On the 17th March, 1933, the decree was assigned by Durga Prasad to the appellant Keshardeo Chamria. The execution proceedings out of which these appeals arise were started by the assignee on the 10th October, 1936, for the realization of Rs. 4,20,693-8-9 and interest and costs. This execution had a chequered career. To begin with, the judgment-debtors raised an objection that the assignee being a mere benamidar of Durga Prasad Chamria had no *locus standi* to take out execution. This dispute eventually ended in favour of the assignee after about five years' fight and it was held that the assignment was *bona fide* and Keshardeo was not a benamidar of the decree-holder.

On the 17th July, 1942, Keshardeo made an application for attachment of various new properties of the judgment-debtors and for their arrest. Another set of objections was filed against this application by Radha Kissen Chamria. He disputed the correctness of the decretal amount; and contended that a certain payment of Rs. 1,60,000 should be recorded and certified as made on the 28th May, 1934, and not on the date the sum was actually paid to the decree-holder. This objection was decided by the Subordinate Judge on the 11th September, 1942, and it was held that the judgment-debtors were liable to pay interest on the sum of Rs. 1,60,000 up to the 12th October, 1936, and not up to the 4th July, 1941, as claimed by the assignee. On appeal the High Court by its judgment dated the 22nd June, 1943, upheld the decree-holder's contention, and ruled that the judgment-debtors were liable to pay interest up to the 4th July, 1941, on this sum of Rs. 1,60,000. The judgment-debtors then applied for leave to appeal to the Privy Council against this decision and leave was granted. On the 13th February, 1945, an application was made to withdraw the appeals, and withdrawal was allowed by an order of the Court dated the 20th February, 1945. Thus the resistance offered by the judgment-debtors to the decree-holder's application of the 17th July, 1942, ended on the 20th February, 1945.

The records of the execution case were then sent back by the High Court and reached the Howrah Court on the 28th February, 1945. The decree-holder's counsel was informed of the arrival of the records by an order dated the 2nd March, 1945. The hearing of the case was fixed for the 5th March, 1945. On the 5th March, 1945, the Court made the following order :

"Decree-holder prays for time to take necessary steps. The case is adjourned to 10th March, 1945, for order. Decree-holder to take necessary steps by that date positively."

The decree-holder applied for further adjournment of the case and on the 10th, the Court passed an order in these terms :

"Decree-holder prays for time again to give necessary instructions to his pleader for taking necessary steps. The petition for time is rejected. The execution case is dismissed on part satisfaction."

When the decree-holder was apprised of this order, he on the 19th March, 1945, made an application under section 151, Civil Procedure Code, for restoration of the execution and for setting aside the order of dismissal. On this application notice was issued to the judgment-debtors who raised a number of objections against the decree-holder's petition to revive the execution. By an order dated the 25th April, 1945, the Subordinate Judge granted the decree-holder's prayer and ordered restoration of the execution. The operative part of the order is in these terms :

"On 10th March, 1945, the decree-holder again prayed for time for the purpose of giving necessary instructions to his pleader for taking steps. That petition was rejected by me. On 10th March, 1945, by the same order—I mean the order rejecting the petition for adjournment—I dismissed the execution case on part satisfaction. The learned counsel on behalf of the present petitioner wants me to vacate the order by which I have dismissed the execution case on part satisfaction. He has invoked the aid of section 151, Civil Procedure Code, for cancellation of this order and the consequent restoration of the execution case. *I would discuss at the very outset as to whether I was justified in dismissing the execution case in the same order after rejecting the petition of the decree-holder for an adjournment without giving him an opportunity to his pleader to make any submission he might have to make after the rejection of the petition for time.* It is clear from the order that the fact that the petition for time filed by the decree-holder on 10th March, 1945, was rejected by me was not brought to the notice of the pleader for the decree-holder. It seems to me that there was denial of justice to the decree-holder in the present execution proceeding inasmuch as it was a sad omission on my part not to communicate his pleader the result of this petition he made praying for an adjournment of this execution proceeding and *at the same time* to dismiss the execution case on part satisfaction which has brought about consequences highly prejudicial to the interest of the decree-holder. I think section 151, Civil Procedure Code, is the only section which empowers me to rectify the sad omission I have made in not communicating to the pleader for the decree-holder as to the fate of his application for an adjournment of the execution case and as such I would vacate the order passed by me dismissing the execution case on part satisfaction. The ends of justice for which the Court exists demand such rectification and I would do it. The learned Advocate-General on behalf of the judgment-debtor Radha Kissen has argued before me that this Court has no jurisdiction to vacate the order passed by me on 10th March, 1945, dismissing the execution case on part satisfaction. His argument is that section 48, Civil Procedure Code, stands in my way inasmuch as the law of limitation as provided in the above section debars the relief as sought for by the decree-holder in the present application. I do not question the soundness

of this argument advanced by the learned Advocate-General. The facts of this case bring home the fact that in the present case I am rectifying a sad omission made by me which brought about practically a denial of justice to the decree-holder, and as such the operation of section 48, Civil Procedure Code, does not come to the assistance of the judgment-debtor Radha Kissen."

It would have saved considerable expense and trouble to the parties had the dismissal for default chapter been closed for ever by this order of the Judge; the proceedings, however, took a different course. A serious controversy raged between the parties about the correctness of this obviously just order and after seven years it is now before us. An appeal and a revision were preferred to the High Court against this order. By its judgment dated 24th August, 1945, the High Court held that no appeal lay against it as the question involved did not fall within the ambit of section 47, Civil Procedure Code. It, however, entertained the revision application and allowed it, and remanded the case to the Subordinate Judge for reconsideration and disposal in accordance with the observations made in the order. The High Court took the view that the Subordinate Judge was in error in restoring the execution without taking into consideration the point whether the decree-holder's pleader could really take any step in aid of the execution if he had been apprised of the order of the Court dismissing the adjournment application. This is what the High Court said:—

"The ground put forward by the Subordinate Judge in support of his order for restoration is that the order rejecting the adjournment petition should have been communicated to the pleader for the decree-holder but this was not done. We will assume that this was an omission on the part of the Court. The question now is whether it was possible for the decree-holder to take any further steps in connection with the execution of the decree and thereby prevent the execution case from being dismissed for default. No evidence was taken by the learned Subordinate Judge on this point and even the pleader who was in charge of the execution case on behalf of the decree-holder was not examined . . . . If really the decree-holder was not in a position to state on that day as to what was the amount due under the decree for which he wanted the execution to be levied and if according to him it required elaborate accounting for the purpose of arriving at the proper figure it was not possible for him to ask the Court to issue any process by way of attachment of the property on that date. It seems to us that the learned Judge should have considered this matter properly and he should have found on proper material as to whether the decree-holder could really take any steps after the application for adjournment was disallowed."

In sharp contrast to the opinion contained in the order of remand is the view now expressed by the High Court on this point in its final judgment under appeal:

"One important circumstance which, in our opinion, tells in favour of the decree-holder is the fact we have noticed before, namely, that after the petition for time was rejected the Court did not call on the execution case and otherwise intimate its decision to go on with it. In one sense this might be regarded as a mere error of procedure on the part of the Court which it would be wrong to allow the decree-holder to take advantage of, but an error it was, as was admitted by the learned Judge himself who had dealt with the matter, and we do not think his opinion can be lightly brushed aside. There can be no doubt that the learned Judge was in the best position to speak as regards the actual proceedings in his Court on the 10th March, 1945, and if he thought that it amounted to a 'denial of justice' to have rejected the petition for time and by the same order to dismiss the execution case, it is not for us to say that he was not right. It may well be that even if the case was called on the decree-holder's pleader would even then have been absent, but having regard to all the facts and circumstances of the case, we think the Court might yet give the decree-holder the benefit of doubt in this matter, and assume in his favour that his pleader would have appeared before the learned Judge and tried to avert a peremptory dismissal of the execution case, even though he or his client might not have been fully ready with all necessary materials for continuing the execution proceeding.

As we have pointed out before and as the Court below has also found, it was possible for the decree-holder or his pleader to have submitted to the Court some sort of an account of the decretal dues on that date after refusal of the adjournment but even if this could not be done, we still believe that the pleader, if he appeared, could have done something, either by drawing the Court's attention to some of its previous orders or otherwise, by which a dismissal of the case might be prevented."

It was not difficult to envisage what the counsel would have done when faced with such a dilemma. He would have straightaway stated that the execution should issue for an amount which was roughly known to him, and that the Court should issue a process for the arrest of the judgment-debtors. By such a statement he would have saved the dismissal without any detriment to his client who could later make another application stating the precise amount due and praying for additional reliefs.

After remand on the 13th March, 1946, the learned Subordinate Judge restored the execution case in respect of a sum of Rs. 92,000 only and maintained the order of dismissal in other respects. He held that the decree-holder was grossly negligent on the 5th and the 10th March, 1945, and that due to his negligence the execution case was dismissed in default; that even if his pleader had been informed of the order rejecting the application for adjournment he could not have taken any steps to prevent the dismissal of the execution; that the execution being now barred by limitation the judgment-debtors should not be deprived of the valuable rights acquired by them but at the same time they should not be allowed to retain the advantage of an acknowledgment of a debt of Rs. 92,000 made by the decree-holder.

Both the decree-holder and the judgment-debtors were dissatified with this order. The decree-holder preferred an appeal to the High Court and also filed an application under section 115, Civil Procedure Code. The judgment-debtors filed cross-objections in the appeal and also preferred an alternative application in revision.

The appeal, the cross-objections and the two revision applications were disposed of together by the High Court by its judgment, dated 17th February, 1947. The order dismissing the execution in default was set aside and the case was restored on terms. The decree-holder was held disentitled to interest on the decretal amount from 10th March, 1945, to the date of final ascertainment of the amount of such interest by the executing Court and was ordered to pay to the judgment-debtors a consolidated sum of Rs. 20,000 by way of compensatory costs. He was to pay this amount to the judgment-debtors within two weeks of the arrival of the records in the executing Court or have it certified in the execution. In default the appeal was to stand dismissed with costs and the cross-objections decreed with costs.

An application for leave to appeal to His Majesty in Council against this order was made by the judgment-debtors and leave was granted to them on 30th May, 1947. The decree-holder also applied for leave and he was granted leave on 27th June, 1947. Both the appeals were consolidated by an order of the Court dated 4th December, 1947, and thereafter the appeals were transferred to this Court.

On behalf of the decree-holder it was contended that the High Court was wrong in allowing the judgment-debtors Rs. 20,000 by way of compensation for costs, and that having regard to the terms of the compromise decree it had no jurisdiction to deprive the decree-holder of the interest allowed to him by the decree, and that it has neither power nor jurisdiction under section 115, Civil Procedure Code, to set aside the order dated 25th April, 1945, passed by Mr. Chakravarti, Subordinate Judge, under section 151 of the said Code and that the interlocutory remand order of the High Court being without jurisdiction, all subsequent proceedings taken thereafter were null and void.

The learned counsel for the judgment-debtors not only supported the judgment of the High Court to the extent it went in their favour but contended that the High Court should have refused to restore the execution altogether and that the assumption made by it that the decree-holder's pleader could do something to prevent the dismissal of the case or could present some sort of statement to the Court was wholly unwarranted and unjustifiable. It was urged that it ought to have been held that the decree-holder was guilty of gross negligence and he was himself responsible for the dismissal of the case, and that it was not necessary to formally call on the case after the rejection of the petition for adjournment and that a valuable right having accrued to the judgment-debtors by efflux of time, they should not have been deprived of it in the exercise of the inherent powers of the Court.

It is unnecessary to consider all the points taken in these appeals because, in our opinion, the point canvassed on behalf of the decree-holder that the order of remand was without jurisdiction and that all the proceedings taken subsequent

to the order of the executing Court reviving the execution were void, has force. The sole ground on which the Subordinate Judge had ordered restoration of the execution was that he had himself made a sad mistake in dismissing it at the same time that he dismissed the adjournment application without informing the decree-holder's counsel that the request for adjournment had been refused and without calling upon him to state what he wanted done in the matter in those circumstances. As the Subordinate Judge was correcting his own error in the exercise of his inherent powers, it was not necessary for him to investigate into the correctness of the various allegations and counter-allegations made by parties. He was the best Judge of the procedure that was usually adopted in his Court in such cases and there is no reason whatsoever for the supposition that when the Subordinate Judge said that he had not given any opportunity to the decree-holder's pleader to take any steps in execution of the decree after the dismissal of the adjournment application he was not right. It could not be seriously suggested that such an opportunity was given to the decree-holder, the dismissal order of the execution having been made at the same moment of time as the order dismissing the application for adjournment. It is quite clear that the interests of justice demanded that the decree-holder's pleader should have been informed that his request for adjournment had been refused, and further given opportunity to state what he wanted done in that situation. It was wholly unnecessary in such circumstances to speculate what the pleader would have done when faced with that situation. The solid fact remains that he was not given that opportunity and that being so, the order dismissing the execution was bad and was rightly corrected by the Court on its own initiative in the exercise of its inherent powers.

The point for determination then is whether such an order could be set aside by the High Court either in the exercise of its appellate or revisional powers. It is plain that the High Court had no jurisdiction in the exercise of its appellate jurisdiction to reverse this decision. In the remand order itself it was held that it was difficult to say that the order by itself amounted to a final determination of any question relating to execution, discharge or satisfaction of a decree and that being so, it did not fall within the ambit of section 47, Civil Procedure Code. We are in entire agreement with this observation. The proceedings that commenced with the decree-holder's application for restoration of the execution and terminated with the order of revival can in no sense be said to relate to the determination of any question concerning the execution, discharge or satisfaction of the decree. Such proceedings are in their nature collateral to the execution and are independent of it.

It was not contended and could not be seriously urged, that an order under section 151 simpliciter is appealable. Under the Code of Civil Procedure certain specific orders mentioned in section 104 and Order XLIII, Rule 1 only are appealable and no appeal lies from any other orders (*vide* section 105, Civil Procedure Code). An order made under section 151 is not included in the category of appealable orders.

In support of his contention that an order made under section 151 may in certain circumstances be appealable, Mr. Daphtary placed reliance on two single Judge judgments of the Madras High Court and on a Bench decision of Oudh. (Vide *Akshia Pillai* v. *Govindarajalu Chetty*[1]; *Govinda Padayachi* v. *Velu Murugiah Chettiar*[2]; *Noor Mohammad* v. *Sulaiman Khan*[3].). In all these cases execution sale had been set aside by the Court in exercise of inherent powers and it was held that such orders were appealable. The ratio of the decision in the first Madras case is by no means very clear and the reasoning is somewhat dubious. In the other two cases the orders were held appealable on the ground that they fell within the ambit of section 47, Civil Procedure Code, read with section 151. It is unnecessary

1. (1924) 47 M.L.J. 549 : A.I.R. 1924 Mad. 399.
2. (1933) 64 M.L.J. 586 : A.I.R. 1933 Mad. 778.
3. A.I.R. 1943 Oudh 35.

to examine the correctness of these decisions as they have no bearing on the point before us, there being no analogy between an order setting aside an execution sale and an order setting aside the dismissal of an application. The High Court was thus right in upholding the preliminary objection that no appeal lay from the order of the Subordinate Judge, dated 25th April, 1945.

We now proceed to consider whether a revision was competent against the order of the 25th April, 1945, when no appeal lay. It seems to us that in this matter really the High Court entertained an appeal in the guise of a revision. The revisional jurisdiction of the High Court is set out in the 115th section of the Code of Civil Procedure in these terms :

"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears :

(*a*) to have exercised a jurisdiction not vested in it by law, or

(*b*) to have failed to exercise a jurisdiction so vested, or

(*c*) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit."

A large number of cases have been collected in the fourth edition of Chitaley and Rao's Code of Civil Procedure (Volume I), which only serve to show that the High Courts have not always appreciated the limits of the jurisdiction conferred by this section. In *Mohunt Bhagwan Ramanuj Das* v. *Khetter Mani Dassi*[1], the High Court of Calcutta expressed the opinion that sub-clause (*c*) of section 115, Civil Procedure Code, was intended to authorise the High Courts to interfere and correct gross and palpable errors of subordinate Courts, so as to prevent grave injustice in non-appealable cases. This decision was, however, dissented from by the same High Court in *Enat Mondul* v. *Baloram Dey*[2], but was cited with approval by Lort-Williams, J., in *Gulabchand Bangur* v. *Kabiruddin Ahmed*[3]. In these circumstances it is worthwhile recalling again to mind the decisions of the Privy Council on this subject and the limits stated therein for the exercise of jurisdiction conferred by this section on the High Courts.

As long ago as 1894, in *Rajah Amir Hassen Khan* v. *Sheo Baksh Singh*[4], the Privy Council made the following observations on section 622 of the former Code of Civil Procedure, which was replaced by section 115 of the Code of 1908 :—

"The question then is, did the Judges of the lower courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the case, and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity."

In 1917 again in *Balakrishna Udayar* v. *Vasudeva Aiyar*[5], the Board observed :—

"It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

In 1949 in *Venkatagiri Ayyangar* v. *Hindu Religious Endowments Board, Madras*[6], the Privy Council again examined the scope of section 115 and observed that they could see no justification for the view that the section was intended to authorise the High Court to interfere and correct gross and palpable errors of subordinate courts so as to prevent grave injustice in non-appealable cases and that it would be difficult to formulate any standard by which the degree of error of subordinate courts could be measured. It was said—

"Section 115 applies only to cases in which no appeal lies, and, where the legislature has provided no right of appeal, the manifest intention is that the order of the trial court, right or wrong, shall be final. The section empowers the High Court to satisfy itself on three matters, (*a*) that the order of the subordinate court is within its jurisdiction ; (*b*) that the case is one in which the court ought

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1. (1896) 1 C.W.N. 617.
2. (1899) 3 C.W.N. 581.
3. (1930) I.L.R. 58 Cal. 111.
4. (1884) I.L.R. 11 Cal. 6 : L.R. 11 I.A. 237 (P.C.).
5. (1917) 33 M.L.J. 69 : L.R. 44 I.A. 261 : I.L.R. 40 Mad. 793 (P.C.).
6. (1949) 1 M.L.J. 505 : L.R. 76 I.A. 67 (P.C.).

to exercise jurisdiction ; and (*c*) that in exercising jurisdiction the court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. If the High Courts is satisfied on those three matters, it has no power to interfere because it differs, however profoundly, from the conclusions of the subordinate court on questions of fact or law."

Later in the same year in *Joy Chand Lal Babu* v. *Kamalaksha Chaudhury*[1], their Lordships had again adverted to this matter and reiterated what they had said in their earlier decision. They pointed out—

"There have been a very large number of decisions of Indian High Courts on section 115 to many of which their Lordships have been referred. Some of such decisions prompt the observation that High Courts have not always appreciated that although error in a decision of a subordinate court does not by itself involve that the subordinate court has acted illegally or with material irregularity so as to justify interference in revision under sub-section (*c*), nevertheless, if the erroneous decision results in the subordinate court exercising a jurisdiction not vested in it by law, or failing to exercise a jurisdiction so vested, a case for revision arises under sub-section (*a*) or sub-section (*b*) and sub-section (*c*) can be ignored."

Reference may also be made to the observations of Bose, J., in his order of reference in *Narayan Sonaji* v. *Sheshrao Vithoba*[2] wherein it was said that the words "illegally" and "material irregularity" do not cover either errors of fact or law. They do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes have been complied with.

We are therefore of the opinion that in reversing the order of the executing court dated the 25th April, 1945, reviving the execution, the High Court exercised jurisdiction not conferred on it by section 115 of the Code. It is plain that the order of the Subordinate Judge dated the 25th April, 1945, was one that he had jurisdiction to make, that in making that order he neither acted in excess of his jurisdiction nor did he assume jurisdiction which he did not possess. It could not be said that in the exercise of it he acted with material irregularity or committed any breach of the procedure laid down for reaching the result. All that happened was that he felt that he had committed an error in dismissing the main execution while he was merely dealing with an adjournment application. It cannot be said that his omission in not taking into consideration what the decree-holder's pleader would have done had he been given the opportunity to make his submission amounts to material irregularity in the exercise of jurisdiction. This speculation was hardly relevant in the view of the case that he took. The Judge had jurisdiction to correct his own error without entering into a discussion of the grounds taken by the decree-holder or the objections raised by the judgment-debtors. We are satisfied therefore that the High Court acted in excess of its jurisdiction when it entertained an application in revision against the order of the Subordinate Judge dated the 25th April, 1945 and set it aside in exercise of that jurisdiction and remanded the case for further enquiry.

The result therefore is that Appeal No. 12 of 1951 is allowed, as the interlocutory remand order of the High Court was one without jurisdiction and that being so, the subsequent proceedings taken in consequence of it, *viz.*, the order of the Subordinate Judge restoring the application for execution to the extent of Rs. 92,000, the further order of the High Court on appeal restoring the execution case on terms, are null and void and have to be set aside and the order of the executing court dated the 25th April, 1945, restored. We order accordingly. Appeal No. 13 of 1951 is dismissed.

In the peculiar circumstances of this case we direct that the parties be left to bear their own costs throughout, that is, those incurred by them in the High Court in the proceedings which terminated with the remand order, the costs incurred in the subordinate court after the remand order, and the costs thereafter incurred in the High Court and those incurred in this court in these appeals.

1. (1949) 2 M.L.J. 6: L.R. 76 I.A. 131 (P.C.). 2. A.I.R. 1948 Nag. 258.

Agent for Appellant in C. A. No. 12 of 1951 and for Respondent in C. A. No. 13 of 1951 : *P. K. Chatterjee.*

Agent for Respondent in C. A. No. 12 of 1951 and for Appellant in C.A. No. 13 of 1951 : *Sukumar Ghose.*

G.R./K.S. *Appeal No.* 12 *allowed and appeal No.* 13 *dismissed.*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT :—B. K. MUKHERJEA, N. CHANDRASEKHARA AIYAR AND N. H. BHAGWATI, JJ.

Raj Bajrang Bahadur Singh .. *Appellant**

v.

Thakurain Bakhtraj Kuer .. *Respondent.*

Will—Construction—Absolute or limited estate—Tests—Use of words " absolute owner " and " generation after generation "—Effect—Restraint against alienation—Validity—Successive life estates—Validity.

Avadh Estates Act (I of 1869)—*Sections* 11 *and* 12—*Scope.*

The words " absolute estate " (Malik Kamil) and " generation after generation " (*Naslan bad naslan*) used with reference to estate conferred under a will no doubt are descriptive of a heritable and alienable estate in the donee and they connote full proprietary rights unless there is something in the context or in the surrounding circumstances which indicate that absolute rights were not intended to be conferred. In all such cases the true intention of the testator has to be gathered not by attaching importance to isolated expressions but by reading the will as a whole with all its provisions and ignoring none of them as redundant or contradictory.

Where the dominant intention of the testator was to make provision not for the donee alone but for the benefit of his heirs and successors " generation after generation ", the expression " heirs " in the context will mean the donee's heirs determined according to the general law of inheritance and not the successors to the estate under the special provisions of the Oudh Estates Act (which governed the parties in the instant case). In the instant case the beneficiaries under the will were the donee and his heirs in succession and in each such heir or set of heirs the rights of *malik* are given but without any power of alienation. Where the restrictions on alienations are the primary things which the testator desires and they are consistent with the whole tenor of the will, it is a material circumstance to be relied upon for displacing the presumption of absolute ownership implied in the use of the word " malik ".

When a gift is made to a class or series of persons, some of whom are in existence and some are not, it does not fail in its entirety; it is valid with regard to the persons who are in existence at the time of the testator's death and is invalid as to the rest. The widow of the donee who was in existence at the time of the testator's death is entitled to take a life estate.

The Oudh Estates Act does not interdict the creation of future estates and limitations provided they do not transgress the rule against perpetuities contained in sections 11 and 12 of the Act.

On appeal from the judgment and decree dated the 4th September, 1946, of the late Chief Court of Oudh, now the High Court of Judicature at Allahabad (Lucknow Bench), (Misra and Walford, JJ.) in First Civil Appeal No. 139 of 1941, arising out of judgment and decree dated the 23rd October, 1941, of the Court of the Civil Judge, Bahraich, in Regular Suit No. 1 of 1941.

Onkar Nath Srivastava, Advocate for Appellant.

Bishan Singh, Advocate for Respondent.

The Judgment of the Court was delivered by

Mukherjea, J.—This appeal is on behalf of the plaintiff and is directed against a judgment and decree of the Chief Court of Avadh dated 4th September, 1946, affirming, on appeal, those of the Civil Judge, Bahraich, passed in Regular Suit No. 1 of 1941.

To appreciate the controversy between the parties to this appeal it would be necessary to state a few facts. One Raja Bisheshwar Bux Singh, the father of the plaintiff and of the defendant's husband, was a taluqdar of Oudh, and the estate known as Gangwal Estate, to which he succeeded in 1925 on the death of the widow of the last holder, is one to which the Oudh Estates Act (I of 1869) applies. Raja Bisheshwar died on 16th October, 1930, leaving behind him two

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* Civil Appeal No. 147 of 1951. 7th November, 1952.

sons, the elder of whom Bajrang Bahadur is the plaintiff in the present litigation; while the younger, whose name was Dhuj Singh, has died since then, being survived by his widow Bhaktraj Kuer, who is the defendant in the suit. Shortly before his death, Raja Bisheshwar executed a will dated 11th September, 1929, by which five properties, described in lists A and B attached to the plaint, were bequeathed to Dhuj Singh, the younger son, by way of making provisions for the maintenance of the said son and his heirs. On the death of Raja Bisheshwar, the estate went to the plaintiff as his eldest son under the provisions of the Oudh Estates Act and Dhuj Singh got only the five properties mentioned above under the terms of his father's will. Dhuj Singh had no issue of his own and on his death in 1940 disputes arose in respect of these properties between the plaintiff on the one hand and Dhuj Singh's widow on the other. The plaintiff succeeded at first in having his name mutated as owner of these properties in the revenue records in place of his deceased brother, but the appellate revenue authority ultimately set aside this order and directed mutation to be made in the name of the defendant. The plaintiff thereupon commenced the suit out of which this appeal arises, praying for declaration of his title to the five properties mentioned above on the allegation that they vested in him on the death of Dhuj Singh and that the defendant could not, in law, assert any right to the same. It may be stated here that four out of these five properties have been described in list A to the plaint and there is no dispute that they are taluqdari properties. The fifth item is set out in list B and admittedly this property is not taluqdari in its character. Besides lists A and B there is a third list, *viz.*, C attached to the plaint, which mentions two other properties as being in possession of the defendant and in the plaint a claim was made on behalf of the plaintiff in respect to these properties as well although they were not covered by the will of Bisheshwar. This claim, however, was abandoned in course of the trial and we are not concerned with it in the present appeal.

The plaintiff really rested his case on a two-fold ground. It was averred in the first place that Dhuj Singh had only a life interest in the properties bequeathed to him by Bisheshwar and on the termination of his life interest, the property vested in the plaintiff as the heir of the late Raja. In the alternative the case put forward was that even if Dhuj Singh had an absolute interest created in his favour under the terms of his father's will, the plaintiff was entitled to succeed to the taluqdari properties at any rate, under the provision of section 14 (*b*) read with section 22 (5) of the Oudh Estates Act.

The defendant in her written statement resisted the plaintiff's claim primarily on the ground that Bisheshwar Bux Singh, as the full owner of the properties, was competent to dispose of them in any way he liked and under his will it was the defendant and not the plaintiff in whom the properties vested after the death of Dhuj Singh. The contention, in substance, was that the will created a life estate for Dhuj Singh followed by a devise in favour of the widow as his personal heir.

The decision of the point in dispute between the parties thus hinges on the proper construction of the will left by Bisheshwar. The trial Court after an elaborate consideration of the different portions of the will, viewed in the light of surrounding circumstances, came to the conclusion that Dhuj Singh got a life interest in the devised properties but there were similar life estates created in favour of his personal heirs in succession, the ultimate remainder being given to the holder of the estate when the line of personal heirs would become extinct. The defendant, therefore, was held entitled to the suit properties so long as she was alive and in that view the plaintiff's suit was dismissed. Against this decision, the plaintiff took an appeal to the Chief Court of Avadh and the Chief Court affirmed the decision of the trial Judge and dismissed the appeal. The plaintiff has now come up to this Court on the strength of a certificate granted by the High Court of Allahabad with which the Chief Court of Avadh was amalgamated sometime after the disposal of this case.

The learned counsel appearing for the appellant first of all drew our attention to the provisions contained in certain sections of the Oudh Estates Act and it

was urged by him on the basis of these provisions that as Dhuj Singh, who got the suit properties under the will of his father, the late taluqdar, came within the category of persons enumerated in clause (1) of section 13-A, Oudh Estates Act, he could, under section 14 of the Act, hold the properties subject to the same conditions and the same rules of succession as were applicable to the taluqdar himself. In these circumstances, it is said that the provisions of section 22 (5) of the Act would be attracted to the facts of this case and the plaintiff, as the brother of Dhuj Singh, would be entitled to succeed to the properties of the latter in preference to his widow.

The argument formulated in this way does not appear to us to be helpful to the appellant. Section 11 of the Oudh Estates Act confers very wide powers of disposition upon a taluqdar and he is competent under the section :

> " to transfer the whole or any portion of his estate, or of his right and interest therein, during his lifetime, by sale, exchange, mortgage, lease or gift, and to bequeath by his will to any person the whole or any portion of such estate, and interest."

Sections 13 and 13-A make certain special provisions in cases of transfers by way of gift and bequest in favour of certain specified persons and lay down the formalities which are to be complied with in such cases. Section 14 then provides that

> " if any taluqdar or grantee, or his heir or legatee, shall heretofore have transferred or bequeathed, or if any taluqdar or grantee, or his heir or legatee shall hereafter transfer or bequeath the whole or any portion of his estate—
>
> (a) . . . .
>
> (b) to any of the persons mentioned in clauses (1) and (2) of section 13-A, the transferee or legatee and his heirs and legatees shall have same rights and powers in regard to the property to which he or they may have become entitled under or by virtue of such transfer or bequest, and shall hold the same subject to the same conditions and to the same rules of succession as the transferor or testator."

It is true that Dhuj Singh being a younger son of the testator came within the purview of clause (1) of section 13-A of the Oudh Estates Act and if he became full owner of the properties under the will of his father, succession to such properties after his death would certainly be regulated by the special rules of succession laid down in the Oudh Estates Act, and not by the ordinary law of inheritance. But section 14 would have no application if the disposition by the will did not make Dhuj Singh an absolute owner of the properties and he was given only an interest for life which was followed by subsequent interests created in favour of other persons.

It cannot also be contended that a taluqdar governed by the Oudh Estate Act cannot convey anything less than his absolute proprietary right in a property by transfer *inter vivos* or by will, or that it is not competent for him to create any limited interest or future estate. Apart from the plenary provision contained in section 11, section 12 of the Act which makes the rule against perpetuity applicable to transfers made by a taluqdar, furnishes a clear indication that the Act does not interdict the creation of future estates and limitations provided they do not transgress the perpetuity rule.

The questions, therefore, which require consideration in this case are really two in number. The first is, whether Dhuj Singh got an absolute estate or an estate for life in the properties given to him by the will of Raja Bisheshwar ? If he got an absolute estate, the contention of the appellant should undoubtedly prevail with regard to the taluqdari properties specified in list A of the plaint. If, on the other hand, the interest was one which was to inure only for the period of his life, the further question would arise as to whether any subsequent interest was validly created by the will in favour of the widow on the strength of which she can resist the plaintiff's claim. If the life estate was created in favour of Dhuj Singh alone, obviously the plaintiff as the heir of the grantor would be entitled to come in as reversioner after his death.

The answers to both the questions would have to be given on a proper construction of the will left by Raja Bisheshwar. The will has been rightly described by the trial Judge as a most inartistic document with no pretension to any precision of language, and apparently it was drawn up by a man who was not acquainted

with legal phraseology. The Civil Judge himself made a translation of the document, dividing its contents into several paragraphs and this was found useful and convenient by the learned Judges of the Chief Court. The material portions of the will, as translated by the trial Judge, may be set out as follows :—

"As I have become sufficiently old and no reliance can be placed on life, by God's grace I have got two sons, namely, Bajrang Bahadur Singh, the elder, and Dhuj Singh, the younger. After my death the elder son would, according to rule, become the Raja, the younger one is simply entitled to maintenance.

(1) Consequently with a view that after my death the younger son and his heirs and successors, generation after generation, may not feel any trouble and that there may not be any quarrel between them.

(2) I have decided after a full consideration that I should execute a will in favour of Dhuj Singh with respect to the villages detailed below.

(3) So that after my death Dhuj Singh may remain in possession of those villages as an absolute owner with the reservation that he will have no right of transfer.

(4) If God forbid, Dhuj Singh may not be living at the time of my death, his son or whoever may be his male heir or widow may remain in possession of the said villages on payment of the Government Revenue as an absolute owner.

(5) The liability for the land revenue of the said villages will be with Dhuj Singh and his heirs and successors; the estate will have no concern with it.

(6) Although Dhuj Singh and his heirs are not given the power of transfer, they will exercise all other rights of absolute ownership, that is to say, the result is that the proprietor of the estate or my other heirs and successors will not eject Dhuj Singh or his heirs or successors in any way.

(7) Of course if Dhuj Singh or his heirs become ever heirless then the said villages will not escheat to the Government but will revert and form part of the estate.

(8) Hence with the soundness of my mind without any force or pressure and after having fully understood and also having thought it proper I execute this will in favour of Dhuj Singh, my own son, with the above-mentioned terms."

The learned counsel for the appellant naturally lays stress upon the words "absolute owner" (Malik Kamil) and "generation after generation" (Naslan bad naslan) used in reference to the interest which Dhuj Singh was to take under the will. These words, it cannot be disputed, are descriptive of a heritable and alienable estate in the donee, and they connote full proprietary rights unless there is something in the context or in the surrounding circumstances which indicate that absolute rights were not intended to be conferred. In all such cases the true intention of the testator has to be gathered not by attaching importance to isolated expressions but by reading the will as a whole with all its provisions and ignoring none of them as redundant or contradictory.

The object of the testator in executing the will is clearly set out in the preamble to the document and in spite of the somewhat clumsy drafting that object seems to have been kept in view by the testator throughout, in making the provisions. The language and tenor of the document leave no doubt in our minds that the dominant intention of the testator was to make provisions not for Dhuj Singh alone but for the benefit of his heirs and successors, "generation after generation" as the expression has been used. The expression "heirs" in this context obviously means and refers to the personal heirs of Dhuj Singh determined according to the general law of inheritance and not the successors to the estate under the special provisions of the Oudh Estates Act, for paragraph 6 of the will mentioned above is expressly intended to protect the personal heirs of Dhuj Singh from eviction from the properties in question by the future holders of the estate.

Thus the beneficiaries under the will are Dhuj Singh himself and his heirs in succession and to each such heir or set of heirs the rights of *malik* are given but without any power of alienation. On the total extinction of this line of heirs the properties affected by the will are to revert to the estate. As it was the intention of the testator that the properties should remain intact till the line of Dhuj Singh was exhausted and each successor was to enjoy and hold the properties without any power of alienation, obviously what the testator wanted was to create a series of life estates one after another, the ultimate reversion being given to the parent estate when there was a complete failure of heirs. To what extent such intention could be given effect to by law is another matter and that we shall consider presently.

But it can be said without hesitation that it was not the intention of the testator to confer anything but a life estate upon Dhuj Singh in respect of the properties covered by the will. The clause in the will imposing total restraint on alienation is also a pointer in the same direction. In cases where the intention of the testator is to grant an absolute estate, an attempt to reduce the powers of the owner by imposing restraint on alienation would certainly be repelled on the ground of repugnancy; but where the restrictions are the primary things which the testator desires and they are consistent with the whole tenor of the will, it is a material circumstance to be relied upon for displacing the presumption of absolute ownership implied in the use of the word "malik" We hold, therefore, that the courts below were right in holding that Dhuj Singh had only a life interest in the properties under the terms of his father's will.

Of course this by itself gives no comfort to the defendant; she has to establish, in order that she may be able to resist the plaintiff's claim, that the will created an independent interest in her favour following the death of Dhuj Singh. As we have said already, the testator did intend to create successive life estates in favour of the successive heirs of Dhuj Singh. This, it is contended by the appellant is not permissible in law and he relies on the case of *Tagore* v. *Tagore*[1]. It is quite true that no interest could be created in favour of an unborn person but when the gift is made to a class or series of persons, some of whom are in existence and some are not, it does not fail in its entirety; it is valid with regard to the persons, who are in existence at the time of the testator's death and is invalid as to the rest. The widow, who is the next heir of Dhuj Singh, was in existence when the testator died and the life interest created in her favour should certainly take effect. She thus acquired under the will an interest in the suit properties after the death of her husband, commensurate with the period of her own natural life and the plaintiff consequently has no present right to possession. The result, therefore, is that the appeal fails and is dismissed with costs.

Agent for Appellant: *Rajinder Narain.*

Agent for Respondent: *C. P. Lal*, for *S. S. Shukla.*

G.R./K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SUBBA RAO.

Andiappa Pillai and others .. *Petitioners**

v.

The State of Madras, through the Secretary, Revenue Department to the State of Madras .. *Respondent.*

Madras Estates Land (Reduction of Rent) Act (XXX of 1947)—Notification of half a village granted as dharmasanam—*Validity.*

Grants made to separate persons cannot be clubbed together to form a whole village for the purpose of definition of an "estate" under the Estates Land Act. It would be an *a priori* case if such grants were made on different dates. When only a share of the village was granted it cannot be a grant of a whole village. Such a *dharmasanam* village is not an estate to which Madras Act XXX of 1947 applies and the notification under that Act must be quashed.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the proceedings taken by the respondent under the Madras Act XXX of 1947 with regard to the petitioners' village Athankothangudi Sikkal Zemin Taluq in the Ramanathapuram district and annul and quash the said proceedings.

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1. (1872) 18 W.R. 379.

* C.M.P. No. 9036 of 1950. 17th March, 1952.

R. Kesava Aiyangar and *K. Parasaran* for Petitioners.

The Government Pleader (*P. Satyanarayana Raju*) for Respondent.

The Court delivered the following

JUDGMENT.—This is an application for issuing a writ of *certiorari* to quash the order of the Government of Madras, notifying the village of Athankothangudi, under Madras Act XXX of 1947. The simple question is whether the village is an estate within the meaning of the Act. It would be an estate if originally the entire village was granted to the petitioners' ancestors. The only document filed in the case is the Inam Fair Register. The Inam Fair Register shows the history of the grant. The village was situate in the Zamindari of Ramanadhapuram. Half of the village was granted for the support of Sri Adi Jagannadhaswami in Tiruppullany and the remaining half as Dharmasanam.

The former grant was a permanent one and the latter was a hereditary grant. Column 11 of the Inam Fair Register indicates that the name of the grantor in regard to one half is not known, whereas the name of the other grantor is given as Raghunatha Sethupathi. Column 8 shows that one half was granted to Dharmasanam and the other half for the support of Sri Adi Jagannadhaswami. From the recitals of the document it is manifest that the grantors, the grantees and the purpose of the grant were all different. The Inam Commissioner confirmed the grant to two different persons and issued separate title deeds. On these facts it is not possible to hold that the Dharmasanam grant, with which I am now concerned, is a grant of a whole inam village at the time it was made. The Supreme Court in the decision in *District Board, Tanjore* v. *Noor Mohammad Rowther*[1], had to consider the scope of a grant, which was the subject-matter of the appeal before them. There the grant was made in one deed of different extents of a village to different persons. Even so, their Lordships expressed the view that the grant would not satisfy the definition of an estate. Mahajan, J., observed at page 590 as follows :

"It is difficult to hold positively, though it is probable, that the grant to Mudali as well as the Yerayali grant were by the same Paravangi, but even so, these will be two separate grants though written on one piece of paper, the contracting parties being two different persons. Neither of these grants can be held to be a grant of a whole village."

It follows from the abovesaid observations that the grant made to separate persons cannot be clubbed together to form a whole village for the purpose of the definition of an "estate" under the Act. It would be an *a priori* case if the two grants were made on different dates. When the grant was made to the petitioner's ancestor only a share of the village was granted and therefore it could not have been a grant of a whole village. I therefore hold that the Dharmasanam Athankothangudi village is not an estate to which the Act applies.

The notification, therefore, is quashed. The petitioner will have his costs.

K.S. ——— *Notification quashed.*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT :—MEHRCHAND MAHAJAN, S. R. DAS, VIVIAN BOSE AND GHULAM HASAN, JJ.

The Raghuvanshi Mills, Ltd., Bombay .. *Appellant**

v.

The Commissioner of Income-tax, Bombay City .. *Respondent.*

Income-tax Act (XI of 1922), sections 3 and 4—Amounts received by assessee firm under insurance policies for loss sustained by fire insured against—If income assessable to income-tax.

The assessee company owning certain mills had insured its buildings, plant and machinery with various insurance companies and also had taken "consequential loss" policies insuring against loss of profit, standing charges and agency commission. On 18th of January, 1944, a fire broke out and

1. (1952) 2 M.L.J. 586 (S.C.).

* Civil Appeal No. 55 of 1950. 3rd November, 1952.

the mills were completely destroyed. The insurance companies therefore paid the assessee company various amounts under the policies. On a question whether the amounts so received was income assessable to tax,

Held (in the circumstances) the money so paid is a receipt and in so far as it represents loss of profits, as opposed to loss of capital and so forth, it is an item of income in any normal sense of the term. The receipt is inseparably connected with the ownership and conduct of the business and arises from it. Accordingly it is not exempt.

On appeal by Special Leave from the Judgment and Order, dated the 18th March, 1949, of the High Court of Judicature at Bombay (Chagla, C.J. and Tendolkar, J.) in Income-tax Reference No. 5 of 1948, arising out of Order, dated the 27th September, 1947, of the Income-tax Appellate Tribunal, Bombay Bench 'A' in I.T.A. No. 2205 of 1946-47 (Assessment year 1945-46).

C. K. Daphtary, Solicitor-General for India (*K. T. Desai* and *A. M. Mehta*, Advocates, with him), for Appellant.

M. C. Setalvad, Attorney-General for India (*G. N. Joshi*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Bose, J.—This is an appeal from the High Court at Bombay in an Income-tax Reference under section 66 (1) of the Indian Income-tax Act of 1922.

The reference was made to the Bombay High Court by the Bombay Bench of the Income-tax Appellate Tribunal in the following circumstances.

The appellant-assessee is a company known as the Raghuvanshi Mills, Ltd., of Bombay. The assessment year with which we are concerned is 1945-46. The assessee had insured its buildings, plant and machinery with various insurance companies and also took out, besides those policies, four policies of a type known as a "Consequential Loss Policy." This kind of policy insures against loss of profit, standing charges and agency commission. The total insured against under the latter heads was

Rs. 37,75,000 on account of loss of profits and standing charges, and

Rs. 2,25,000 on account of agency commission,

making a total of Rs. 40,00,000.

On the 18th of January, 1944, a fire broke out and the mills were completely destroyed. The various insurance companies therefore paid the assessee company an aggregate of Rs. 14,00,000 on account in the year with which we are concerned under these policies. This was paid in two sums as follows : Rs. 8,25,000 on 8th September, 1944 and Rs. 5,75,000 on 22nd December, 1944. These payments have been treated as part of the assessee's income and the company has been taxed accordingly. The question is whether these sums are or are not liable to tax.

Before we set out the question referred, it will be necessary to state that the whole of this Rs. 14,00,000 has been treated as paid on account of loss of profits. The learned Solicitor-General, who appeared for the appellant-assessee, contended that that was wrong because the portion of it assignable to Standing Charges and Agency Commission could not on any construction be liable to tax.

This contention is new and involves questions of fact and travels beyond the scope of the question referred. We are consequently not able to entertain it. It has been assumed throughout the proceedings, right up to this Court, that the whole of the Rs. 14,00,000 was assignable to loss of profits. There is nothing on the record to show that it was ever split up among the other heads or that it was ever treated as having been split up either by the insurance companies or by the assessee, nor is there any material on which we would be able to apportion it. Our decision therefore proceeds on the assumption that the whole sum is assignable to loss of profits and we make it clear that we decide nothing about other moneys which may be distributable among other heads.

The question has been referred in these terms :—

Whether in the circumstances of the case, the sum of Rs. 14,00,000 was the assessee company's income within the meaning of section 2 (6-C) of the Indian Income-tax Act and liable to pay income-tax under the Indian Income-tax Act.

We are concerned in this case with four policies of insurance with four different insurance companies. The clauses relevant to the present matter are the same in all four cases though the sum insured against by each insurance company differs. They are as follows :

"*Policy No. C.L.* 10018. . . . .

Rupees X Lacs only.

On Loss of Profits, Standing Charges and Agency Commission of the above Co.'s Mills, situate at Haines Road, Mahaluxmi, Bombay, following fire . . . .

The total amount declared for insurance is Rs. 40,00,000 and for 18 months' benefits, only as under :—

Rs. 37,75,000 on Loss of Profits and Standing Charges.

Rs. 2,25,000 on Agency Commission.

Rs. 40,00,000 out of which this policy covers Rs. *X* lacs only . . . .

* * * * * *

Schedule attached to and forming part of Policy No. C.L. 10018.

The Company will pay to the assured :—

The loss of Gross Profits due to (*a*) Reduction in Output and (*b*) Increase in Cost of Working and the amount payable as indemnity hereunder shall . . . ."

Definitions of those two terms follow. We need not reproduce them. Then come the following definitions :—

"*Gross profit.*—The sum produced by adding to the Net profit the amount of the Insured Standing Charges, or if there be no Net Profit the amount of the Insured Standing Charges, less such a proportion of any net trading loss as the amount of the Insured Standing Charges bears to all the Standing Charges of the business.

Net profit.—The net trading profit (exclusive of all capital receipts and accretions and all outlay properly chargeable to capital) resulting from the business of the Insured at the premises after due provision has been made for all Standing and other charges including depreciation.

Insured standing charges.—Interest on Loans and Bank Overdrafts, Rent Rates and Taxes, Salaries to permanent Staff and Wages to skilled employees, Directors' Fees, Auditors' Fees, Travelling Expenses, Insurance Premiums, Advertising and agency Commission.

* * * * * *

Period of indemnity.—The period beginning with the occurrence of the fire and ending not later than eighteen consecutive calendar months thereafter during which the results of the business shall be affected in consequence of the fire.

Rate of Gross Profit.—The rate of Gross profit per unit earned on the output during the financial year immediately before the date of the fire . . . . . to which such adjustments shall be made as may be necessary to provide for the trend of the business and for variations in or special circumstances affecting the business either before or after the fire or which would have affected the business had the fire not occurred *so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the result which, but for the fire, would have been obtained during the relative period after the fire.*"

The italicised words show that the insurance in respect of profits was to represent as nearly as possible the profits which would have been made had the Mills been working in its normal way.

We turn next to the Income-tax Act. Under section 3, the "total income of the previous year" is liable to tax subject to the provisions of the Act. Section 4 defines the total income to inlcude

"all income, profits and gains from whatever source derived."

There are certain qualifications but they do not concern us here.

It will be seen that the taxable commodity, "total income," embraces three elements "income," "profits" and "gains." Now though these may overlap in many cases, they are nevertheless separate and severable, and the simple question is whether the Rs. 14 lacs falls under any one or more of those heads. In our opinion, it is "income" and so is taxable.

It was argued on behalf of the assessee that it cannot be called profits because the money is only payable if and when there is a loss or partial loss and that something received from an outside source in circumstances like these is not money which is earned in the business and if there are no earnings and no profits there cannot be any income. But that only concentrates on the word " profits." This may not be a " profit " but it is something which represents the profits and was intended to take the place of them and is therefore just as much income as profits or gains received in the ordinary way. Section 4 is so widely worded that everything which is received by a man and goes to swell the credit side of his total account is either an income or a profit or a gain.

No attempt has been made in the Act to define " income " except to say in section 2 (6-C) that it includes certain things which would possibly not have been regarded as income but for the special definition. That however does not limit the generality of its natural meaning except as qualified in the section itself. The words which follow, namely, " from whatever source derived," show how wide the net is spread. So also in section 6. After setting out the various heads of taxable income it brings in the all embracing phrase " income from other sources."

There is however a distinction between " income " and " taxable income." The Act does not purport to subject all sources of income to tax, for the liability is expressly made subject to the provisions of the Act and among the provisions are a series of exceptions and limitations. Most of them are set out in section 4 itself but none of them apply here. The nearest approach for present purposes is section 4 (3) (vii) :—

> " Any receipts . . . not being receipts arising from business . . . . which are of a casual and non-recurring nature."

But the sting, so far as the assessee is concerned, lies in the words " not being receipts arising from business."

The assessee is a business company. Its aim is to make profits and to insure against loss. In the ordinary way it does this by buying raw material, manufacturing goods out of them and selling them so that on balance there is a profit or gain to itself. But it also has other ways of acquiring gain, as do all prudent businesses, namely, by insuring against loss of profits. It is indubitable that the money paid in such circumstances is a receipt and in so far as it represents loss of profits, as opposed to loss of capital and so forth, it is an item of income in any normal sense of the term. It is equally clear that the receipt is inseparably connected with the ownership and conduct of the business and arises from it. Accordingly, it is not exempt.

This question was considered by the Supreme Court of Canada which decided that a receipt of this nature is not a " profit " and so is not taxable. (*B. C. Fir and Cedar Lumber Co.* v. *The King*[1].) But the Court did not examine the wider position whether it is " income " and in any event the decision was reversed on an appeal to the Privy Council. Their Lordships held it is " income ". This was followed later by the Court of Appeal in England and endorsed by the House of Lords in *Commissioners of Inland Revenue* v. *William's Executors*[2]. In so far as these decisions do not turn on the special wording of the Acts with which they are respectively concerned and deal with the more general meaning of the word " income ", we prefer the view taken in England.

It is true the Judicial Committee attempted a narrower definition in *Commissioner of Income-tax* v. *Shaw Wallace & Co.*[3] by limiting income to " a periodical monetary return ' coming in ' with some sort of regularity, or expected regularity, from definite sources " but, in our opinion, those remarks must be read with reference to the particular facts of that case. The non-recurring aspect of this kind of receipt was considered by the Privy Council in *The King* v. *B. C. Fir*

1. (1931) Canada L.R. 435.
2. (1941) 26 Tax Cases 28.
3. (1932) 63 M.L.J. 124 : L.R. 59 I.A. 206 : I.L.R. 59 Cal. 1343 (P.C.).

and Cedar Lumber & Co.[1] and we do not think their Lordships had in mind a case of this nature when they decided *Shaw Wallace & Company's case*[2].

The learned Solicitor-General relies strongly on a clause which appears in three of the four policies with which we are concerned. That is a clause which states that the insured must do all he can to minimise the loss in profits and until he makes an endeavour to restart the business the moneys will not be paid. This he argued shows that the money was paid as an indemnity against the loss of profits and was neither income nor profits, nor was it a gain within the meaning of the section. We are unable to see how these receipts cease to be income simply because certain things must be done before the moneys can be claimed.

In our opinion, the High Court was right in holding that the Rs. 14,00,000 is assessable to tax. The appeal fails and is dismissed with costs.

Agent for Appellant : *Rajinder Narain.*

Agent for Respondent : *P. A. Mehta.*

G.R./K.S. *Appeal dismissed.*

[IN THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT :—MEHRCHAND MAHAJAN, S. R. DAS, VIVIAN BOSE AND GHULAM HASAN, JJ.

Nemi Chand and another .. *Appellants**

v.

The Edward Mills Co., Ltd. and another .. *Respondents.*

Court-Fees Act (VII of 1870), section 7 (iv) (c) and Schedule II, Article 17—Applicability—Dismissal of suit on preliminary ground—Appeal giving up one of the reliefs and paying court-fee on remaining relief—Court-fee—Sections 5 and 12 of Court-Fees Act—Scope—Decision as to court-fee—" Finality "—Limits.

It is always open to the appellant in an appeal to give up a portion of his claim and to restrict it. It is further open to him, unless the relief is of such a nature that it cannot be split up, to relinquish a part of the claim and to bring it within the amount of court-fee already paid. For the purpose of deciding whether the memorandum of appeal was properly stamped according to the subject-matter of the appeal, it is not open to the court to canvass the question whether the suit with one of the prayers eliminated from it fell within the mischief of the proviso to section 42 of the Specific Relief Act. That is a question which relates to the merits of the appeal and does not concern its proper institution. Accordingly the Court cannot demand additional court-fee from the plaintiff appellant in respect of the prayer that is relinquished and dismiss the appeal for failure to meet it.

The difference in the phraseology employed in sections 5 and 12 of the Court-Fees Act indicates that the scope of section 12 is narrower than that of section 5, which declares decisions on questions of court-fee, whenever they arise in the Chartered High Courts as final makes a decision as to the *necessity* of paying a fee or the amount thereof final. Whereas section 12 makes a decision on every question relating to *valuation* for the purposes of determining the amount of any fee payable under Chapter 3 on a plaint or memorandum of appeal final. When the two sections in the same Act relating to the same subject-matter have been drafted in different language, it is not unreasonable to infer that they were enacted with a different intention and that in one case the intention was to give finality to all decisions of the taxing officer or the taxing Judge, as the case may be, while in the other case it was only intended to give finality to questions of fact that are decided by a Court but not to questions of law. Whether a case falls under one particular section of the Act or another is a pure question of law and does not directly determine the valuation of the suit for purposes of court-fee. The question of determination of valuation or appraisement only arises after it is settled in what class or category it falls.

Section 12 when it says that such a decision shall be final between the parties only makes the decision of the Court on a question of court-fee non-appealable and places it on the same footing as other interlocutory non-appealable orders under the Civil Procedure Code and it does no more than that. If a decision under section 12 is reached by assuming jurisdiction which the Court does not possess or without observing the formalities which are prescribed for reaching such a decision the order obviously would be revisable by the High Court in the exercise of revisional powers. Similarly, when a party thinking that a decision under section 12 is palpably wrong takes the risk of his plaint being rejected or suit dismissed and then

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1. (1932) A.C. 441 at 448. I.L.R. 59 Cal. 1343 (P.C.).
2. (1932) 63 M.L.J. 124 : L.R. 59 I.A. 206 :

* C. A. No. 105 of 1950. 10th November, 1952.

appeals from the order rejecting the plaint or from the decree dismissing the suit but not from the decision on the question of court-fee, then it is open to him to challenge the interlocutory order even on the question of court-fee made in the suit or appeal. The word "finality" construed in the limited sense in which it is often used in statutes means that no appeal lies from an order of this character as such and it means no more than that.

In any event a decision that as the suit could not be maintained without asking for relief No. 2, the same fee was payable on the memorandum of appeal as on the plaint, is only a decision as to the maintainability of the appeal without first deciding whether the appeal had been properly instituted in that Court, and no finality can attach to it by the provisions of section 12 as in reality it decides no question within the ambit of section 12 of the Court-Fees Act.

On Appeal from the Judgment and Order, dated the 22nd March, 1945, of the Court of the Judicial Commissioner, Ajmer-Merwara, Ajmer (R. H. W. Davies, Judicial Commissioner) in Civil First Appeal No. 16 of 1944, arising out of Judgment and Decree, dated the 13th March, 1944 of the Court of the Judge, Small Causes, Ajmer and Additional District Judge, Ajmer, in Civil Suit No. 28 of 1942.

S. S. Deedwania, Advocate for Appellants.

M. C. Setalvad, Attorney-General for India (*J. N. Sharma*, Advocate with him), for Respondents.

The Judgment of the Court was delivered by

Mahajan, J.—This is an appeal by special leave granted by the Privy Council and limited to the question of court-fee, *viz.*, whether on the memorandum of appeal presented to the High Court court-fee was payable under section 7 (iv) (*c*) or Article 17 of Schedule II of the Court-Fees Act.

The question whether the memorandum of appeal was properly stamped arose in the following circumstances : Edward Mills, Co., Ltd., is a joint-stock company situate in Beawar, Ajmer-Merwara. In accordance with the provisions of the articles of the company one Seth Gadh Mal Lodha and Rai Sahib Moti Lal (respondent No. 2) were its chairman and managing director respectively since 1916. Seth Gadh Mal Lodha represented his family firm of Kanwal Nain Hamir Singh, while Rai Sahib Moti Lal represented the joint family firm of Champa Lal Ram Swaroop. On 1st July, 1938, Rai Sahib Moti Lal and his firm were adjudged insolvents by the Bombay High Court. The result was that respondent No. 2 had to vacate the office of managing director and the members of his firm also became ineligible for it. By a resolution of the Board of Directors passed on 18th July, 1938, Gadh Mal Lodha was appointed to take the place of Rai Sahib Moti Lal as managing director. Gadh Mal Lodha died on 11th January, 1942 and the board of directors then appointed Seth Sobhagmal Lodha to act as chairman as well as managing director till the appointment was made by the company. An extraordinary meeting of the company was called for the 8th February, 1945, for the election of the chairman. At this meeting conflict arose between the two groups represented by Sobhagmal Lodha and Moti Lal. The chairman therefore dissolved the meeting but the supporters of Moti Lal continued to hold it and passed a resolution appointing him as the sole agent and chairman for a period of twenty years on a remuneration equal to ten per cent. of the profits of the company. It is this resolution of the 8th February, 1942, which has led to the present dispute.

Seth Sobhagmal in the situation that arose approached the District Judge of Ajmer with the prayer that a general meeting of the company may be held under the supervision of the Court. This request was allowed on 11th February, 1942 and the Court ordered that the meeting be held on 12th February, 1942, under the chairmanship of Seth Sobhagmal. Respondent No. 2 being aggrieved by this order, filed an application in revision in the Court of the Judicial Commissioner impugning the order. The learned Judicial Commissioner allowed the revision and directed that the resolution of the 8th February, 1942, should be acted upon.

Having failed to get redress in the summary proceedings, the appellant then filed the suit out of which this appeal arises for quashing the resolution of the 8th February, 1942. In the plaint he asked for the following reliefs :—

1. That it be declared that the appointment of defendant No. 2 is illegal, invalid and *ultra vires* and that he has no right to act as chairman, managing director, etc., of defendant No. 1 ;

2. That a receiver be appointed to take charge of the management of the company, until a properly qualified chairman, managing director, etc., is duly appointed as required by the memorandum and articles of the company.

The plaint bore a court-fee stamp of Rs. 10 only, but on the objection of the respondents that court-fee was payable on relief No. 2, the appellants paid *ad valorem* fee on Rs. 51,000 which was the valuation of the suit for purposes of jurisdiction.

The Additional District Judge dismissed the suit on the preliminary ground that it was not maintainable as it related to the internal management of the company and that the appellants had no right to bring it without impleading the directors who were necessary parties to it.

Aggrieved by this decision of the trial Judge, the appellants preferred an appeal to the Court of the Judicial Commissioner, Ajmer-Merwara, at Ajmer. The memorandum of appeal was stamped with a court-fee stamp of Rs. 10 and it was expressly stated therein that relief No. 2 of the plaint was given up. An objection was raised regarding the amount of court-fee paid on the memorandum of appeal. The Judicial Commissioner ordered that proper court-fee be paid thereon in a month. In this order no reasons were given for this decision. The additional fee demanded was not paid, and the Judicial Commissioner dismissed the appeal with costs on 22nd March, 1945. An application was made for leave to appeal to the Privy Council against this order but it was refused. In the order refusing leave it was said as follows :—

"On appeal to this Court, the memorandum was again stamped with a ten rupee stamp only and the respondents therefore objected. It having been conceded by plaintiffs earlier that the relief for the receivership was consequential to the relief for the declaration, the appellants were directed to pay the same stamp as had been paid in the trial Court. They objected stating that they had expunged from their memorandum of appeal the request that the Court should appoint a receiver and that they were not, therefore, liable to pay the same amount. On this a notice was issued and counsel were heard.

It being clearly set out in section 42 of the Specific Relief Act that no Court shall grant a declaration only where the plaintiff being able to seek further relief than a mere declaration of title omits to do so, the appellants were directed to pay as earlier ordered the same amount as had ultimately been paid on the plaint. They had earlier sought a consequential relief and the Court was, therefore, entirely unable to hold that the plaintiffs were unable to seek a further relief, they having sought the relief in the lower Court and it having been refused to them. The amount of the stamp was not paid and the appeal was therefore dismissed with costs."

The reasons for demanding additional court-fee, though not mentioned in the original order, are stated in this order.

The question for determination in this appeal is whether the order of the Judicial Commissioner demanding additional court-fee can be sustained in law. A memorandum of appeal, as provided in Article 1 of Schedule I of the Court-Fees Act, has to be stamped according to the value of the subject-matter in dispute in appeal ; in other words, the relief claimed in the memorandum of appeal determines the value of the appeal for purposes of court-fee. The only relief claimed in the memorandum of appeal was the first one mentioned in the plaint. This relief being purely of a declaratory character, the memorandum of appeal was properly stamped under Article 17 of the II Schedule.

It is always open to the appellant in an appeal to give up a portion of his claim and to restrict it. It is further open to him, unless the relief is of such a nature that it cannot be split up, to relinquish a part of the claim and to bring it within the amount of court-fee already paid : *Brahmanandam* v. *Secretary of State for India*[1] ; *Ram Prasad* v. *Bhiman*[2] ; *Karam Chand* v. *Jullundur Bank, Ltd.*[3] ; *Neelachalam* v. *Narasinga Dass*[4] ; *Sah Ramchand* v. *Ponnalal*[5] ; *Chuni Lal* v. *Sheo Charanlal Lalman*[6]. The plaintiffs in express terms relinquished the second relief they had claimed in the plaint, in their memorandum of appeal. For the purpose of deciding whether the memorandum of appeal was properly stamped according to the subject-matter of the

1. (1929) 57 M.L.J. 357 : I.L.R. 53 Mad. 48.
2. (1904) I.L.R. 27 All. 151.
3. A.I.R. 1927 Lah. 543.
4. A.I.R. 1931 Mad. 716.
5. A.I.R. 1929 All. 308.
6. (1925) I.L.R. 47 All. 756.

appeal, it was not open to the Judicial Commissioner to canvass the question whether the suit with the second prayer eliminated from it fell within the mischief of the proviso to section 42 of the Specific Relief Act. That was a question which related to the merits of the appeal and did not concern its proper institution. On this ground, therefore, the Judicial Commissioner had no jurisdiction to demand additional fee from the plaintiffs and the appeal could not be dismissed for failure to meet it. We are thus of the opinion that the order damanding additional court-fee on the memorandum of appeal as it stood, that is, minus the second prayer, was erroneous and we hold that the memorandum of appeal was properly stamped, as the subject-matter of the appeal was purely of a declaratory character.

Mr. Setalvad for the respondents contended that the first relief claimed in the plaint, and which was the subject-matter of the appeal included within it consequential relief and was not purely declaratory in nature and therefore the Judicial Commissioner was right in demanding additional court-fee on the value of the consequential relief. It was said that the words that respondent No. 2 "had no right to act as chairman and managing director" amounted to a claim for consequential relief. We are unable to agree. The claim contained in the first relief of the plaint is to the effect that it be declared that defendant No. 2 has no right to act as chairman and managing director because of his appointment being illegal, invalid, and *ultra vires*. The declaration claimed is in negative form that defendant 2 has no right to act as chairman and managing director. No claim for a consequential relief can be read within this prayer. The words "that defendant 2 has no right to act as chairman," are mere repetition and reiteration of what is contained in the opening sentence of the paragraph. The contention of Mr. Setalvad, therefore, cannot be sustained.

It was next contended that in view of the provisions of section 12 of the Court-Fees Act it should be held that the decision of the Judicial Commissioner was final, and could not be challenged in appeal. Section 12 of the Court-Fees Act enacts as follows :

"Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed and such decision shall be final as between the parties to the suit."

The provisions of this section have to be read and construed keeping in view the provisions of the Code of Civil Procedure. Order VII, Rule 11, Civil Procedure Code, provides as follows :

"The plaint shall be rejected—

(*b*) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Courts, fails to do so ;

(*d*) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court, to supply the requisite stamd paper within a time to be fixed by the Court, fails to do so."

An order rejecting a plaint is a decree as defined in section 2, sub-section (ii) and is appealable as such. There is an apparent conflict between the provisions of the Code of Civil Procedure and the provisions of section 12 which make the order relating to valuation final and efforts to reconcile the provisions of the Court-Fees Act and the Code have resulted in some divergence of judicial opinion on the construction of the section. In a number of decisions the Calcutta High Court took the view that the finality declared by section 12 of the Court-Fees Act had been taken away by the relevant provisions of the Code, as the order rejecting a plaint was appealable as a decree, no matter whether the dispute related to the category under which the same falls for purposes of court-fee or only to valuation pure and simple under a particular category : *Vide* In re *Omrao Mirza* v. *Mary Jones*[1] and *Tara Prasanna Chongdar* v. *Nrisingha Moorari Pal*[2]. This extreme view has

1. 12 C.L.R. 148. 2. (1923) I.L.R. 51 Cal. 216.

not been maintained in later decisions and it has been held that the finality declared by section 12 is limited only to the question of valuation pure and simple and does not relate to the category under which a certain suit falls : *Joriman Khatun* v. *Secretary of State for India in Council*[1]. The Allahabad High Court in its earlier decisions took the extreme view : Vide *Muhammad Sadik* v. *Muhammad Jan*[2]. Later on that Court veered round to the view that the finality declared by section 12 only related to matters of appraisement. The High Court of Lahore has placed a similar construction on the meaning of the expression " valuation " in section 12 and has held that the finality attaches only to a decision which concerns valuation simpliciter and no finality attaches when a Court decides a question whether a case falls within one or other category of the cases mentioned in the different sections and schedule of the Court-Fees Act : Vide *Mahna Singh* v. *Bahadur Singh*[3] ; *Mst. Parmeshri* v. *Panna Lal*[4]. This view has consistently been held in that Court. The Madras High Court took the same view in *Lakshmi Amma* v. *Janamajayam Nambiar*[5], *Annamalai Chetty* v. *Cloete*[6] ; and *Narasimhalu Chetty* v. *Ramayya Naidu*[7]. Mr. Setalvad drew our attention to the recent Full Bench decision of that Court in *Madana Mohana Naiko* v. *Kripasindhu Naiko*[8]. That case, however, concerned the second part of section 12 and was not concerned directly with the construction to be placed on the first part of the section. It, however, contains certain observations indicating that in the opinion of the Judges there was no ground for this restricted construction of the word " valuation " in section 12 and that the finality declared by section 12 attached not only to valuation pure and simple but also attached to decisions relating to category under which a suit or appeal falls for purposes of Court-fee. These *obiter* observations, however, cannot be said to overrule the earlier Full Bench decision of that Court in *Lakshmi Amma* v. *Janamajayam Nambiar*[5]. In a later decision in *Narasimhalu Chetty* v. *Ramayya Naidu*[7], the decision of the Full Bench was explained as not in any way overruling the decision in *Lakshmi Amma* v. *Janamajayam Nambiar*[5]. All recent decisions of the Bombay High Court have taken the same view : Vide *Dada* v. *Nagesh*[9], *Krishnaji Hari Dhandhere* v. *Gopal Narain Dhandhere*[10] Mr. Setalvad drew our attention to an earlier decision of the Bombay High Court in *Vithal Krishna* v. *Balkrishna Janardhan*[11]. In that case the Court undoubtedly held that no appeal lay and the finality declared by section 12 was comprehensive enough to include all questions whether relating to category or valuation pure and simple. It was, however, held that the High Court could correct an erroneous decision in the exercise of its revisional powers. Thus the finality declared by section 12 was destroyed by the exercise of powers of appeal under the guise of exercising revisional jurisdiction. In Patna and Oudh the same view has been taken as in Lahore. Vide *Chandramoni Koer* v. *Basdeo Narain Singh*[12] ; *Gumani* v. *Banwari*[13]. It thus appears that the consensus of judicial opinion is against the construction suggested by Mr. Setalvad. We think that the construction given to the language in section 12 in these decisions is right, and our reasons for saying so are these :

The difference in the phraseology employed in sections 5 and 12 of the Court-Fees Act indicates that the scope of section 12 is narrower than that of section 5. Section 5 which declares decisions on questions of court-fee whenever they arise in the chartered High Courts as final makes a decision as to the *necessity* of paying a fee or the amount thereof final. Whereas section 12 makes a decision on every question relating to *valuation* for the purpose of determining the amount of any fee payable under Chapter 3 on a plaint or memorandum of appeal final. Had section 12 been drafted somewhat as follows :

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1. I.L.R. (1940) 2 Cal. 166.
2. (1888) I.L.R. 11 All. 91 (F.B.).
3. 1919 Punjab Record 16.
4. A.I.R. 1931 Lah. 378.
5. (1894) 4 M.L.J. 183 (F.B.).
6. (1881) I.L.R. 4 Mad. 204.
7. (1942) 1 M.L.J. 400 : A.I.R. 1942 Mad. 502.
8. (1937) 1 M.L.J. 1 : I.L.R. (1937) Mad. 275 : A.I.R. 1937 Mad. 81 (F.B.).
9. (1898) I.L.R. 23 Bom. 486.
10. A.I.R. 1936 Bom. 166.
11. (1886) I.L.R. 10 Bom. 610 (F.B.).
12. (1918) 4 P.L.J. 57.
13. (1919) 54 I.C. 733.

"If any dispute arises as to the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal, it shall be decided by the Court in which such plaint or memorandum is filed and such decision shall be final as between the parties,'

then the construction contended for by Mr. Setalvad might have been upheld. When the two sections in the same Act relating to the same subject-matter have been drafted in different language, it is not unreasonable to infer that they were enacted with a different intention and that in one case the intention was to give finality to all decisions of the taxing officer or the taxing Judge, as the case may be, while in the other case it was only intended to give finality to questions of fact that are decided by a Court but not to questions of law. Whether a case falls under one particular section of the Act or another is a pure question of law and does not directly determine the valuation of the suit for purposes of court-fee. The question of determination of valuation or appraisement only arises after it is settled in what class or category it falls.

It has been argued in some decisions that it is absolutely necessary to decide the category in which a case falls before assessing its value and therefore the determination of the question of category is necessarily involved in the determination of the valuation of the suit for purposes of court-fee. This argument, though plausible, does not seem sound. The actual assessment of the value depends either on arithmetical calculations or upon a valuation by an expert and on the evidence led in the case, while the decision of the question of category is one of law and may well be said to be an independent question antecedent but not relating to valuation. The expression "valuation" interpreted in its ordinary meaning of "appraisement" cannot be said to necessarily include within its ambit the question of category which is a matter of law. The construction placed on this section by a long course of decisions is one which reconciles the provisions of the Court-Fees Act with that of the Code of Civil Procedure and does not make those provisions nugatory and is therefore more acceptable than the other constructions which would make the provisions of either one or the other of these statutes nugatory. Perhaps it may be possible to reconcile the provisions of the two statutes by holding that the finality declared by section 12 of the Court-Fees Act means that the parties cannot impugn such a decision by preferring an appeal but that it does not confer on such decisions a complete immunity from examination in a higher Court. In other words, section 12 when it says that such a decision shall be final between the parties only makes the decisions of the Court on a question of court-fee non-appealable and placed it on the same footing as other interlocutory non-appealable orders under the Code and it does no more than that. If a decision under section 12 is reached by assuming jurisdiction which the Court does not possess or without observing the formalities which are prescribed for reaching such a decision, the order obviously would be revisable by the High Court in the exercise of revisional powers. Similarly, when a party thinking that a decision under section 12 is palpably wrong takes the risk of his plaint being rejected or suit dismissed and then appeals from the order rejecting the plaint or from the decree dismissing the suit but not from the decision on the question of court-fee, then it is open to him to challenge the interlocutory order even on the question of court-fee made in the suit or appeal. The word "finality" construed in the limited sense in which it is often used in statutes means that no appeal lies from an order of this character as such and it means no more than that.

Conceding for the sake of argument but not admitting that Mr. Setalvad is right in his contention that section 12 is comprehensive enough to include within its ambit all questions relating to court-fee whether they involve a decision as to question of category or as to valuation simpliciter, in the present case the Judicial Commissioner decided none of these questions and his decision cannot be said to be one falling within the ambit of section 12. All that the Judicial Commissioner decided was that as the suit could not be maintained without asking for relief No. 2, the same fee was payable on the memorandum of appeal as on the plaint. In substance the Court decided an issue regarding the maintainability of the appeal without first deciding whether the appeal had been properly instituted in that Court. No finality

can attach to such a decision by the provisions of section 12, as in reality it decides no question within the ambit of section 12 of the Court-Fees Act.

For the reasons given above the second objection raised by Mr. Setalvad that no appeal lies from the order of the Judicial Commissioner by special leave is without force and is overruled.

The result is that the appeal is allowed, the decision of the Judicial Commissioner dismissing the appeal is set aside and the case remanded to him for decision in accordance with law on the basis that the memorandum of appeal presented to him was properly stamped. The appellants' costs of this appeal will be costs in the appeal in the Court of the Judicial Commissioner.

Agent for Appellants : *Rajinder Narain.*

Agent for Respondents : *S. P. Varma.*

G.R./K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRA REDDI.

K. Tirupathi Mudali .. *Appellant**

v.

T. Lakshmana Mudali and another .. *Respondents.*

Transfer of Property Act (IV of 1882), section 53—Fraudulent transfer—Fraud not carried out—Transferor if and when entitled to recover the property from the transferee.

So long as the contemplated fraud is not carried out or at least there has been no substantial part performance of it, the grantor although in *pari delicto* is entitled to invoke the assistance of a Court for the recovery of the properties he has parted with, irrespective of the fact whether the frustration of the fraud was the result of the *locus penitentiae* of the transferor or due to other causes like the intervention of the Court or third parties.

Whether a sale deed was a sham and simulated one not intended to convey any title or whether it was a real one intended to pass title to the transferee depends upon the *animus transferendi* at the time when the parties entered into the transaction and each case has to be decided with reference to the documents and surrounding circumstances. It cannot be said, that, in all cases of fraudulent transfers intended to defraud the creditors, they should be presumed to be mere sham and bogus transactions not intended to be operative between the grantor and the grantee. Where the document is not sham but an operative one, and as such voidable, the grantor cannot ask for a mere declaration that he is entitled to the property without asking for the avoidance of that document.

The property cannot be recovered without a prayer for setting aside the sale deed.

Appeal against the decree of the Court of the Subordinate Judge, Chingleput, in Appeal Suit No. 81 of 1946, preferred against the decree of the Court of the District Munsiff of Tiruvallur in Original Suit No. 154 of 1943.

M. Natesan for Appellant.

L. S. Veeraraghava Aiyar for Respondents.

After calling for certain findings from the lower appellate Court, the Court delivered the following

JUDGMENT.—This Second Appeal is filed by the 1st defendant against the judgment and decree of the Subordinate Judge of Chingleput who reversed the decision of the trial Court dismissing the suit brought by the respondents for a declaration of their title to the suit property and for the recovery of possession thereof. The facts material for the purpose of this enquiry are as follows : One Damodara Mudali executed a sale deed Ex. P-1 in favour of the appellant conveying his divided half share in the suit house for a stated consideration of Rs. 600-0-0 on 9th June, 1935 and had it registered on 3rd October, 1935. The vendor took the same property on lease from the vendee evidenced by the original of Ex. D-1, dated 3rd October, 1935. A creditor of Damodara attached the suit house in execution of a decree which he obtained against him. The 1st defendant in the present suit

* S. A. No. 183 of 1948. 21st October, 1952.

intervened with a claim petition but his claim was disallowed on the ground that the sale was effected with a view to defraud the creditors. The defeated claimant did not bring a suit to set aside the claim order as the decree debt was satisfied out of the sale proceeds of other properties belonging to Damodaram. Subsequently, the present plaintiffs instituted a suit O. S. No. 176 of 1936 against the present 1st defendant, that is the vendee under Ex. P-1 and the widow and mother of Damodara (Damodara having died by that time) for an injunction restraining them from interfering with the plaintiff's possession on the allegations that Damodara and the plaintiffs were members of an undivided joint family and that on the death of Damodara the plaintiffs got the suit property by survivorship. This suit was ultimately dismissed as it was found that Damodara on the date of Ex. P-1 was divided from the plaintiffs and that the plaintiffs were not in possession of the property at the time of the suit. It is not necessary for me to refer to some other litigation in respect of the same property as that has no bearing on the controversy in the present appeal. Having failed there, the plaintiffs laid this action for the reliefs mentioned above with the averments that Ex. P-1 was a sham and nominal document not intended to convey title and that they were entitled to the properties as the reversioners to the estate of Damodara.

The suit was resisted mainly on the plea that the sale deed Ex. P-1 was a genuine one and that the plaintiffs could not put forward any claim thereto. The trial Court dismissed the suit holding that Ex. P-1 evidenced a real transaction and that it was not a nominal document executed in fraud of creditors. On appeal the lower appellate Court in disagreement with the trial Court found that Ex. P-1 was executed with a view to defraud the creditors. In the result, it decreed the suit.

It may be stated that the learned Subordinate Judge had not kept in view the distinction between a sham and fictitious document under which no title was intended to pass and a real document executed with intent to defraud creditors. Having regard to this fact, I had to call for a finding when the appeal came on for hearing for the first time in September, 1951, as to whether Ex. P-1 was a mere sham document under which no title was intended to pass to the vendee and therefore a mere nullity or whether it was a document by which legal title was intended to vest in the vendee with the object of defrauding the creditors. The finding submitted by the learned Subordinate Judge is that the intention of Damodara was not to defraud his creditors but that his object was only to retain the suit property for himself and make the creditors proceed against the other properties, that consequently Ex. P-1 was not intended to convey legal title to the 1st defendant and that it was merely a sham document. I will presently show that this finding is not borne out by the evidence on record and is also self-contradictory and is therefore not entitled to any weight. I propose to consider the evidence afresh and give a decision on this question on the materials before me.

In support of this appeal, Mr. Natesan on behalf of the appellant contended that in view of the finding of the learned Subordinate Judge that there were no creditors at all in fraud of whom this document is said to have been executed, the only conclusion that could have been reached by the learned Subordinate Judge was that Ex. P-1 evidenced a genuine transaction and could not be impeached on the ground that it was entered into with a view to defraud the creditors. I do not think that I can accede to this argument having regard to the fact that there is evidence to show that there were some creditors at the time of the execution of Ex. P-1 to defeat whom the document is said to have been executed and that the finding given in all the prior litigations was that this document was executed with intent to defraud the creditors.

It was next argued that the object in entering into the transaction being a fraudulent one and the reason for the non-fulfilment of the fraud being not the *locus penitentiae* of the fraudulent grantor but the intervention of the Court, the transferor cannot invoke the aid of the Court to recover the property transferred by him. According to him, it is only when an illegal transaction is not carried out due to repentance on the part of the transferor and not due to the intervention of

third parties that the transferor would be entitled to claim the recovery of the property through Court. In support of this proposition reliance was placed by him on *Muthuraman Chetti* v. *Krishna Pillai*[1], and also on the opinion expressed by Pritchard, J., in *Bigos* v. *Bousted*[2].

I do not think that *Muthuraman Chetti* v. *Krishna Pillai*[1], carries the appellant very far. All that was laid down there was that the rule that a person in *pari delicto* cannot recover is applicable not only to cases where contemplated fraud is completely carried out but to cases where there has been substantial part performance of the same as well. Undue weight cannot be attached to the remarks at page 74 of the Report which run thus :

> " Turning to the facts here, we do not find a case when a party to a fraudulent transaction relented before anything was done in pursuance of the intended fraud and the unlawful compact was in no way carried out."

These remarks should be understood only with reference to the context in which they are used.

No doubt the judgment of Pritchard, J., in *Bigos* v. *Bousted*[2], supports to a greater extent the position taken up by Mr. Natesan. The following observations of the learned Judge at page 100 of the report are pertinent :

> " I confess that there was a time when I thought it would be right to apply to the facts of this case the reasoning of the decision in *Taylor* v. *Bowers*[3], but having considered all the authorities, I do not take that view. I think that what is to be extracted from the authorities may be treated as follows : I think that they show, first, that there is a distinction between what may, for convenience, be called the repentance cases, on the one hand, and the frustration cases, on the other hand. If a particular case may be held to fall within the category of repentance cases I think the law is that the Court will help a person who repents, provided his repentance comes before the illegal purpose has been substantially performed. If I were able in this case, to take the view that the defendant has brought himself within that sphere of the authorities, it might well be that I would have been able to help him by saying that his repentance had come before the illegal purpose had been substantially performed but I do not take that view. I think, however, that this case falls within the category of cases which I call the frustration cases."

I do not think I can share this view of the learned Judge. It is not only opposed to the rule of law contained in section 84 of the Indian Trusts Act but to the principles enunciated in the Privy Council decision in *Petheperumal Chetty* v. *Muniandy Servai*[4], which has been followed by the Full Bench of this Court in *Venkataramayya* v. *Pullayya*[5].

In *Pethaperumal Chetti* v. *Muniandy Servai*[4], in order to defeat the claim of an equitable mortgagee to certain property the predecessor-in-interest of the plaintiff and another member of the joint Hindu family executed a document purporting to be a sale of the property in favour of the predecessor-in-interest of the defendant. But the equitable mortgagee succeeded in getting a declaration that his mortgage could be enforced against the property covered by the last conveyance in priority to the last-mentioned conveyance as the transferee under the sale-deed was aware of the existence of the equitable mortgage. The claim arising under the mortgage was subsequently satisfied. In a suit filed by the transferor for the recovery of the property purported to have been conveyed under the sale deed the defence put forward was that as the grantor was in *pari delicto* his successor-in-interest could not recover the property although the fraud was not successfully carried out. This objection was overruled and a decree was granted. The Privy Council repelled the contention that if the plaintiff was allowed to recover the property in dispute and if the maxim in *pari delicto potior est conditio possidentis* were not rigorously applied to such cases, much confusion would be imported into the law in the following words :—

> " The answer to that is that the plaintiff, in suing to recover possession of his property is not carrying out the illegal transaction but is seeking to put everyone, as far as possible, in the same position as they were in before that transaction was determined upon. It is the defendant, who is relying upon the fraud, and is seeking to make a title to the lands through and by means of it.

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1. (1905) 15 M.L.J. 478 : I.L.R. 29 Mad. 72.
2. (1951) 1 All. E.R. 92.
3. (1876) 1 Q.B.D. 291.
4. (1908) 18 M.L.J. 277 : L.R. 35 I.A. 98 : I.L.R. 35 Cal. 551 (P.C.).
5. (1936) 71 M.L.J. 458 : I.L.R. 59 Mad. 998 (F.B.).

And despite his anxiety to effect great moral ends, he cannot be permitted to do this. And, further, the purpose of the fraud having not only not been effected, but absolutely defeated, there is nothing to prevent the plaintiff from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme, and recovering possession of his property. The decision of the Court of Appeal in *Taylor* v. *Bowers*[1], and the authorities upon which this decision is based, clearly establish this. *Symes* v. *Hughes*[2], and In re *Great Berlin Steamboat Company*[3] are to the same effect. And the authority of these decisions, as applied to a case like the present, is not in their Lordships' opinion, shaken by the observations of Fry, L.J., in *Kearley* v. *Thompson*."[4]

The statement contained in the subsequent portion of the judgment that it is only when a contemplated fraud was effected that a fraudulent transferor would forfeit the right to seek the assistance of a Court to get back the property he has parted with furnishes a complete answer to the contention put forward by Mr. Natesan. It is evident from these observations that there is no foundation for the distinction between the fraud not being carried out on account of the repentance of the grantor and the frustration of the fraud through the intervention of Courts or third parties. In my opinion, in judging whether a fraudulent grantor can recover the property he had parted with, with the aid of the Court, the test is whether the fraud has been perpetrated or whether there has been a substantial part performance of it and not whether it was due to the penitence of the fraudulent grantor or whether it fell through on account of the intervention of a Court or third parties.

Pethaperumal Chetti v. *Muniandy Servai*[5], was followed by a Full Bench of this Court in *Venkataramayya* v. *Pullayya*[6]. What happened there was this. With a view to cheat his son a Hindu father transferred an item of joint family property in favour of his daughter. Subsequent to this he filed a suit for partition of family properties in which the property covered by the sale deed was not included. When objection was taken to it by the son in his written statement to this exclusion, the father agreed to include this property for partition and asked for its being allotted to his share. Ultimately the matter was compromised and the property was allotted to his share and he recovered possession thereof from his son. Shortly thereafter the maternal grandson that is the transferee's son filed a suit for the recovery of the property in dispute. The defence to the suit was that the sale in favour of his daughter was a *benami* transaction entered into for the purpose of cheating his son. The question arose whether it was open to the 1st defendant to plead his own fraud. The answer given by the Full Bench was in the affirmative. It took the view following *Pethaperumal Chetti* v. *Muniandi Servai*[5], that in order to deprive a fraudulent grantor of his right to recover the property with the assistance of a Court, the intended fraud must have been effected or at least there must have been a substantial part performance of the intention to defraud. The learned Judges expressed the opinion that a mere fraudulent intention as evidenced by the impeached document, was not sufficient.

I may also refer to section 84 of the Indian Trusts Act. The rule enacted in that section is in conformity with the principles embodied in the decisions quoted above. Section 84 runs thus :

"Where the owner of a property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor."

On this statutory provision and the principles enunciated in *Pethaperumal Chetti* v. *Muniandy Servai*[5], followed in *Venkata Ramayya* v. *Pullayya*[6], and in other rulings to which I need not allude here, my conclusion is that so long as the contemplated fraud is not carried out or at least there has been no substantial part performance of it, the grantor although in *pari delicto* is entitled to invoke the assistance of a Court for the recovery of the properties he has parted with irrespective of the fact whether the frustration of the fraud was the result of the *locus penitentiae* of the transferor or due to other causes. I therefore reject the contention based on the theory pro-

1. (1876) 1 Q.B.D. 291.
2. (1870) L.R. 9 Eq. 475, 479.
3. (1884) L.R. 26 Ch.D. 616.
4. (1890) 24 Q.B.D. 742.
5. (1908) 18 M.L.J. 277 : L.R. 35 I.A. 98 : I.L.R. 35 Cal. 551 (P.C.).
6. (1936) 71 M.L.J. 458 : I.L.R. 56 Mad. 998 (F.B.).

pounded by Pritchard, J., in *Bigos* v. *Bousted*[1], and find that the plaintiffs can get a decree for the recovery of the property if otherwise they are entitled to do so.

The next submission made by Mr. Natesan is that if the object in executing a sale deed was to defraud the creditors it must be considered to be a fraudulent transfer which has to be avoided and not a sham and colourable transaction not intended to convey title which need not be set aside. In support of this he cited to me the judgment of Krishnan, J., in *The Secretary of State for India* v. *Dadi Reddi Nagiah*[2]. That judgment does lend support to this contention of Mr. Natesan. But the other learned Judge Ayling, J., remarked thus :

> "I speak thus cautiously, because we have not had the benefit of any argument *contra* and the words are open to the construction placed upon them by the learned District Judge."

The dictum laid down by Krishnan, J., is opposed to a Bench decision of this Court in *Swaminatha Aiyar* v. *Rukmani Ammal*[3]. In *Palaniandy Chetti* v. *Appavu Chettiar*[4] a Bench of this Court consisting of Coutts Trotter and Seshagiri Ayyar, JJ., called for a finding whether a document executed with a view to defraud the creditors was merely a colourable one leaving the real beneficial enjoyment with him who purported to transfer it or a real one meant to effect a real transfer of the property from the transferor to the transferee. The decision in *Pethaperumal Chetti* v. *Muniandi Servai*[5], also seems to be opposed to what is stated by Krishnan, J., in *The Secretary of State for India* v. *Dadi Reddi Nagiah*[2]. In the last mentioned case it was observed that if the transaction impeached was a *benami* one not intended to be operative as between the grantor and the grantee the successor-in-interest of the grantor could recver the property without asking for the cancellation of the document. It looks to me that the proposition was too broadly stated by Krishnan, J., in that decision. In my opinion, whether a sale deed was a sham and simulated one not intended to convey any title or whether it was a real one intended to pass title to the transferee thereunder depends upon the *animus transferendi* at the time when the parties entered into the transaction and each case has to be decided with reference to the documents and the surrounding circumstances. Nor is there any substance in the contention of Mr. Veeraraghava Aiyar that in all cases of fraudulent transfers intended to defraud the creditors they should be presumed to be mere sham and bogus transactions not intended to be operative between the grantor and the grantee.

This leads me to the question whether the document in this case is a mere paper transaction under which no legal title passed to the transferee and the beneficial interest was retained by the transferor or whether it was a real document intended to be given effect to. On a consideration of the evidence on record and the surrounding circumstances, the only reasonable conclusion I can arrive at is that Ex. P-1 was not a mere fictitious or a bogus document but was a document intended to be operative and to be given effect to. It was a real transaction which was acted upon as can be seen from the following circumstances. On the death of Damodara the vendor who occupied the house subsequent to Ex. P-1 as a tenant under Ex. D-1, his widow and his mother were not living in the house as spoken to by P.W. 2. It is evident from the admission of P.W. 1 the next friend of the plaintiffs that the 2nd defendant to whom the property was leased out under Ex. D-20 occupied the house after the demise of Damodara. She categorically stated that she came to know about this impeached document when there was a talk that the 2nd defendant was occupying the house. It is also in evidence that the 1st defendant paid kist for the suit property. All these circumstances clearly indicate that under the document Ex. P-1 legal title was intended to pass and was meant to be an operative one and that effect was given to this document subsequently.

The next question is that if this document was not a mere sham and colourable transaction but a real one, could the plaintiffs ask for a mere declaration that they are entitled to the property without asking for the avoidance of that document? In my judgment, they cannot do it. The document not being void but

1. (1951) 1 All.E.R. 92.
2. (1918) 36 M.L.J. 180.
3. (1919) 55 I.C. 766 (2).
4. (1916) 30 M.L.J. 565.
5. (1908) 18 M.L.J. 277 : L.R. 35 I.A. 98 : I.L.R. 35 Cal. 551 (P.C.).

only voidable will be valid till it is set aside and the plaintiffs without having it avoided cannot recover the property. In this case there is no prayer for setting aside the sale deed and the reliefs asked for are the declaration mentioned above and recovery of possession of the property. Consequently, they cannot recover possession of the property from the 1st defendant.

It follows that the reliefs asked for cannot be granted and the suit has to be dismissed. The decision of the lower appellate Court decreeing the suit is unsustainable. Hence the appeal is allowed. In the circumstances of this case, I direct the parties to bear their own costs throughout.

No leave.

K.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: MR. JUSTICE RAGHAVA RAO.

The Coimbatore Municipality represented by its Commissioner .. *Appellant**

v.

C. S. Govindayyar .. *Respondent.*

Madras District Municipalities Act (V of 1920), section 354, Proviso—Action of Municipality capricious and arbitrary in adopting valuation of property for assessment—Suit by owner of house challenging the assessment and for refund of amount paid—Not barred.

Where the action of a Municipality is capricious and arbitrary in adopting valuation of property for assessment it cannot be said that the provisions of the Madras District Municipalities Act have been complied with by the municipality in substance or in effect. The mere fact of the existence of a right of appeal under the provisions of the Act against the assessment by the municipality does not necessarily oust the jurisdiction of the Civil Court to entertain a suit in challenge thereof.

The Udipi Municipal Council v. *Vasudevacharya*, (1949) 2 M.L.J. 629 and *Commissioner, Municipal Council, Vizagapatnam* v. *Srimati Siddeswara Devi*, (1948) 2 M.L.J. 111, considered and distinguished.

Appeal against the Decree of the District Court of Coimbatore in A.S. No. 93 of 1946, preferred against the decree of the Court of the Subordinate Judge of Coimbatore in O.S. No. 166 of 1944.

K. Kuttikrishna Menon and *C. Vasudeva Mannadiar* for Appellant.

K. V. Ramachandra Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The interesting question argued in this second appeal is the maintainability of a suit by the owner of a house in a municipality questioning the assessment in respect thereof by the Municipality and seeking a refund of the amount collected by the municipality on the basis of such assessment. The plaintiff is the owner of a house property bearing door No. 5/7, in the Imperial Bank Road, Coimbatore. The defendant is the Municipality of Coimbatore represented by its Commissioner. The case of the plaintiff is that the property is liable to a house-tax only of Rs. 124-14-0 per half year on the basis of an annual rental value of Rs. 1,665. That was the value fixed by the Deputy Inspector of Municipal Councils on the basis of the monthly rental of Rs. 150 fixed as the fair rent for the house by the District Collector of Coimbatore under the House Rent Control Order. The plaintiff attacks the value of Rs. 4,440, adopted by the Municipality for determining the house-tax as being capricious and unreasonable in view of the orders of the Deputy Inspector of Municipal Councils and of the District Collector of Coimbatore aforesaid. The defendant pleaded that it was not bound by such orders and that the levy was justified under section 82 of the Madras District Municipalities Act, which will hereinafter be referred to as the Act. It also raised the contention that since the provisions of the Act had been complied with the jurisdiction of the Court stood excluded, and that the plaintiff had accordingly to be non-suited. The learned Subordinate Judge of Coimbatore by whom the suit was tried upheld the pleas of the Municipality and dismissed the action. The learned District Judge on appeal has reversed him and decreed the suit.

* S. A. No. 1411 of 1947. 11th July, 1950.

It is argued for the municipality in this second appeal that however erroneous the levy of tax under section 82 of the Act may be, section 354 interposes a bar in the way of a suit to question it. It is also contended that the only remedy of the plaintiff was to appeal against the assessment under the Act.

Section 82 of the Act so far as material provides in sub-section (2) that the annual value of buildings shall be deemed to be the gross annual rent at which they may reasonably be expected to let from month to month or from year to year. Section 354 so far as material provides as follows :

"(1) No assessment . . . . under the authority of this Act shall be impeached or affected by reason of any clerical error or by reason of any mistake . . . . in respect of the amount assessed . . . . provided that the provisions of this Act have been, in substance and effect, complied with.

(2) No suit shall be brought in any Court to recover any sum of money collected under the authority of this Act or to recover damages on account of any assessment, or collection of money made under the said authority :

Provided that the provisions of this Act have been, in effect, complied with."

The learned District Judge in appeal held that in view of the order of the District Collector under the House Rent Control Order the amount of assessment charged by the defendant was not on the basis of the annual rent at which the premises could reasonably be expected to let from month to month or from year to year within the meaning of section 82 (2) of the Act, and that in view of the order of the Deputy Inspector of Municipal Councils based upon the fair rent fixed by the Collector the annual value of the lands for the purpose of that section and that sub-section could not be what the municipality adopted in disregard of that order. It followed in the opinion of the learned District Judge that the Civil Court "has jurisdiction to entertain the suit as the action of the defendant was arbitrary and capricious." Section 354 of the Act did not, according to the learned District Judge, create a difficulty in the way of the plaintiff apparently because the provisions of the Act relating to assessment were not, in substance and effect, complied with and the proviso to the section did not accordingly stand satisfied.

Whether in terms of section 82 (2) of the Act the annual rent adopted by the municipality is such as the premises may reasonably be expected to let at from month to month or from year to year is a question of fact. Unless vitiated by any error of principle the finding of the learned District Judge in regard to this matter cannot be challenged in second appeal. It was not as if there was no evidence to support his conclusion. On the other hand, the material in support of it is ample. *Prima facie*, the orders of the Collector and the Deputy Inspector of Municipal Councils should have been accepted by the municipality and the District Judge rightly held that the action of the municipality in disregard of those orders was something capricious and arbitrary. The provision of the Act cannot in terms of the proviso to section 354 be accordingly held to have been complied with by the municipality in substance or in effect.

There being no bar of suit under the terms of section 354 of the Act, the question is whether *de hors* the section there is any such bar. I am not satisfied that there is any. The mere fact of the existence of a right of appeal under the provisions of the Act against the assessment by the municipality does not, in my opinion, necessarily oust the jurisdiction of the Civil Court to entertain a suit in challenge thereof. Reliance is placed by Mr. Kuttikrishna Menon appearing for the Municipality in support of his contention on a recent decision of a single judge of this Court (*Viswanatha Sastri, J.*) reported in *Udipi Municipal Council* v. *Vasudevacharya*[1]. There it was held in respect of the property in question that the assessment under section 81 (3) of the Act was rightly made and that, in any event, where the Municipal Council determined the question of fact (whether the site assessed was or was not used exclusively for agricultural purposes) on the evidence and materials available, the civil court cannot assume the powers of the assessing authority and investi-

1. (1949) 2 M.L.J. 629.

gate the facts afresh to find out whether its conclusion on the facts is correct. The passage in the judgment in that case on which stress has been laid by the learned advocate for the appellant is to be found at page 631 as follows :—

"If the land was used exclusively for agricultural purposes, the assessing authority had to proceed under section 81 (4) and if not, under section 81 (3). It had power to determine and determined the question of fact on the evidence and materials available and its conclusion was that the land in question was not used exclusively for agricultural purposes. It may be that a different view on the facts is possible. All that can be said for the respondents is that the executive authority of the Municipal Council came to a wrong conclusion on a matter of fact which it was within its competence to decide. *If so, their remedy was by way of an appeal to the Municipal Council.* The Civil Court cannot assume the powers of the assessing authority and investigate the facts afresh to find out whether its conclusion on the facts is correct. If on the facts found, assumed or admitted by the assessing authority, the assessment is found to have proceeded on an erroneous basis, the Civil Courts can step in and declare the invalidity of the assessment on the ground that the provisions of the Act have not been in substance and effect complied with. No statutory body can give itself power to impose a tax on citizens by an erroneous interpretation of the taxing provisions in the statute and if it does so, the aggrieved tax-payer has a right to get redress in the ordinary Courts. In the present case, however, I am of the opinion that the assessment cannot be assailed on this ground. The error, if any, related to the appreciation of the materials available for arriving at a conclusion on a question of fact which the assessing authority had to determine in the course of making an assessment."

The distinction drawn in this passage between cases of an erroneous basis adopted by the municipality and cases of an erroneous conclusion reached in regard to the existence of the right statutory basis on the facts found, assumed or admitted by the assessing authority is certainly *prima facie* in favour of the appellant's contention, and the respondent on the basis of this passage read literally is confined only to the remedy of an appeal to the Municipal Council under the Act and debarred of a suit in the ordinary courts. I am, however, with respect not prepared to accept this decision as correct if it should be taken as meaning that however arbitrary, capricious or perverse the assessment of the Municipality on the statutory basis may be, the assessee must content himself with an appeal under the Act and cannot resort to a suit for relief. Section 9 of the Code of Civil Procedure provides that

"The Court shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

The question is whether in respect of a suit of the kind with which we are concerned in the present case there is any provision of law anywhere which operates as a bar thereto either expressly or impliedly. No bar derived from any other enactment has been suggested, and the only bar in the Act is what is gatherable from section 354 itself, which comes into being only where the provisions of the Act relating to assessment have been, in substance and effect, complied with. The maintainability of such a suit where there has been no such compliance with the provisions of the Act which is the necessary implication of the section cannot be treated as whittled down or eviscerated by the mere existence of a right of appeal provision in Schedule IV of the Act. While there is on the one hand, the rule in the schedule which confers on the assessee the right of appeal, we have on the other the plain language of section 354 in the body of the Act itself which leaves no doubt but that where the provisions of the Act have not been in substance and effect complied with an assessment can well be challenged by reason of a mistake in respect of the amount assessed and that a suit can well be brought to recover any money collected on the basis of such assessment.

Reference is next made by the learned counsel for the appellant to a decision in the *Commissioner, Municipal Council, Vizagapatam* v. *Siddeswara Devi*[1], also of a single Judge. The facts there were that up to 1940 a house and site of about 4 acres had been assessed as if the whole of the 4 acres was adjacent and appurtenant to the house, that in 1940 however on the report of a special officer some 3 acres out of the 4 were excluded from the site held to be appurtenant to the house and were separately taxed, and that when a suit to recover the tax in respect of this land was brought by the municipality the defendants maintained that they were not liable to pay the tax as the site was appurtenant to the house. It was held by the learned Judge (Happell, J.) that where there was a mistake of fact on the part of the munici-

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1. (1948) 2 M.L.J. 111.

pality the remedy was by way of an appeal to the Municipal Council and that the civil court had no jurisdiction, provided the provisions of the Act had been in substance and effect complied with. It will be seen that so far the ruling does not carry the learned counsel the whole length required, because it lays down that the civil court has no jurisdiction on the facts, provided the provisions of the Act have been in substance and effect complied with. That is as much as to suggest that where they have not been in substance and effect complied with, the civil court may well have jurisdiction. The ruling of the learned Judge proceeds further, to the effect that even if the site in question should have been held to be appurtenant to the house, that is merely an error of fact in making the assessment which the municipality had the power to make. But then again the learned Judge proceeds to hedge in his decision in the winding up of the discussion by the remark,

"... . and it seems to me clear that there has been no contravention of any express provisions of the Act and no mistaken view of the provisions of the Act. In this view it was not open to the lower Courts to go into the question whether the assessment was correct or not."

If one is to regard the ruling—as I am not prepared to do—as going the whole length of laying down that in view of the existence of a right of appeal under the Schedule to the Act the remedy of a suit in cases of non-compliance by the municipality with the provisions of the Act in substance and in effect stands excluded, I must say that I consider this ruling to be erroneous like the ruling in *Udipi Municipal Council* v. *Vasudevacharya*[1].

Stress has also been laid by the learned advocate for the appellant upon a case in *Pattarani Purnachandra Mala Jamna Devi* v. *The President, Taluk Board, Chicacole*[2], referred to by Happell, J., in *The Commissioner, Municipal Council, Vizagapatam* v. *Siddeswara Devi*[3]. In that case a suit was brought to recover the amount collected on the ground that the person practised a profession within the limits of the Taluk Board whereas in fact she had not done so. It was held that the Civil Court had no jurisdiction. That again is a decision of a single Judge (*Jackson, J.*) which, as the head-note bears, lays down that under section 228 (2) of the Madras Local Boards Act, where the provisions requisite for the collection of the tax have been followed, and there is merely a mistake of fact committed *bona fide* by the assessing authority, the remedy of the aggrieved party is that provided by and confined to the statute, namely, an appeal to the Local Board itself. In his judgment the learned Judge, it may be noticed points out :

" If the Local Board substantially comply with these provisions no suit will lie and whether it has complied is a question of fact. This is clearly laid down in the leading Madras case, *Municipal Council, Cocanada* v. *Standard Life Assurance Co.*[4] In the *Municipal Council, Mangalore* v. *Codial Bail Press*[5], it was held that a Civil Court can intervene when the Municipality has deliberately acted upon a wrong basis in contravention of the clear provision of the Act. In that case it was not an isolated mistake but a fundamental departure from the meaning of the statute."

I consider that the test laid down by this decision for the civil court's interference—namely, a fundmental departure from the meaning of the statute—stands fulfilled in the present case.

The true test that must be applied to cases of this description is in my opinion what the Privy Council have laid down in *Secretary of State for India in Council* v. *Mask & Co.*[6] Lord Thankerton in delivering the judgment of the Board of the Judicial Committee in that case observes at page 614 :

" It is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well-settled that even if jurisdiction is so excluded, the civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

That case no doubt related to an altogether different enactment, namely, the Sea Customs Act (VIII of 1878) and in particular to the provisions of sections 188

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1. (1949) 2 M.L.J. 629.
2. (1928) 113 I.C. 560.
3. (1948) 2 M.L.J. 111.
4. (1900) 10 M.L.J. 401 : I.L.R. 24 Mad. 205. at 213.
5. (1903) 14 M.L.J. 410 : I.L.R. 27 Mad. 547.
6. (1940) 2 M.L.J. 140 : L.R. 67 I.A. 222 : I.L.R. (1940) Mad. 599 (P.C.).

and 191 thereof. Whether in regard to cases under that Act where the right of appeal provided for by the Act had been actually exercised by the party aggrieved he would still be entitled to have recourse to a suit is a question on which their Lordships do not express any final opinion. The circumstance that in the case before me the right of appeal provided for by the Schedule IV to the Act was exercised is immaterial in view of my interpretation of section 354 of the Act as yielding the plain result on its language that quite apart from the right of appeal a suit does lie where in fact the provisions of the Act have not been in substance and effect complied with. The principle laid down by Lord Thankerton in *Secretary of State for India* v. *Mask & Co.*[1], which I have referred to above is in my opinion a principle of general application which must be held to govern the present case. Then, it is pointed out by the learned Lord at page 616 of the report, referring to a decision of Willes, J., in *Wolverhampton New Waterworks Company* v. *Hawkesford*[2], that the question in such class of cases is whether the case falls under the third class stated by Willes, J., namely :

> "Where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it . . . . . With respect to that class it has always been held that the party must adopt the form of remedy given by the statute."

That makes no difference to the view I am taking, as it is perfectly clear to my mind on a scrutiny of section 354 of the Act that in addition to the right of appeal provided for by and in Schedule IV of the Act the right of suit stands saved in all cases in which the provisions of the Act have not in substance and effect been complied with. After all, in the language of Varadachariar, J., in *Kamaraja Pandiya Naicker* v. *The Secretary of State in Council*[3], the appeal in such a case is only to a body acting as part of the Executive machinery and not to an independent body acting as a special tribunal for settling a dispute between the taxpayer and the taxing authority. For this reason, the Full Bench ruling of this Court in *Secretary of State for India in Council* v. *Allu Jagannadhan*[4] too can be of no assistance to the appellant.

I am accordingly of opinion that the suit in this case was competent, and that this second appeal must fail with the costs of the respondent right through.

No leave.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Puthiya Purayil Puthanpurayil Ussain .. *Petitioner**

v.

Parayi Kunhiraman and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 47, rule 1—Amendment of plaint and decree—Order disallowing—Later order allowing amendment disregarding rule of res judicata—*Aggrieved party's remedy—Review or appeal.*

A plaint and decree contained an erroneous description of the subject-matter of the dispute in that for a fresh or new survey number an old survey number was put in and the petitioner herein was one of the respondents in an application by the decree-holder to amend the plaint and decree. One application to amend was dismissed and another later one was allowed. On the application by the present petitioner (respondent) for review of the order of amendment on the ground of an error of law in that the principle of *res judicata* had not been applied by the lower Court to the application for amendment.

Held, that the proper procedure would be by way of an appeal and not by an application for review. The decision ignoring the application of principle of *res judicata* was not such an apparent error of law for the lower Court to have been asked to review its own order.

Venkatarayulu v. *Rattamma*, (1939) 1 M.L.J. 120, distinguished.

1.—(1940) 2 M.L.J. 140 : L.R. 67 I.A. 222 : I.L.R. (1940) Mad. 599 (P.C.).
2. (1859) 6 C.B. (N.S.) 336 at 356 : 141 E.R. 486.
3.—(1934) 69 M.L.J. 695 at 701.
4. (1941) 2 M.L.J. 47 : I.L.R. (1941) Mad. 850 (F.B.).

* C. R. P. No. 116 of 1950. 24th October, 1952.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsif, Kuthuparamba, dated 22nd August, 1949, in R.I.A. No. 645 of 1949 in O.S. No. 789 of 1944.

A. Achuthan Nambiar for Petitioner.

V. P. Gopalan Nambiar for Respondents.

The Court delivered the following

JUDGMENT.—R.I.A. No. 3041 of 1947 was an application made by one of the parties in O.S. No. 789 of 1944 on the file of the Court of the District Munsif of Kuthuparamba for amendment of the plaint as well as the decree by scoring out the name of the desom and the old survey number and substituting in their place another desom and a fresh survey number. That application was based on the allegation that there was a mistake made by the parties in the plaint. For some reason or other R.I.A. No. 3041 of 1947 was dismissed without the amendment being allowed. Later on an application R.I.A. No. 645 of 1949 was made to amend the decree and plaint practically for the same reasons as had been alleged in the earlier petition. The District Munsif, on this application, allowed the amendment. The third defendant who was aggrieved by that amendment, instead of filing an appeal against that portion of the amended decree, applied to the lower Court by R.I.A. No. 1091 of 1949 for a review of the order in R.I.A. No. 645 of 1949 on the ground that at the time when the order in R.I.A. No. 645 of 1949 was passed the learned District Munsif committed an error which was apparent on the face of the record because he should have taken into consideration the fact that since an earlier application for the same relief had been dismissed another petition was not sustainable. The lower Court has now held that the provision of Order 47, rule 1, Civil Procedure Code, have not been complied with in this application for the reason that there is no error apparent on the face of the record and that the proper course which the third defendant should have taken was to have filed an appeal against the amended decree.

Mr. Achuthan Nambiar for the petitioner contends on the authority of *Venkatarayulu* v. *Rattamma*[1] that where a Court overlooks a provision of law and passes an order, an application for review of that order would lie, even if the ground for review may not be strictly one that is apparent on the face of the record, but is only an error of law. I do not think that decision can be applied to the facts of the present case. When the District Munsif passed the order in R.I.A.No. 645 of 1949, he was cognisant of the fact that already an application for amendment of the decree and plaint had been rejected by him. It may be that he should not have passed the order reviewing the order in R.I.A. No. 645 of 1949 following the principle of *res judicata.* But if a Court ignores or does not decide a case on the principle of *res judicata,* it cannot be stated that such an error is one apparent on the face of the record. The proper procedure which the petitioner here should have had recourse to was to have filed an appeal against the order in R.I.A. No. 645 of 1949 and contended in that appeal that the Court had no jurisdiction to amend the decree.

I, therefore, dismiss the Civil Revision Petition but in the circumstances, without costs.

K.C. *Petition dismissed.*

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1. (1939) 1 M.L.J. 120.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

C. V. Rajagopalachariar .. *Appellant**

v.

Rajagopalan and others .. *Respondents.*

Execution—Setting aside Court sale—Application under section 47 of the Code of Civil Procedure by the legal representatives of the judgment-debtor—Plea of constructive res judicata—*When, not available—Sale partially set aside—Claim by the auction purchaser for refund of proportionate share of purchase money negatived.*

The plea of constructive *res judicata* is not available against the legal representatives of the judgment-debtor in the absence of any notice by reason of any of the processual formalities laid down in the Code of Civil Procedure that a particular item of the property constituting the subject-matter of dispute was being sold as entirely being liable in execution of the decree.

In Court sales there is no guarantee of title and the buyer must be aware. The right of the auction purchaser to claim for recovery of the purchase money is confined only to cases where there has been a total failure of consideration and not where there is a partical failure of consideration. The auction purchaser cannot tack on himself to the judgment-debtors in an application under section 47 of the Code of Civil Procedure filed by them and he must file his own separate proceedings in the shape of a suit or other proceeding to agitate his claims for the refund of the purchase money.

Macha Koundan v. *Kottara Konndan*, (1935) 69 M.L.J. 750 : I.L.R. 59 Mad. 202 (F.B.) and *Narasingi Vannachand Firm, Guntur* v. *Narasayya*, (1945) 1 M.L.J. 312 : I.L.R. (1945) Mad. 789, referred to and followed.

Appeal against the Appellate Order of the District Court of West Tanjore at Tanjore, dated 25th July, 1947 and made in A.S. No. 358 of 1946 preferred against the order of the Court of the Subordinate Judge of Tanjore in E.P. No. 59 of 1945 in O.S. No. 4020 of 1942.

D. Ramaswami Aiyangar for Appellant.

D. L. Narasimha Raju for the Government Pleader (*P. Satyanarayana Raju*) for 4th Respondent.

The Court delivered the following

JUDGMENT.—Two points are taken in the C.M.S.A., *viz.*, that the lower Court should have held that the plea of the respondents was barred by the principle of constructive *res judicata* and secondly, that in any event the appellant before me should be refunded the proportionate share of the purchase money (*i.e.*, three-fourths).

In my opinion, both the points taken are bound to fail. Turning to the first point, what is the constructive *res judicata* pleaded? The argument runs that since the petitioners in the lower Court did not object at the settlement of the proclamation of sale to the sale of this property as property liable to be sold in execution of the decree against the late Viswanatha Ayyar or advance the claim that no sale could be validly held as far as their shares or interests (*viz.*, three-fourths) were concerned, they are barred from agitating the matter any further under the rule of constructive *res judicata*. In advancing this argument, it was overlooked that the petitioners in the lower Court had not any notice by reason of any of the processual formalities laid down in the Code of Civil Procedure that this particular item of property constituting the subject-matter of the dispute was being sold in execution of the decree as entirely liable in execution of the decree against the late Viswanatha Ayyar. No draft, as pointed out by the learned District Judge and Subordinate Judge of the proposed terms was served upon the petitioners, nor did the notice contain any schedule describing the properties to be sold. Therefore, it is idle to contend that if they had any such information at their disposal they should have put forward the objections which have been advanced now by them after being in possession of all the information. In other words, what happened in this case, was, as has been set out in *Chidambaram Chetti* v. *Theivanai Ammal*[1], *viz.*, that these respondents were told that a certain date had been fixed for settling the terms and nothing more and therefore, it would be a very remarkable thing, if on receipt

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* A. A. A. O. No. 5 of 1948. 18th April, 1952.

1. (1923) 45 M.L.J. 346 : I.L.R. 46 Mad. 768.

of such notice, it were to follow that if they did not attend on that occasion, they must be taken to have attended and raised the question whether or not the property was the property of the judgment-debtor. So, by no stretch of imagination, can it be said that these respondents are barred by the principle of constructive *res judicata*.

In regard to the second point, both on procedure and on the state of the law, the appellant is not entitled to a refund of three-fourths of the purchase price. First of all, this is a petition by the judgment-debtors under section 47, Civil Procedure Code and if the appellant wants a refund of his purchase price, he must file his own separate proceedings in the shape of a suit or other proceeding to agitate the relief he wants. He cannot tack on himself to the judgment-debtors in this petition and ask for a refund of the three-fourths of the purchase money which is outside the scope of this petition." Secondly, I am afraid even if he is likely to agitate for it, he is not likely to get the remedy he wants because it has always been repeatedly pointed out that in Court sales there is no guarantee of title and that the buyer must be aware. It follows therefore that there may be "lucky" purchasers as well as "unlucky" purchasers and to which latter category the petitioner appears to belong. In *Narasingi Vannachand Firm, Guntur* v. *Narasayya*[1], it was held by a Bench of this Court that the decision of the Full Bench in *Macha Koundan* v. *Kottara Koundan*[2], rcognising the right of the auction-purchaser to sue for recovery of the purchase money is confined to cases where there has been a total failure of consideration, that is, where the judgment-debtor's interest in the property sold turned out to be nothing and that it does not enable the auction-purchser to file a suit for recovery of the purchase money where there is only a partial failure of consideration, as where the judgment-debtor is found to be entitled only to a portion of the property sold. So, this is precisely a case of this description because it has turned out that the judgment-debtor's good title is only one-fourth and that in regard to the three-fourths, the judgment-debtor had no title to the property for the satisfaction of this debt.

In the result, this C.M.S.A. is bound to fail and is hereby dismissed with costs of the Government Pleader (4th respondent).

V.P.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRA REDDY.

Kamalam .. *Petitioner**

v.

Saradambal and others .. *Respondents.*

Court-fee—Appeal against an ascertained sum under a final decree in a suit for administration—Article 17-B, Schedule II or Article 1 of Schedule I of Court-Fees Act (VII of 1870)—Applicability.

The clause "in every suit where it is not possible to estimate at a money value of the subject-matter in dispute" in Article 17-B of Schedule II of Court-Fees Act, governs both the words "suit and memorandum of appeal" preceding it. If a suit is to be valued for purposes of court-fees under Article 17-B, Schedule II, the appeal arising out of it is also governed by the same provision of the Court-Fees Act, although the subject-matter of the memorandum of appeal is capable of valuation and the appeal is preferred against an ascertained sum under a final decree. Article 1 of Schedule I of the Court-Fees Act is not applicable in such a case.

Khaja Moideen v. *Abdul Gafoor*, (1941) 2 M.L.J. 962 : I.L.R. (1942) Mad. 455 and *Veluchami Pillai* v. *Sankaralingam Pillai*, (1949) 2 M.L.J. 782, followed.

Kadiyala Parvadhannulu v. *Kadiyala Parvadhannulu*, (1949) 2 M.L.J. 402, dissented from and *In re Dhanukodi Nayakar*, (1938) 1 M.L.J. 628 : I.L.R. (1938) Mad. 598 (F.B.), referred to.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to order a refund of certificate for the excess court-fee of Rs. 177-7-0 paid on the appeal memorandum in A.S. No. 45 of 1951

1. (1945) 1 M.L.J. 312 : I.L.R. (1945) Mad. 2. (1935) 69 M.L.J. 750 : I.L.R. 59 Mad. 789. 202 (F.B.).

* C.M.P. No. 9784 of 1952 and S.R. No. 12371 of 1951. 16th September, 1952.

preferred to the High Court against the decree of the District Court of East Tanjore at Negapatam in O.S. No. 21 of 1946, dated 16th April, 1950.

T. S. Kuppuswami Aiyar for Petitioner.

D. L. Narasimharaju for the Government Pleader (*P. Satyanarayana Raju*) on notice from Court.

The Court made the following

ORDER.—This is a reference under section 5 of Court-Fees Act. The facts leading up to this reference may be briefly stated. The plaintiff brought an administration suit against her mother and her three sisters for partition of the plaint schedule property into four shares and for delivery of separate possession of her share and for rendition of accounts of other assets and income from the family property. For purpose of jurisdiction, the suit was valued at Rs. 10,000 and a fixed court-fee of Rs. 100 was paid under Article 17-B of Second Schedule of the Court-Fees Act. A preliminary decree was passed, and there was a direction for an enquiry into other assets and income from the family. A Commissioner was appointed for the purpose and on looking into the accounts, he found that the 2nd defendant who was virtually in management of the estate was liable to pay the plaintiff a sum of Rs. 3,152-8-9. Basing on the Commissioner's report, the District Judge gave a decree *inter alia* for that sum against the 2nd defendant. The 2nd defendant filed an appeal against that judgment valuing it under Article 1, Schedule I and paying an *ad valorem* court-fee on the sum of Rs. 3,152-8-9. Realising that she made a mistake in thinking that the matter is governed by Article 1, Schedule I of the Court-Fees Act and in paying a higher court-fee, the appellant has claimed a refund of the excess court-fee.

2. According to the appellant, the appeal would fall for purposes of court-fee under Article 17-B of 2nd Schedule and not under Article 1 of Schedule I of the Court-Fees Act and as she made a *bona fide* mistake in paying a higher court-fee, the excess should be refunded to her. This petition for refund is opposed by the Government Pleader who contends that the original court-fee paid is correct and that the matter cannot be brought under Article 17-B of Schedule II. Therefore the point for determination is, which of the two provisions of the Court-Fees Act, whether Article 1 of Schedule I or Article 17-B of Schedule II applies to this case.

3. Before I proceed to examine the cases cited on either side, I will refer to the relevant provisions of the Court-Fees Act. Article 1, Schedule I, provides that in respect of the plaint or memorandum of appeal (not otherwise provided for in this Act) an *ad valorem* court-fee mentioned in column 3 should be paid. First column of Article 17-B of 2nd Schedule runs thus :

"Plaint or memorandum of appeal in every suit where it is not possible to estimate at a money value the subject-matter in dispute and which is not otherwise provided for by this Act."

4. The first question to be answered is what is the provision of the Court-Fees Act that is applicable to an administration suit. In *Khaja Moideen* v. *Abdul Gaffoor*[1], it was laid down that an administration suit for partition of the assets amongst the heirs of a deceased person and for accounts should be valued under Article 17-B of 2nd Schedule of the Court-Fees Act. That was a suit for the administration of the estate of a deceased Mahomedan woman, for division of the assets amongst the heirs and for accounts. One of the points for decision was whether an administration suit should be treated as a suit for accounts within the meaning of section 7 (iv) (*b*) of the Court-Fees Act or as one coming under Article 17-B. The learned Judge decided that the appropriate provision of the Court-Fees Act was Article 17-B and not section 7 (iv) (*b*) as, in his opinion, an administration suit is not a suit for accounts. He agreed with the opinion expressed by Wadsworth, J., in Civil Miscellaneous Appeal No. 235 of 1938.

5. I express my respectful accord with the view taken by Horwill, J., in *Khaja Moideen* v. *Abdul Gaffoor*[1] and Wadsworth, J., in C.M.A. No. 235 of 1938. As pointed out by Wadsworth, J., an administration suit by an heir is not merely a suit for

1. (1941) 2 M.L.J. 962 : I.L.R. (1942) Mad. 455.

accounts. The main relief in such a suit is one of division of the assets of the deceased (both movable and immovable) amongst the heirs. Such being the case, the proper provision for purposes of court-fee is Article 17-B as the subject-matter of the suit is incapable of valuation.

6. The next point for consideration is whether the fact that the subject-matter of the appeal is an ascertained sum of money payable by the appellants makes any difference so far as the applicability of the Article 17-B is concerned. It is argued by Mr. Kuppuswami Iyer for the appellant-petitioner that only a fixed court-fee is payable under Article 17-B although what is attacked in the appeal is the direction to pay a fixed amount to the plaintiff. On the other hand the stand taken by the Government Pleader is that Article 17-B ceases to apply to an appeal the subject-matter of which is capable of valuation. According to him the subject-matter in dispute in appeal is not co-extensive with that involved in the suit and hence, the appellant petitioner cannot invoke the provisions of Article 17-B.

7. In support of the contention that an *ad valorem* court-fee has to be paid and not a fixed court-fee under Article 17-B of the Second Schedule he placed reliance on a Full Bench decision of this Court in *In re : Dhanukodi Nayakar and others*[1]. That was a suit for accounts and a preliminary decree was passed for ascertaining accounts. In the final decree, the defendants were held liable to pay a certain amount to the plaintiff. In the appeal by the defendant against that judgment, he sought to value the relief claimed by him arbitrarily. It was held by the Full Bench that he could not do it because, section 7 (iv) (*f*) of the Court-Fees Act referred to the plaintiff who could put his own value, and had no application to the defendant. I do not think that his case has any bearing on the question for decision before me. If it is conceded, that the present case falls within the purview of section 7 (iv) (*f*), then the decision cited will be applicable.

8. Another ruling cited by the Government Pleader is that of Mack, J., in *Kadiyala Peravadhannulu* v. *Kadiyala Peravadhannulu*[2]. The learned Judge expressed the opinion, following *In re : Dhanukodi Nayakar and others*[1] that in an appeal against a decree passed in a partition suit for payment of a specific sum, *ad valorem* court-fee has to be paid under Article 1, Schedule I of the Court-fees Act on the subject-matter of the appeal. The learned Judge remarked that

"for fiscal purposes the liability of a manager of Hindu Joint family business to account to other members of the joint family cannot be differentiated from an ordinary suit for account as between partners."

9. The exact nature of the reliefs asked for is not clear from the report. So it is difficult to see how far the principle underlying it is applicable to these cases on hand and whether it contains a correct statement of law. If, however, what is meant by the observations extracted above is that there is no difference for fiscal purposes between an ordinary suit for accounts and a suit for partition and for an account of outstandings due to the joint family, having family business, I have to express my respectful dissent from it. The right of a coparcener to demand an account, when it existed is an incident to the right of partition of the family properties. The principle is the same even with regard to the joint family business.

10. In this context the observations of Jwala Prasad, J., in *Jyotibati Chaudhurain* v. *Lakshmeshwar Prasad Chaudhuri*[3] are apposite.

"Ordinarily, therefore, there can be no suit for accounts against a karta. He can be asked not to render an account as an agent on behalf of the other members, but only to disclose the properties including cash in his hands and that might necessitate looking into the accounts. A disclosure of property is not rendition of account, the word "account" in a suit for partition and accounts against a karta being used for convenience sake, and not in the legal sense to bring it within the expression used in section 7 (iv) (*f*) of the Court-Fees Act. Section 7 (iv) (*f*) applies to a suit for account. The test is : "Can a junior member without claiming partition, bring a suit for accounts against a karta ? If he cannot, then the relief as to accounts becomes subsidiary to the principal relief of partition. Therefore it will not be correct to say that wherever there is a relief asking for accounts in the sense of disclosure as to the existing state of the family finances, the suit embraces two subject-matters namely, a partition and an account. A suit for accounts implies a liability to account."

1. (1938) 1 M.L.J. 628 : I.L.R. (1938) Mad. 598 (F.B.).
2. (1949) 2 M.L.J. 402.
3. (1929) I.L.R. 8 Pat. 818 at 828.

11. The other cases relied on by the Government Pleader as supporting his plea are *Bala Venkatarama Chettiar* v. *Maruthamuthu Chetti*[1] and *In re : Porkodi Achi*[2].

12. In *Bala Venkatarama Chettiar* v. *Maruthamuthu Chetti*[1] a suit was filed on a promissory note executed by certain persons as trustees, a decree was passed against them personally and the aggrieved trustees filed an appeal against it. They wanted to value the appeal under Article 17-B on the ground that they did not question the decree but were only seeking to avoid a personal liability. It was laid down by Venkataramana Rao, J., that Article 17-B was not applicable as the amount for which they were made liable, was ascertained. I do not think this case has any bearing on the point for determination before me because the suit being for the recovery of a definite sum, it could not be said that it was not possible to estimate the subject-matter in dispute. Such a case cannot attract the provisions of Article 17-B. Therefore the contention that Article 17-B was applicable was rightly rejected in that case, if I may say so with respect, by the learned Judge.

13. *In re : Porkodi Achi*[2], a sale by the mother was set aside, in a suit by her daughter as an heir to the estate of her father, subject to her paying certain amount to the vendee which was found to have been incurred by the mother for a binding purpose. In the appeal, the plaintiff wanted to get rid of the direction for the payment of the money to the defendant and the appeal was valued under Article 17-B of the Court-Fees Act. The appellant sought to pay a fixed court-fee of Rs. 10 on the ground that the condition imposed was incapable of being estimated in money value. The learned judge observed that the valuation of the condition was clearly determined by the amount payable and no other valuation was possible. That case cannot give any assistance in the determination of the question before me because that was not a suit attracting the provisions of Article 17-B of the Second Schedule of the Court-Fees Act.

14. I will now refer to the decisions cited by Mr. Kuppuswami Iyer for the position that an appeal arising out of a suit falling under Article 17-B is governed by the same provision, although the subject-matter in dispute in the appeal is a definite sum.

15. In *Veluchami Pillai* v. *Sankaralingam Pillai*[3], one of the parties in a partition suit was directed to pay a certain amount to the plaintiff towards equalisation of the shares in a final decree proceedings. The question arose whether the appeal against that decree was to be valued under Article 17-B of Second Schedule or under Article 1 of Schedule I of the Court-Fees Act. The learned Judge relying upon the ruling of the Calcutta High Court in *Jyoti Prasad Singha Deo* v. *Jogendra Ram Ray*[4] and a decision of the Patna High Court in *Jyotibati Chaudhurain* v. *Lakshmeshwar Prasad Chauduri*[5], to which I have already alluded, decided that the matter should be treated as wholly incapable of valuation and therefore coming within the meaning of Article 17-B of Second Schedule of the Court-Fees Act.

16. In *Jyoti Prasad Singha Deo* v. *Jogendra Ram Ray*[4], in the original final decree granted by the Court, there was a direction for payment of costs aggregating to Rs. 1,573 to the successful party. Subsequently, this direction was deleted. The plaintiff preferred an appeal claiming the sum which was originally granted to him by way of costs. The question was whether the *ad valorem* court-fee was required to be paid under Article 1 of Schedule I or whether it was sufficient to pay a fixed court-fee under Article 17-B of the Second Schedule. In dealing with that question, the learned Judge observed that

"It does not matter whether the ground of attack is with reference to the allotment of specific portion of immovable or movable property or the ground of attack is the question of costs."

He also proceeded on the assumption that when owelty was directed to be paid to one of the parties the party aggrieved was entitled to prefer an appeal valuing it as in a partition suit and that there was no difference in principle between that and a case where the appeal was directed against the order on the question of costs.

1. (1940) 2 M.L.J. 946.
2. (1921) 41 M.L.J. 587: I.L.R. 45 Mad. 246.
3. (1949) 2 M.L.J. 782.
4. (1928) I.L.R. 56 Cal. 188.
5. (1929) I.L.R. 8 Pat. 818.

17. In *Jyotibati Chaudhurain* v. *Lakshmeshwar Prasad Chaudhuri*[1], there was a suit for partition, which resulted in a decree *inter alia* for a specific sum of Rs. 60,426 in favour of the plaintiff against the manager of the joint family. The aggrieved manager preferred an appeal against that decree. The point having arisen as to the correct provision of the Court-Fees Act applicable, it was decided, that the court-fee was payable under Article 17-B. In my opinion, the principle adumbrated in these cases is a sound one and I express my respectful agreement with it.

18. Although in all these three cases, the decrees which were attacked in the appeals were passed in partition actions, the principle is the same and applies to an administrative suit like the present one. In my opinion if a suit is to be valued for purposes of court-fees under Article 17-B, the appeal arising out of it is also governed by the same provision of the Court-Fees Act.

19. In this context, the expressions used in Article 17-B should be borne in mind, namely,

"Plaint or memorandum of appeal in every suit where it is not possible to estimate at a money value the subject-matter in dispute."

The construction to be placed on this clause depends on the question whether the expression

"In every suit, where it is not possible to estimate at a money value,"

governs only the plaint, or the memorandum of appeal as well. If it governs memorandum of appeal also, then although the subject-matter of the memorandum of appeal is capable of valuation, still it falls within the purview of that article, because the memorandum of appeal is in the suit in which it is not possible to estimate at a money value the subject-matter in dispute. A plain reading of the clause inclines me to the view that the clause governs both the words "suits" "and memorandum of appeal" preceding it.

20. What emerges from the above discussion is that an administration suit for division of the assets of a deceased person amongst his heirs should be valued under Article 17-B of Second Schedule of the Court-Fees Act and in an appeal arising out of such a suit, court-fee need not be computed on an *ad valorem* basis under Article 1 of Schedule I of the Court-Fees Act as it is also governed by Article 17-B of Second Schedule.

21. It follows that it was not necessary to pay the *ad valorem* court-fee on the sum aggregating to Rs. 3,152-8-9 and a fixed court-fee under Article 17-B would have been sufficient. The appellant is therefore entitled to a refund of the excess amount of court-fee paid by her.

22. Consequently the office is directed to issue the necessary certificate. The reference is answered accordingly.

23. As an indulgence is granted to the petitioner in directing the refund of the court-fees, she will pay the costs of the Government Pleader which I fix at Rs. 30.

V.P.S. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Baggiam *alias* Chintamani .. *Petitioner.**

Madras District Police Act (XXIV of 1859), *section* 47—*Applicability to the City of Madras*—"*Charge*" —*Meaning.*

Since 1st September, 1867, when Madras Act VIII of 1867 came into force, the District Police Act XXIV of 1859 is in force in the City of Madras. Section 47 of that Act is applicable to the City. Section 16 of the City Police Act does not take away the right under the Madras District Police Act. Section 47 of the District Police Act creates an offence in respect of not only allegations made against

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1. (1929) I.L.R. 8 Pat. 818.

* Crl. R. C. No. 264 of 1952. 5th November, 1952.
(Crl. R. P. No. 247 of 1952).

the public officer, but also for assaulting or resisting any police officer in the execution of his duty and for aiding or inciting any other person so as to assault or resist any police officer.

There is no identity of meaning between section 47 of the Madras District Police Act and section 211 of the Indian Penal Code, with regard to the word "charge" in the two sections. It need not be of an offence as under the Penal Code. False and frivolous allegations against a constable will amount to "charges" under section 47 of the District Police Act and a person making such "charges" is liable to be convicted even if it is in the City of Madras.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the 4th Presidency Magistrate, G.T., Madras, dated 27th November, 1951, in C.C. No. 4722 of 1951.

A. A. S. Mustapa for Petitioner.

The State Prosecutor (*S. Govind Swaminathan*) for the State.

The Court made the following

ORDER.—The petitioner in this case has been convicted by the Fourth Presidency Magistrate for an offence under section 47 of the Madras District Police Act (XXIV of 1859) and sentenced to a fine of Rs. 30 in default to three weeks' rigorous imprisonment.

The facts of the case may be briefly stated as follows: The petitioner sent a petition, Exhibit P-1, dated 28th May, 1951 to the Inspector-General of Police alleging therein that P.C. 2144 of B-2 station was troubling her daily asking for a mamool of Rs. 10 that he was inducing her to run a brothel and that he was taking bribes. The petition was forwarded to the Sub-Inspector of B-2 station for enquiry. P.W. 2, the Sub-Inspector of B-2 station inquired into the matter and sent a report that the allegations are false and that they were made with a view to remove the police surveillance on her. Thereupon this complaint was laid in Court against the accused for an offence under section 47 of the Madras District Police Act. Both in the enquiry by the Sub-Inspector and before the court beyond her statement no other evidence was let in in support of her allegations in the petition. In the enquiry before the Sub-Inspector a witness was cited, who did not speak to anything more than that the police constable concerned used to come often to the house of the petitioner and question her in an authoritative manner. In the court the witnesses cited by her spoke to the fact that they saw the constable one day coming and talking to the accused. The prosecution examined P.C. 2144 in support of its case that the allegations made against him are false. He stated in his evidence that he had taken action against the petitioner under section 4 (1) of the Madras Prohibition Act and her brother Mari was also charged by him under section 75 of the City Police Act and that he had also taken action against the accused under section 75 of the City Police Act in respect of girls kept by her in her house, whom he arrested. He also stated that on account of his taking action against her, her brother and the girls kept by her, she has sent this petition against him. The Sub-Inspector who made the enquiry was also examined by the prosecution and he filed a report which was submitted to the Commissioner of Police. The Magistrate believed the evidence of the constable, P.W. 2 and as the allegations in the petition, Ex. P-1 were not substantiated by the accused the Magistrate came to the conclusion very rightly in my opinion that the allegations contained in Ex. P-1 are false and that they were maliciously made by the accused. The petitioner was therefore convicted under the aforesaid section.

In revision two points of law were canvassed before me: (1) Sec. 47 is a provision in the Madras District Police Act and it is not applicable to the City as a separate City Police Act governs the conduct of the police officers in the City, and therefore section 47 cannot be invoked in respect of the allegations made against the City constable; and (2) As under section 16 of the Police (Madras City) Act any police officer appointed under the provisions of Act XXIV of 1859 (Madras District Police Act), if employed in the City, shall have the same duties, powers and privileges as police officers under the Police (Madras City) Act, and as section 47 confers a privilege only on a constable employed in the district and that this privilege is

not conferred on a city constable by the Police (Madras City) Act, this section 47, cannot apply in respect of a city Constable in the absence of a similar provision in the Police (Madras City) Act. So far as the first point is concerned, it must not be forgotten that the Madras District Police Act is a Central Act passed in 1859 for the better regulation of the police within the territories subject to the presidency of the Fort. St. George. Under section 55 of the Act, it can be made applicable to any or every district by a notification of the Provincial Government published in the official Gazette. By section 2 of the Madras Act VIII of 1867, the provisions of Act XXIV of 1859 (Madras District Police Act) have been made applicable to the persons, who at that time belonged to or would thereafter belong to the town police. By virtue of this provision, since 1st September, 1867, when the Madras Act VIII of 1867 came into force, the District Police Act (Act XXIV of 1859) is in force in the City of Madras. This is further clear from another Act of the Central Legislature, *viz.*, Act XV of 1874. That is an act for declaring the local extent of certain enactments and for other purposes. Section 4 of the above Act is as follows:

> "The enactments mentioned in the Second Schedule hereto annexed are now in force throughout the whole of the territories now subject to the Government of the Governor of Fort. St. George in Council, except the scheduled district subject to such Government."

Act XXIV of 1859 is one of the Acts referred to in the Second Schedule (*vide* page 257 of Vol. II, of the Unrepealed Central Act, 2nd Edn.) Apart from the Madras Act VIII of 1867, the Central Act XV of 1874 makes it clear that this Madras District Police Act is applicable to the police in the City of Madras. This covers practically the second point also, though I will deal with it separately.

As regards the second point about section 16 of the City Police Act, I do not see how it takes away the right under the Madras District Police Act, which as stated already is applicable to the police in the City of Madras. Section 47 creates an offence in respect of not only allegations made against the police officer, but also for assaulting or resisting any police officer in the execution of his duty and for aiding or inciting any other person so to assault or resist any police officer. This has nothing to do with the privileges of a constable in the City. Even if it is considered as a privilege, I do not see how it can make any difference as the Madras District Police Act applies to the City also. There is therefore no substance in either of the two points raised by the learned advocate for the petitioner.

The only other question is whether the petitioner can be said to have preferred a false or frivolous charge against P.C. 2414. I have already held that the learned Magistrate was justified in coming to the conclusion that the allegations made are false and were maliciously made. The question is whether it is a charge against a police officer.

The word "charge" is not defined either in the Act or in the Code of Criminal Procedure. The ordinary meaning given to it in Wharton's Law Lexicon is "to prefer an accusation against any one." What exactly is meant by "charge" has been considered by two decisions of this Court in connection with its meaning in section 211, Indian Penal Code. The two decisions are *Rayan Kutti* v. *Emperor*[1], and *The Sessions Judge, Tinnevelly Division* v. *Sivan Chetti*[2]. It has also been considered by the Calcutta High Court in *Abdul Hakim Khan Choudhuri* v. *Emperor*[3]. Both *Rayan Kutti* v. *Emperor*[1], and *Abdul Hakim Khan Choudhuri* v. *Emperor*[3] have been considered by King, J., in *Kotha Achayya Setti* v. *Emperor*[4]. As already stated the three decisions in *Rayan Kutti* v. *Emperor*[1], *Sessions Judge, Tinnevelly Division* v. *Sivan Chetti*[2] and *Abdul Hakim Khan Choudhuri* v. *Emperor*[3] referred to by me deal only with the meaning of the word in section 211, Indian Penal Code. But *Kotha Achayya Setti* v. *Emperor*[4], deals with the meaning of the word in section 47 of the Madras District Police Act. I must say that in section 211, Indian Penal Code, the charge must be one against any person with having committed an offence. The sense

1. (1903) I.L.R. 26 Mad. 640.
2. (1909) I.L.R. 32 Mad. 258.
3. (1931) I.L.R. 59 Cal. 334.
4. (1937) 2 M.L.J. 435.

therefore in which the word is used in section 211, Indian Penal Code, is different from that in which it is used in section 47, Madras District Police Act. I entirely agree with King, J., that there is no identity of meaning between section 47 of the Madras District Police Act and section 211, Indian Penal Code, with regard to the word "charge" in the two sections. The rulings therefore in *Rayan Kutti* v. *Emperor*[1], *Sessions Judge, Tinnevelly Division* v. *Sivan Chetti*[2] and *Abdul Hakim Khan Chowdhuri* v. *Emperor*[3] will not apply to a case under section 47 of the Madras District Police Act. I would therefore hold that the allegations by the petitioner against P.C. 2144 amount to a false and frivolous charge against him and that they were made maliciously. The lower Court is justified in convicting the petitioner for an offence under section 47 of the Madras District Police Act and the sentence is not excessive. This petition is therefore dismissed.

K.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

Muthuraman Chettiar and another .. *Appellants* in A. A. O. of 1952 (sought to be preferred to the High Court).*

Arbitration Act (X of 1940), section 39 (1)—Order of single Judge of High Court superseding a reference to arbitration and directing the suit to be tried—If open to appeal.

Civil Procedure Code (V of 1908), section 115—Order of single Judge of High Court under—Not appealable to a bench.

The Judge sitting for hearing revision petitions is not a different Court from a Division Bench hearing appeals. All the Judges constitute members of the same Court and both are parts of the same institution. Section 39 (1) of the Arbitration Act contemplates two different Courts, *viz.*, a Court which supersedes the arbitration and a different Court which is authorised by law to hear appeals from the original decrees of the Court passing the order. As the Courts are the same no appeal lies as the requirements of section 39 (1) have not been satisfied. Clause 15 of the Letters Patent definitely says that an order passed under section 115 of the Civil Procedure Code by a single Judge of the High Court is not appealable to a Bench.

Accordingly, no appeal lies against an order passed by a single Judge of the High Court under section 115 of the Civil Procedure Code whereby a reference to an arbitration has been superseded and the suit is directed to be tried.

S. R. 38068 of 1952 sought to be preferred to the High Court against the order of the Honourable Mr. Justice Raghava Rao dated 29th July, 1952, and made in C. R. P. No. 2037 of 1951, preferred against the order of the Court of the Subordinate Judge of Pudukottai, dated 19th November, 1951, and made in I. A. No. 1298 of 1951, in O. S. No. 113 of 1949.

R. Viswanathan and *S. Gopalaratnam* for proposed appellants.

The Government Pleader (*P. Satyanarayana Raju*) on notice from Court.

The Order of the Court was made by

Govinda Menon, J.—A question has been referred to us as to whether an appeal lies against an order passed by a single Judge of this Court under section 115 of the Civil Procedure Code whereby a reference to an arbitration has been superseded and the suit is directed to be tried. Since the respondent was unrepresented at this stage, we gave notice to the learned Government pleader who has been heard on the question of maintainability.

There was a suit for partition in which a reference to arbitration was made. There were three arbitrators, one of whom was nominated by the plaintiff and another by the defendant. After some time when the proceedings were stagnating, the defendant filed an application that since the arbitrator nominated by the plaintiff was not functioning and was non-co-operating with the other arbitrators,

1. (1903) I.L.R. 26 Mad. 640.
2. (1909) I.L.R. 32 Mad. 258.
3. (1931) I.L.R. 59 Cal. 334.

* S.R. 38068 of 1952. 30th October, 1952.

the Court may be pleased to remove him and appoint another in his stead. The plaintiff also filed an application, but the prayer was that the arbitration should be superseded and the suit should be tried on the merits. The learned Subordinate Judge dismissed the plaintiff's application for superseding the arbitration and allowed the defendant's application for the nomination of a new arbitrator. Two revisions were filed to this Court under section 115 of the Civil Procedure Code by the plaintiff, one against the order dismissing his application and the other against the order nominating a new arbitrator. Both of them were heard together by our learned brother Raghava Rao, J., who by a common order allowed the revision against the order dismissing the application to supersede the arbitration and also allowed the revision against the order by which a new arbitrator was to be nominated. The result of the allowance of these two revision petitions was that the arbitration was superseded and the suit was directed to be tried on the merits. The present attempt is by the defendant to file an appeal against the order of Raghava Rao, J. The office has taken the objection that an appeal is not maintainable and the matter has come before us for arguments.

Mr. R. Viswanathan for the proposed appellant relies upon section 39 (1) (i) of the Indian Arbitration Act and contends that since the arbitration has been superseded for the first time by this Court, an appeal will lie under that clause. He invited our attention to a decision in *Munisami Mudaliar* v. *Rajaratnam Pillai*[1], in which a Full Bench of this Court held that an order of sanction to prosecute a party for giving false evidence passed by a Judge sitting on the Original side of this High Court is appealable to a Division Bench under the provisions of section 195 of the Criminal Procedure Code. The unamended section 195 (6) was to the following effect :

"Any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate."

Then, sub-section (7) stated as follows :—

"For the purposes of this section every Court shall be deemed subordinate only to the Court to which appeals from the former court ordinarily lie."

On a construction of these two sub-sections, the Full Bench held that an appeal lay to the Division Bench hearing appeals from a single Judge on the Original side of the High Court, from an order granting sanction. On the analogy of this decision, the learned counsel contends that a Division Bench on the Appellate side is a Court authorised by law to hear appeals from original decrees of the Court passing the order. What is urged is that supposing on the original side of this Court an order superseding arbitration is passed, then under section 39 (1) an appeal will lie to this Court itself which will be heard on the Appellate Side by a Division Bench.

The difficulty in accepting this contention is that when the learned Judge heard the two revisions before him he was exercising a power conferred upon him under section 115 of the Civil Procedure Code as is made clear by section 41 (*a*) of the Arbitration Act which is to the effect that :

"the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings before the Court, and to all appeals under this Act."

In *Gauri Shankar Bhargava* v. *Jagat Narain Shahgal*[2], a single Judge in considering the nature of the powers exercised in revision expressed the view that as a 'decree' as defined in section 2 of the Civil Procedure Code means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit an order passed in revision undoubtedly comes within this definition. It is not necessary for us to rely on this decision for the proposition that the powers of revision are those exercised in the Appellate Jurisdiction. Section 115 makes it clear that a power of revision can only be exercised by the High

1. (1922) 43 M.L.J. 375 : I.L.R. 45 Mad. 928 (F.B.). 2. (1933) I.L.R. 56 All. 608.

Court when no appeal is provided to it, in its Appellate Jurisdiction. We, therefore, are of opinion that when Raghava Rao, J., superseded the arbitration, he was functioning as an appellate Court and when he functions as an appellate Court there is a prohibition that no second appeal shall lie from an order passed by him under section 39 (2) of the Arbitration Act. This is concluded so far as this Court is concerned by the decision in *Radhakrishnamurthy* v. *Ethirajulu Chetty and Co.*,[1] which view has found acceptance in *Madhavadas* v. *Vithaldas*[2], and *R. Wright and Partner, Ltd.* v. *Governor-General in Council*[3]. If in an appeal an order is passed superseding an arbitration and no second appeal can lie from such an order, we fail to see how there can be an appeal against an order passed in revision. Clause 15 of the Letters Patent definitely says that an order passed under section 115 by a single Judge of the High Court is not appealable to a Bench.

Even on the wording of section 39 (1), in our opinion, there can be no appeal. The Judge sitting for hearing revision petitions is not a different Court from a Division Bench hearing appeals. All the Judges constitute members of the same Court and both are parts of one and the same institution. It cannot be said that a Judge sitting on the appellate side singly is a Court different from a Division Bench. Section 39 (1) contemplates two different Courts, *viz.*, a Court which supersedes the arbitration and a different Court which is authorised by law to hear appeals from the original decrees of the Court passing the order. Since there is no duality of Courts in this case, we cannot say that there can be any application of section 39 (1) on the facts of the present case. Mr. Viswanathan was asked the question as to what would be the result if a Division Bench for the first time hears a revision under section 115 and supersedes an arbitration in which case would it be that an appeal can lie from a Division Bench to a Full Bench under section 39 (1)? The learned Counsel is compelled to answer that since there is no other Court, an appeal would not lie except to the Supreme Court. In the view which we take, that the Courts are one and the same, no appeal lies. The requirements of section 39 (1) have not been satisfied and the papers will be returned to the proposed appellant.

K.S. ——— *Papers returned.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

D. Pandurangan and another .. *Appellants**

Penal Code (XLV of 1860), section 292—"Obscene"—Test—Prosecution under section 292—If evasion of Press (Objectionable Matters) Act (LVI of 1951).

It is a question of fact in each case whether a particular book falls within the meaning of the word "obscene" in section 292 of the Indian Penal Code. "Obscene" means "offensive to chastity or modesty"; expressing or presenting to the mind or view something that delicacy, purity, and decency forbid to be expressed; impure "expressing or suggesting unchaste and lustful ideas, impure, indecent, lewd."

A prosecution under section 292 of the Indian Penal Code does not in any way amount to an evasion of the provisions of the Press (Objectionable Matters) Act (LVI of 1951).

The object of Act LVI of 1951 is only to provide against printing and publication of objectionable matter and not to punish where there has been publication or printing. That Act does not in any way repeal any provision of the Penal Code and is no bar to the prosecution for an offence under section 292, Indian Penal Code. The printer cannot be convicted in the absence of proof that the book was printed by him. When a prosecution does not make out a case against an accused, no question shall be put to the accused under section 342, Criminal Procedure Code, and any answer that he might give cannot be used to fill up the gaps in the prosecution case.

Appeal against the order of the Court of the Chief Presidency Magistrate of Egmore in C. C. No. 2929 of 1952.

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1. (1945) 1 M.L.J. 54 : I.L.R. (1945) Mad. 564.
2. I.L.R. (1952) Bom. 570 : A.I.R. 1952 Bom. 229.
3. I.L.R. (1948) 2 Cal. 265.

* Crl. App. Nos. 276 and 277 of 1952. 7th November, 1952.

P. S. Janakiram for 1st Accused.

V. S. Chandrasekharan for 2nd Accused.

A. C. Muthanna for the State Prosecutor for the State.

The Court delivered the following :

JUDGMENT.—The two appellants were tried and convicted by the Chief Presidency Magistrate for an offence under section 292, Indian Penal Code and sentenced each to three months' rigorous imprisonment and a fine of Rs. 1,000.

The second accused in the case is the keeper of a Press called "Sri Andal Press." This is situated in 175, Lloyds Road, Royapettah. The first accused is the printer and publisher of a book called "Kama Leelai." The book contains pictures of various postures of sexual intercourse with an explanatory note on the opposite page. It is clear from Ex. P-5 filed in the case that the first accused printed as many as 700 copies of the book. The two ledgers Exs. P-2 and P-3 seized by the police show the number of books sold by the first accused. It is clear therefore from these two documents that the first accused has printed and published these books for the purpose of sale. In fact, this is not seriously disputed, though it is stated that the sale was intended only for adults. Even so these books were undoubtedly printed and published for sale.

The prosecution case is that these are obscene books and therefore fall within the mischief of section 292, Indian Penal Code. The learned Chief Presidency Magistrate after referring to the various decisions cited before him has in a well-considered judgment held that they are obscene. The main question therefore in the appeal is whether these books are obscene within the meaning of the term in section 292, Indian Penal Code.

The word "obscene" is not defined in the Code. The natural and ordinary meaning of the term as given by the dictionaries is this :

Webster's New International Dictionary :

"Obscene : Offensive to chastity or modesty ; expressing or presenting to the mind or view something that delicacy, purity and decency forbid to be expressed ; impure, as obscene language, obscene pictures."

Oxford New English Dictionary :

"Obscene : Offensive to modesty or decency ; expressing or suggesting unchaste and lustful ideas ; impure, indecent, lewd."

It is therefore a question of fact in each case whether a particular book falls within the meaning of this word. In this case a perusal of the book will convince anyone that it falls within the meaning given above. The book therefore is obscene and the offence is clearly made out.

It is contended by the learned counsel for the appellant that this is a matter which falls more within the scope of Act LVI of 1951 (The Press Objectionable Matter Act, 1951), and a proceeding against the appellant for an offence under section 292, Indian Penal Code, really amounts to an evasion of the provisions of that Act. The provisions in the above Act regarding the publication of books which contains any objectionable matter and which as per section 3 (6) of the Act include publications which are grossly indecent or obscene are contained in section 11 and it only deals with the forfeiture of those books to the Government. There is nowhere in that Act anything to indicate that section 292, Indian Penal Code, is either abrogated or superseded. In my view the prosecution of the appellants for an offence under section 292, Indian Penal Code, does not in any way amount to evading the provisions of Act LVI of 1951.

It is next contended that there are several such books which are published and which are under circulation and those publishers have not been prosecuted. In support of that, certain exhibits have been filed by the defence advocate. The fact that other publishers of similar publications have not been prosecuted does not mean that the book in question does not fall within the scope of section 292,

Indian Penal Code. We are concerned here only with the question whether this book is an obscene publication within the meaning of the term under section 292, Indian Penal Code. The argument of the learned counsel in my opinion is without force.

It is further contended that by this prosecution the accused must have been deprived of their rights to have the matter decided by a jury in accordance with the provisions of Act LVI of 1951. That Act is intended mainly to provide against the printing and publication of objectionable matter. Its object is to prevent and not to punish. As already stated that Act does not in any way repeal any of the provisions in the Indian Penal Code. Act LVI of 1951 is no bar to the prosecution for an offence under section 292, Indian Penal Code. The contentions in my opinion of the learned counsel fail.

But so far as the second accused is concerned, there is no proof that these books were printed in his press except what is printed on the books as to where they are printed. The presumption which applies under section 7 of Act XXV of 1867 to the printer and publisher does not apply to the keeper of a press. Apart from Ex. P-5, the presumption under section 7 of the Act XXV of 1867 makes it clear that the first accused is the printer and publisher of these books. There is no such presumption against the keeper of a press. No evidence has been let in that this was printed in this press. It is true that the second accused admits in his statement that he was the keeper of the press and that at the time when the copies of the book in question were printed, he was out of Madras. He also admits that they were printed in his press for sale. It is a well-recognised principle that when the prosecution does not make out a case against an accused, no question shall be put to the accused under section 342, Criminal Procedure Code and any answer that he might give cannot be used to fill up the gaps in the prosecution case. The case therefore against the second accused that he was the keeper of the press in which this book was printed has not been proved and the conviction and sentence of the second accused are set aside and he is acquitted. The fine if paid will be refunded.

So far as the first accused is concerned, I have already pointed out that there is a presumption under section 7 of Act XXV of 1867, and there is also Ex. P-5, which clearly shows that he was the printer and publisher. I have already held that the book is an obscene one within the meaning of the term in section 292, Indian Penal Code. His guilt is therefore established beyond all doubt. I therefor confirm his conviction. As regards the sentence, the learned Chief Presidency Magistrate observes :

> "The accused show no signs of repentance and are bent upon printing and selling pornographic publication. . . . ."

Even so in view of the undertaking given by the learned advocate for the accused that he shall not print any more copies extra I think that the ends of justice will be met by sentencing him to the period undergone and a fine of Rs. 500, in default 2 weeks' rigorous imprisonment.

With these modifications the appeal of the first accused is dismissed, while the appeal of the second accused is allowed.

Appeal of first accused dismissed and that of second accused allowed.

K.S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

K. Gopalu Mudali .. *Petitioner**

v.

A. Venkatesu Mudali and others .. *Respondents.*

Court-Fees Act (VII of 1870), *section* 7 (*xi*) (*cc*)—*Suit for arrears of rent and recovery of possession—Section* 7 (*v*) (*d*), ad valorem *court-fee when payable.*

The question of title cannot be gone into in a suit for rent brought under section 7 (xi) (*cc*) of the Court-Fees Act.

Court-fee has to be determined in the first instance on the plaint averments. Even enhanced court-fee can be paid on a plaint originally filed on the footing of landlord and tenant if one of the defendants puts up a defence of adverse possession and challenges the plaintiff's position as landlord. In such a case the plaintiff can amend his plaint and pay the necessary additional court-fee under section 7 (v) (*d*) of the Court-Fees Act for recovery of possession.

Balasidhantam v. *Perumal Chetti*, (1914) 27 M.L.J. 475, followed. *Shanmuga Nadar* v. *Kandaswami Nadar*, (1936) 71 M.L.J. 842 and *Hiralal Banerjee* v. *Surendranath Sarbanga*, A.I.R. 1926 Cal. 504, referred to.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Munsiff's Court, Tirupati, dated 25th July, 1951, in O. S. No. 482 of 1950.

D. Narasaraju and *K. B. Krishnamoorthi* for Petitioner.

D. L. Narasimharaju for Government Pleader (*P. Satyanarayana Raju*) for the State.

Respondents not represented.

The Court delivered the following

JUDGMENT.—A simple point of court-fee is raised in this Civil Revision Petition. The petitioner is the plaintiff who sued the two defendants for arrears of rent amounting to Rs. 126-0-3 and recovery of possession of the land on the basis of the relationship of landlord and tenant valuing the suit for purposes of court-fee under section 7, clause (xi) (*cc*) of the Court-Fees Act. The District Munsiff upheld the objection taken by the court-fee examiner that *ad valorem* court-fee should be paid under section 7, clause (v) (*d*) of the Court-Fees Act.

Court-fee has to be determined in the first instance on the plaint averments. According to the plaint the original owner of the land was the first defendant who executed an usufructuary mortgage on it in favour of the plaintiff. A year later the plaintiff leased it back to the first defendant for one year. The plaint alleged that the first defendant continued therefore in possession as a tenant holding over, and further more that the second defendant had purchased the land from the first defendant subject to the usufructuary mortgage. These averments, reasonably and liberally construed simply mean that the first defendant had conveyed his rights in the land which were only that of a tenant holding over to the second defendant. This appears to be a fair reading of the plaint which in the circumstances would not justify an inference that the plaintiff was seeking to recover possession from a trespasser who was putting up an adverse title. Even enhanced court-fee can be paid on a plaint originally filed on the footing of landlord and tenant if one of the defendants puts up a defence of adverse title and challenges the plaintiff's position as landlord. In such a case the plaintiff can amend his plaint and pay the necessary additional court-fee under section 7, clause (v) (*d*) of the Court-fees Act for recovery of possession. Even according to the written statements filed, there is nothing to indicate that either the first defendant or the second defendant in any way challenged the position of the plaintiff as the usufructuary mortgagee entitled to possession. The second defendant in his written statement pleaded that he purchased the land by a registered sale deed from the first defendant who undertook to discharge the mortgage in question. He at the same time pleaded

*C.R.P. No. 1153 of 1951. 24th October, 1952.

that the first defendant had not put him into possession at all. There is a curious allegation in paragraph 10 of the written statement to the effect that the suit was brought by the plaintiff against the second defendant maliciously at the instigation of and in collusion with the first defendant. One of the decisions relied on by the court-fee examiner is *Hiralal Banerjee* v. *Surendranath Sarbanga*[1], decided by Chakravarthi, J., where the plaintiff asked for a declaration of title and also for relief against one of the defendants on the footing that he was a trespasser. It was held that the suit did not come within the scope of section 7 (1) of the Court-Fees Act. In the present case the second defendant was certainly not impleaded as a trespasser but more in the capacity of a sub-tenant from the original tenant who was holding over. There is some support for this view in *Shanmugha Nadar* v. *Kandaswami Nadar*[2]. Mr. Narasimharaju for the Government Pleader has referred me to *Balasidhantam* v. *Perumal Chetti*[3], which lays down that the question of title cannot be gone into in a suit for rent brought under section 7 (xi) (*cc*) of the Court-Fees Act. As I read the plaint I find that no question of title is raised. If it arises at the trial it will not be gone into by the trial Court. This petition is allowed and the lower Court's order set aside without any order as to costs.

V.P.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE KRISHNASWAMI NAYUDU.

Varadarajan .. *Appellant**

v.

Muthu Venkatapathi Reddi and others .. *Respondents.*

Civil Procedure Code (Act V of 1908), Order 21, rule 90—Application to set aside sale—Dismissal for default—Application for restoration—Maintainability under Order 9 and section 151, Civil Procedure Code—Sufficient grounds for non-appearance—What are.—Sale confirmed under Order 21, rule 92, during pendency of such application—Application for restoration allowed subsequently on appeal—Effect of—Earlier order confirming sale—If becomes automatically vacated—Principle of subordinate or dependent order—Applicability and scope—Pendency of an application under Order 21, rule 89, 90 or 91—If a bar to confirmation of sale under Order 21, rule 92.

During the minority of *V* a judgment-debtor a petition was filed by his guardian-*ad-litem* under Order 21, rule 90, Civil Procedure Code, to set aside a sale held in execution of a mortgage decree and *V* ratified and elected to proceed with the same after attaining majority and furnished sufficient security in respect of the same. *V* who was a college student had to be away on the day on which the petition came up for hearing as his college had then re-opened. The petition was called and dismissed for default as the Advocate reported no instructions and two days later the sale was confirmed under Order 21, rule 92. Subsequently an application under Order 9 and section 151, Civil Procedure Code, was made to set aside the dismissal for default. It was in evidence that *V* left the case in charge of his erstwhile guardian and took every step, including the securing of attendance of witnesses. (On appeal) *Held* that (i) in the circumstances, the application to restore the petition dismissed for default could in no view be held a frivolous or vexatious one and there was sufficient cause for non-appearance of the petitioner *V*, and *V's* petition to set aside the sale must be restored.

(ii) The effect of restoring the application under Order 21, rule 90, automatically operates to vacate or render ineffective the earlier order confirming the sale under Order 21, rule 92.

Orders under Order 21, rule 92, Civil Procedure Code, are in the nature of contingent or dependent orders and depend upon orders that may be passed on an application under Order 21, rule 89, 90 or 91. Hence when an application to set aside the sale is entertained or allowed the earlier order confirming the sale becomes automatically vacated or may even be considered to be null and void.

Pendency of an application under Order 21, rule 90, Civil Procedure Code, is a bar to an order of confirmation of sale under Order 21, rule 92, being made or remaining effective. By reason of the restoration of the application under Order 21, rule 90, which was dismissed for default, the position is that the application under Order 21, rule 90, must be deemed to be pending and not disposed of. The confirmation of the sale could only be after the disallowance of that application and not any time during its pendency. The effect of entertainment of an application to set aside a sale after orders of confirmation must, having regard to the intention of the Legislature as disclosed in this rule, quite apart from the general theory in such cases, be to render the order ineffective so as to make the sale

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1. A.I.R. 1926 Cal. 504.
2. (1936) 71 M.L.J. 842.
3. (1914) 27 M.L.J. 475.

*A.A.O. Nos. 117 and 355 of 1947. 16th September, 1952.
(and C.R.P. No. 390 of 1947 and A.A.O. No. 254 of 1947.)

absolute. The power to confirm the sale is dependent upon the existence and pendency of an application under rule 90 and when such an application has been filed the confirmation made earlier becomes ineffective the reason being that the pendency of an application is a bar to the confirmation being made or remaining effective. Even if the principle of dependent orders and decrees cannot be held to be completely applicable to cases arising under Order 21, rule 92, Civil Procedure Code, the order of confirmation is a dependent order and the restoration of a petition under Order 21, rule 90, makes the confirmation already made ineffective.

Appeal against the orders of the District Court of South Arcot, dated 25th February, 1947, and made in M. P. Nos. 302 of 1944 and 187 of 1946, respectively in O. S. No. 20 of 1937, etc.

S. Jagathisa Aiyar for Appellant.

R. Gopalaswami Aiyangar for Respondent.

The Judgment of the Court was delivered by

Krishnaswami Nayudu, J.—In O. S. No. 20 of 1937 on the file of the District Court of South Arcot a mortgage decree was passed on 6th January, 1939, for a sum of Rs. 3,540-15-4, the mortgagors being the 1st defendant and the 2nd defendant being his minor son represented by the father 1st defendant as guardian-*ad-litem*. One Muthu Venkatapathi Reddiar as the assignee-decree-holder brought the mortgaged property to sale, the sales having been held on the 11th and 12th September, 1944, and three persons Mahadeva Goundan, Natesa Goundan and Swami Kannu Goundan and the decree-holder purchased the property at the auction. M. P. No. 302 of 1944 was filed on behalf of the minor second defendant for setting aside the sale under Order 21, rule 90 and section 47, Civil Procedure Code, mainly on the ground that there was no proper advertisement and publication of the sale and that the property which was of the value of about Rs. 16,000 fetched a low price of about Rs. 6,442. Sufficient security in immovable properties was furnished on behalf of the 2nd defendant-petitioner and during the pendency of the petition the 2nd defendant having become a major he was declared a major and he elected to proceed with the petition executed a fresh security bond and registered it and the petition was posted for enquiry to the 10th April, 1945. The Court having been engaged in sessions work on that day the petition was adjourned to 10th July, 1945. The petitioner was called on 10th July, 1945, and found absent and his vakil reported no instruction with the result the petition was dismissed. From the endorsement on the petition it is seen that the Advocate asked for adjournment, the adjournment was refused and the petition was dismissed. On 12th July, 1945, the Court passed an order confirming the sale. The petitioner filed a petition under Order 9, and section 151, Civil Procedure Code, for setting aside the order of dismissal but the same was dismissed on the ground that such an application does not lie. Then he appealed to the High Court against the order of dismissal of M. P. No. 302 of 1944 in C. M. A. No. 447 of 1945 and by order of the High Court dated 28th March, 1946, the District Judge of South Arcot was directed to restore the petition (M.P. No. 302 of 1944) on the petitioner paying to the respondents a sum of Rs. 500 as and towards their costs up to that date within one week of the re-opening of the District Court. There is a further direction that the District Judge shall dispose of the petition on the merits in the light of the observations contained in the judgment. In the judgment the learned Judge observed that the petitioner was a college student and his antecedent conduct with reference to the petition did not justify the view that he was really unmindful of the petition and did not care as to what happened to it and that he should be given an opportunity to satisfy the District Judge that he had good grounds for non-appearance on the date of the hearing and that his petition was not a frivolous or vexatious one. The learned Judge's order proceeds as follows :—

"If the appellant pays within one week of the re-opening of the District Court, Cuddalore, to the respondents a sum of Rs. 500 as and towards their costs of the proceedings held so far, to be retained by them in any event and irrespective of the result of the petition, the order of the lower Court will stand set aside and the petition will be restored to file and disposed of according to law. The District Judge will first go into the question, whether the appellant had satisfactory grounds for being absent on the 10th July, which is the subject-matter of the miscellaneous petition filed by the appellant for the restoration of the petition under Order 21, rule 90, Civil Procedure Code which was dismissed for default. If he is satisfied that the appellant had good grounds for non-appearance, the petition will be dealt with on its merits."

The petitioner complied with the order for costs and it is found from the endorsement on the petition, that M. P. No. 302 of 1944 was restored to file on 27th June, 1946. On 13th August, 1946, the petitioner paid into Court the amount due under the decree and on 27th August, 1946, he filed M. P. No. 187 of 1946 for vacating the order of confirmation of sale made on 12th July, 1945. On 31st August, 1946, the petitioner filed another petition M. P. No. 213 of 1946 under Order 34, rule 5, Civil Procedure Code and asked for setting aside the sales. All these petitions were heard and orders were passed on 25th February, 1947, dismissing them. C. M. A. No. 117 of 1947 is against the order dismissing M. P. No. 302 of 1944, which was restored to file and which was for setting aside the sale under Order 21, rule 90, Civil Procedure Code. C. M. A. No. 355 of 1947 is against the order dismissing M. P. No. 187 of 1946, filed for vacating the order of confirmation and C. R. P. No. 390 of 1947 is against the order dismissing M. P. No. 213 of 1946 filed under Order 34, rule 5, Civil Procedure Code.

It is contended on behalf of the 2nd defendant-appellant that the learned District Judge erred in dismissing the petitions both on grounds of fact and of law. It is urged that M. P. No. 302 of 1944 having been directed to be restored to file by the High Court in its order in C. M. A. No. 447 of 1945, and accordingly restored by the District Court by its order, dated 27th June, 1946 the confirmation of sale made on 12th July, 1945, after the disposal by the District Court on 10th July, 1945, of M. P. No. 302 of 1944 would stand automatically vacated and that, in any event, the learned District Judge erred in not vacating the order of confirmation even on the application M. P. No. 187 of 1946 filed by the appellant. Further, it is urged that the learned District Judge erred in dismissing M. P. No. 302 of 1944 and that the evidence adduced did not justify the conclusion arrived at, namely, that the appellant had not sufficient cause for his failure to appear on 10th July, 1945.

It may be convenient to consider the order of dismissal on the merits before dealing with the other question raised. The direction of the High Court to the District Judge is that he should go into the question whether the appellant had satisfactory grounds for being absent on the 10th July and if the District Judge was satisfied that the appellant had good grounds for non-appearance, he could proceed to deal with the application on its merits. From the conduct of this petition prior to the date of dismissal it will be seen that security was furnished while he was a minor and after he became a major he himself elected to proceed with the petition and further filed a security bond by himself. For the first time the petition was posted and came up for hearing on 10th April, 1945 and on the ground that the Court was engaged with Sessions work it was adjourned to 10th July, 1945. In fact that was really the first day of the hearing.

The appellant was a student in the Honours class in the Annamalai University and the college re-opened on 3rd July, 1945 and therefore he had to go away to the college. He says he informed his erstwhile guardian Natesa Goundan that he would go to the college and his guardian told him that he would take the witnesses on the date of the hearing. He says that he trusted him and went to the college, but later he found that Natesa Goundan committed fraud in collusion with the purchaser and while he took the witnesses to the Court, he did not take them to the house of the vakil and made them return on the representation that the case was adjourned. P.Ws. 2 and 3 are the witnesses who say that they attended the Court on 10th July, 1945, and that Natesa Goundan did not take them to the Advocate but left them in the Court compound under a banyan tree and after sometime came and represented that the petition stood adjourned to 13th July, 1945, and thereafter they returned. Excepting a minor discrepancy in the evidence of these witnesses as to whether they returned by bus or by walk, substantially the evidence of these witnesses supports the case of the appellant that in so far as these witnesses were concerned, they were present in Court and the hearing of the petition could have been proceeded with even in the absence of the appellant and since the appellant was a minor at the time of the sale he could not have been of much help in adding to the evidence of these witnesses. Respondent 3 examined

himself as R. W. 1 and from the printed copy of his evidence it is found that he stated that he had come to Court with his witnesses on the hearing date (10th July, 1945) and that both Natesa Goundan and P.Ws. 1, 2 and 3 came. But the learned District Judge in his judgment while referring to the evidence of R. W. 1 mentions R.W. 1 as having stated that on that day, neither the guardian of the petitioner, Natesa Goundan, nor P.Ws. 1, 2 and 3 came to Court. There is this discrepancy in the evidence as recorded and the evidence as understood by the learned Judge. If the witnesses were present as stated by R. W. 1, then there could be no ground for holding that the appellant was not ready to go on with the enquiry. But, whatever may be the evidence of R. W. 1, we find it difficult to reject the evidence of P.Ws. 2 and 3, against whom nothing is alleged as being in any way interested in the appellant and both of them have sworn that they came to Court but were made to wait in the compound and had to return on the false representation of the erstwhile guardian of the appellant that the case had been adjourned. The learned Judge does not disbelieve the evidence of the appellant as P.W. 1. It appears to us that the appellant had made arrangements for the conduct of the enquiry, and relied upon Natesa Goundan to take the witnesses and, in our opinion, it would be sufficient to hold that he was diligent and by reason of the opening of the College he had sufficient cause to be away. It is unlikely from the way in which the petition was conducted that having furnished security and after taking every step including securing the attendance of the witnesses, the appellant is likely to have allowed the petition to go by default. Further, the direction of the High Court is that the District Judge should give an opportunity to the appellant to show that he had good grounds for non-appearance on the date of the hearing and that his petition was not a frivolous or vexatious one. We are of opinion that there was sufficient cause for his non-appearance and that in no view could it be held that the petition was a frivolous or vexatious one. The learned District Judge should not have dismissed the petition, without further considering the question whether it was a frivolous or vexatious one. The order dismissing M. P. No. 302 of 1944 is therefore liable to be set aside.

In view of the restoration of M. P. No. 302 of 1944, the petition under Order 21, rule 90, Civil Procedure Code, by the order of the District Judge endorsed on the petition itself, dated 27th June, 1946, in pursuance of the order of High Court and in view of our order setting aside the order of dismissal of M. P. No. 302 of 1944 it is necessary to consider whether the confirmation of sale made on 12th July, 1945, continues to be effective or, as it is urged on behalf of the appellant, became automatically vacated.

Order 21, rule 92, provides that where no application is made under rule 90, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute, and where such application is made and allowed, the Court shall make an order setting aside the sale. By reason of the restoration of M. P. No. 302 of 1944, the position is that the application under Order 21, rule 90, must be deemed to be pending and not disposed of. The confirmation of the sale could only be after the disallowances of that application and not at any time during its pendency. The confirmation in the present case was made on 12th July, 1945, after the dismissal by the District Judge on 10th July, 1945, of the petition for setting aside the sale. The confirmation was then perfectly in order. Could that order of confirmation though validly made be said to have its effect even after the restoration of the petition? The decision of a Bench of this Court in *Venkata Narasimham* v. *Nagoji Rao*[1] is directly in point. In that case, there was an application for setting aside the sale on the grounds of certain irregularities in the conduct of the sale. A compromise petition was filed by which parties agreed to the petition being allowed on part of the decree amount being paid. The judgment-debtor deposited the sum and applied for setting aside the sale under Order 34, rule 5. When the petition under Order 34, rule 5, came up for hearing the judgment-debtor petitioner was absent and it was dismissed for default and the sale was confirmed. Two applications were filed

1. (1946) 1 M.L.J. 216.

by the judgment-debtor for setting aside the orders dismissing the application for default and the orders of dismissal were set aside in those applications. The judgment-debtor also by way of abundant caution, as in the present case, filed another application for setting aside the confirmation of sales. The learned Judges held that the effect of setting aside the orders of dismissal for default operates automatically to set aside the orders of confirmation of the sales.

In *Charitter Shukul* v. *Lal Behari Singh*[1], an application was filed on behalf of a minor judgment-debtor for setting aside the sale and a compromise was effected on his behalf whereby the application was withdrawn and the sale was confirmed. In a suit subsequently filed on behalf of the minor the compromise itself was questioned and set aside. By reason of setting aside the compromise it was held, that the declaratory decree holding the compromise to be not binding on the minor, all that follows therefrom including the order confirming the sale must also be null and void.

To a similar effect are the observations of Abdul Rahim, Offg. Chief Justice in *Muthu Korakkai Chetty* v. *Mahomed Madar Ammal*[2]. The question that arose in that case was as to the time from which the period of three years had to be computed under Article 180 of the Indian Limitation Act and therefore it was necessary to find when the sale became absolute. At page 197, the learned Officiating Chief Justice observes :

"Even without the help of the Privy Council rulings which I shall presently notice I should answer, that in the given circumstances, the sale did not become absolute until the petition made to set it aside had been disallowed. Rule 92 has primarily in contemplation cases where the application to set aside the sale is made within the limit of thirty days allowed by the law so that any order confirming the sale would be ordinarily made after the disposal of such applications. But if the Court in this case was justified and I take it that it was in entertaining the application to set aside the sale after it had made the order confirming the same, can it be said that whatever be the result of the application, the order confirming the sale remained effective so as to make the sale absolute from the date on which it was drawn up? To my mind, obviously not. The effect of entertainment of the application to set aside the sale after the order of confirmation must, having regard to the intention of the Legislature as disclosed in this rule and quite apart from any general theory in such connections be to render the order ineffective so as to make the sale absolute."

It is clear from the language of Order 21, rule 92, that the Court can confirm the sale only if there has been no application under rule 89, rule 90 or rule 91 filed within the period of 30 days from the date of the sale and if within the period of 30 days, there is such an application and such application is disallowed the Court shall then confirm the sale. But at any time within 30 days after the sale or during the pendency of an application under Order 21, rule 89, rule 90, or rule 91, the Court has no power to confirm the sale and such confirmation could not be valid. That the power of the Court to confirm is dependent upon the existence and pendency of an application under rule 89, rule 90, or rule 91 or the disallowances of such application receive further support from the observation of Abdur Rahim, Offg. Chief Justice, in the case referred to that the Court allows the judgment-debtor to file an application after the expiry of the period of 30 days after the confirmation of sale, still when such an application has been filed the confirmation made earlier becomes ineffective, the reason being that the pendency of an application is a bar to the confirmation being made or remaining effective.

It is urged by Mr. Gopalaswami Iyengar that on the language of Order 21, rule 92, it cannot be held that there could be any automatic vacation of the confirmation once made, since on the failure to make an application or disallowances of such an application the sale does not become automatically confirmed, but the Court shall make an order confirming the sale and if the Court makes an order confirming the sale it could not stand automatically vacated, but the Court should again pass an order vacating the confirmation. The principle under which it could be said that by reason of the restoration of a petition for setting aside the sale, the confirmation made earlier would stand automatically vacated is that laid down

1. A.I.R. 1934 All. 433. at pp. 197 and 198.
2. (1919) 38 M.L.J. 1 : I.L.R. 43 Mad. 185

in Privy Council decision in *Shama Purshad Roy Chowdery* v. *Hurro Purshad Roy Chowdery*[1], where it was held that certain orders and decrees which are subordinate and dependent upon earlier orders and decrees could only remain in force so long as the order or decree on which they were dependent are not reversed or superseded. They are dependent decrees and orders and when the decrees or judgment on which they depend are reversed they could not continue to remain in force. It is urged that this principle cannot be made applicable since even the absence of an application for setting aside the sale within the period prescribed by law would require the Court to make an order for confirmation. If only an application to set aside the sale is filed and such an application is disallowed that order might be held to enable the Court to confirm the sale and when that order disallowing the sale is subsequently reversed in appeal, the confirmation which is dependent on the original order might be considered to have been superseded. But the same argument would not be available where there was no application at all. It is true that Order 21, rule 92 contemplates two contingencies: (1) the absence of any application and (2) an application and disallowance thereof and it is only in the latter case; the order of confirmation may be considered to be dependent on an order of Court. But it cannot be ignored that under Order 21, rule 92 the order of confirmation is a dependent order depending not only on an earlier order of Court but also on certain circumstances existing or not existing, namely, there being an application for setting aside the sale or not. The principle in *Shama Purshad Roy Chowdery's case*[1] has direct application in other cases for instance in the case of a preliminary and final decree where the final decree is passed and subsequently the preliminary decree is set aside in appeal, the result of which would be the final decree becomes superseded. Also in suits filed under the summary procedure, when an application for leave to defend is rejected and a decree is passed, subsequently when leave to defend is granted, the decree passed would become vacated. Similarly in cases of an *ex parte* decree and the result of an allowance of an appeal against it. Even if that principle of dependent orders and decree laid down in *Shama Purshad Roy Chowdery's case*[1] cannot be held to be completely applicable to cases arising under Order 21, rule 92, we have no doubt that the order of confirmation is a dependent order and the restoration therefore of a petition under Order 21, rule 90 would make the confirmation already made ineffective. Such an order of confirmation may be treated as ineffective or automatically vacated as observed by the learned Judges in *Venkata Narasimham* v. *Nagojirao*[2] or even may be considered to be null and void as held by the Allahabad High Court in *Charitter Shukul* v. *Lal Behari*[3], the net result being that such order continues to have no legal effect or force.

It is further urged by Mr. Gopalaswami Ayyangar that the order of confirmation made on 12th July, 1945, has not been set aside in appeal and that the High Court in allowing the appeal filed against the order in M.P. No. 302 of 1944 dated 10th July, 1945, should also have made an order setting aside the confirmation. But this argument ignores that an order of confirmation is not one of the orders enumerated under Order 43, Civil Procedure Code, where there is a right of appeal. Further, the order of confirmation is subsequently made on 12th July, 1945 and not part of the order dated 10th July, 1945, dismissing the petition and as such the appellant could not have raised an objection to the order even under section 105, Civil Procedure Code. In the view we have taken, it is unnecessary for the Court in such circumstances to pass even a formal order setting aside the confirmation, since the confirmation would cease to have any legal effect. In any event, the appellant had applied in M.P. No. 187 of 1946 for vacating the order of confirmation and that application being stated to have been filed out of abundant caution should have been ordered.

In the result C.M.A. Nos. 117 of 1947 and 355 of 1947 are allowed. C.R.P. No. 390 of 1947 is against the order dismissing the appellant's application under

1. (1865) 10 M.I.A. 203.
2. (1946) 1 M.L.J. 216.
3. A.I.R. 1934 All. 433.

Order 34, rule 5, Civil Procedure Code, which was dismissed for the reason that M.P. Nos. 302 of 1944 and 187 of 1947 have been dismissed. By reason of the setting aside of those orders, this petition is allowed. The appellant will have his costs in C.M.A. No. 117 of 1947 from the respondent purchasers. M.P. No. 302 of 1944 and M.P. No. 213 of 1946 are remanded to the lower Court for disposal according to law.

R.M. ——— *Appeals and petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRA REDDI.

Kannaganti Suryanarayanamurthi and others .. *Appellants**

v.

Pidugu Rama Rao and another .. *Respondents.*

Civil Procedure Code (*V of* 1908), *section* 9—*Mere right of holding a lighted torch inside the chariot during a car festival of a temple—Not a right of a civil nature.*

The mere right of holding a lighted torch inside the chariot during a car festival in a temple is not a right of a civil nature as there is no corresponding compellable duty. Such a right related only to a religious honour or dignity and not an office and therefore a suit to establish such a right is not cognisable by a civil Court.

Appeal against the decree of the Court of the Subordinate Judge of Tenali in A.S. No. 119 of 1947 preferred against the decree of the Court of the District Munsiff of Tenali in O.S. No. 50 of 1946.

N. V. B. Sankara Rao for Appellants.

R. Venkatasubba Rao and *A. Ranganayakulu* for Respondents.

The Court delivered the following

JUDGMENT.—The respondent herein filed a suit in the Court of the District Munsiff of Tenali for a declaration that they have exclusive right to hold the lighted torch, Sannidhikola, inside the chariot during the Radhotsavam of Sri Agasthiswaraswami at Nandivelugu and for a permanent injunction restraining the defendants from interfering with their right. The basis of the suit was that, ever since the inauguration of the car festival, the ancestors of the plaintiffs and the plaintiffs have been exercising exclusive right of holding the lighted torch inside the chariot and that this right was being exercised till they were obstructed by the defendants in the year of 1945.

The suit was resisted by the defendants, who are the trustees of the temple mainly on two grounds. The exclusive right of the plaintiffs to hold the Sannidhikola was denied and it was also pleaded that the suit was not cognisable by a civil Court as the right claimed related only to a religious honour or dignity.

The trial Court, while holding that the plaintiffs have proved their exclusive right to hold the lighted torch, though for a few years before the institution of the suit they did not exercise this right, dismissed the suit on the ground that the right claimed by them was a mere religious honour and, as such, could not be enforced in a civil Court. On appeal, the Subordinate Judge, while confirming the judgment of the Court of the first instance with regard to the right of the plaintiff to hold the lighted torch, reversed it on the point whether the right claimed was not cognisable by a civil Court. In the opinion of the lower appellate Court, the right to hold the lighted torch can be deemed to be attached to a service or an office and that it was, in any event, a mode of worship, which could be enforced through a Court of law. In the result, he decreed the suit.

The defendants, who are dissatisfied with this judgment of the Subordinate Judge, have preferred this second appeal. In this appeal, the conclusion of the

*S.A. No. 949 of 1948. 7th March, 1952.

learned Subordinate Judge is challenged by Mr. Sankar Rao for the appellants as being erroneous. He urges that the view of the lower appellate Court that the right to hold the lighted torch inside the chariot is one that is attached to a service or an office is not correct and secondly that the lower appellate Court erred in holding that it was a mode of worship when the plaintiffs did not seek to enforce the right as a mode of worship.

The sole question for determination in the second appeal is whether the right claimed is one that could be agitated in a civil Court. To appreciate this question, it is necessary to refer to the terms of section 9, Civil Procedure Code. Section 9 of the Code of Civil Procedure lays down that

> "the courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.
>
> *Explanation* : A suit in which the right to property or to an office is contested is a suit of a civil nature notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies."

I have, therefore, to see whether the present suit is a suit of a civil nature within the meaning of section 9 of the Code of Civil Procedure. As I have already stated, the lower appellate Court rests its decision on two grounds (i) that it is a right attached to a service or office and (ii) that it is a mode of worship. First I will dispose of the second ground of decision as it does not present any difficulty. It must be observed that the plaintiffs did not claim the right as a mode of worship. They stated categorically that it was an office to which they have been entitled from time immemorial. This question was not raised in the pleadings nor was an issue raised about it. So, the lower appellate Court could not base its judgment on a ground, which was not raised in the pleadings. It is, therefore, unnecessary for me to consider whether the right to hold the lighted torch inside the chariot is a mode of worship.

Turning now to the question whether the right amounts to an office within the meaning of the explanation to section 9 of the Code of Civil Procedure, I will first consider whether there is any support for the view of the learned Judge, in the two decisions cited by him. In *Srinivasa* v. *Tiruvengada*[1], the suit was for an injunction to prevent the trustees of a temple from interfering with the right to distribute sacred water and serving satakopam, *i.e.*, gold crown to *Adyapakas* during a particular festival. A Bench of this Court consisting of Collins, C.J. and Justice Parker held that the right claimed by the plaintiffs was cognisable by a civil Court. The learned Judges propounded the following test for deciding whether the suit is of a civil nature or not.

> "The ordinary test is whether there is any specific pecuniary benefit attached to the office claimable in the nature of wages however small that benefit may be. If there be, the right to such benefit is a question which the Courts are bound to entertain."

Thirumalai Alwar Aiyengar v. *Lakshmi Sadagopa Aiyengar*[2] is an instance of a right to conduct worship in a particular mode claimed by the Mandapamdars and upheld by a Court of law. Justice Spencer and Justice Krishnan held that such a right comes within the ambit of section 9 of the Civil Procedure Code as, in their opinion, it was an act of worship in a particular mode and with particular incidents attached to it. The learned Judges classified cases relating to religious services into four kinds, which come within the purview of section 9 of the Code of Civil Procedure. In the language of the learned Judges :

> "One class of cases comprises those in which a plaintiff sues to establish his individual right of public worship from which he has been wrongfully excluded . . . With these are closely associated cases in which a right of access to religious objects is sought to be established as these generally involve questions of caste status and as that is a matter of civil right . . . . . In a different category fall suits brought by worshippers under Act XX of 1863 to compel the performance of acts of worship in which there has been neglect of duty on the part of a trustee or manager of a temple or other religious institution. . . . . The next class includes suits to establish a claim to an office with emoluments. It has always been held that such suits will lie because the right to emoluments is a civil right connected with property, although the determination of it may involve the decision of questions of religion. . . . . An extension of this principle appears in certain cases when what is claimed is not emoluments of any pecuniary value but honours attached to an office in lieu of emoluments."

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1. (1888) I.L.R. 11 Mad. 450.
2. (1916) 31 M.L.J. 758.

The reason why according to the learned Judges civil Courts will not take cognizance of suits in which the claim relates merely to receive religious honours and emoluments unconnected with any office is:

"The duty of individuals to submit to and perform certain religious observance in accordance with the ritual or conventional practice of their race or sect is, in the absence of express legal recognition and provision, an imperfect obligation of a moral and not a civil nature."

Applying the test propounded by the learned Judges in that case, I am afraid the right claimed by the plaintiffs should be held to be outside the scope of section 9 of the Code of Civil Procedure. It is thus seen that the two decisions relied on by the learned Judge, far from lending any support to the conclusion, go to show that such a right as claimed, in the present case, is not a right attached either to an office or a mode of worship.

The case very much in point is *Ramaswami Goundan* v. *Lakshmana Reddi*[1]. There a person claimed the right to lead a horse on a particular festival day in a temple whenever that festival was performed, the festival being performed only whenever the funds of the temple permitted it. It was found that the plaintiff could not be compelled either to bring the horse or to lead it if he did not choose to do so. It was decided by Leach, C.J. and Somayya, J., that the right claimed was not an office within the meaning of section 9, Civil Procedure Code, as it was a mere honour. The *ratio decidendi* was that the right claimed would not amount to an office as there was no corresponding obligation to perform duties. The learned Judges quoted with approval a passage from *Srinivasa Thathachariar* v. *Srinivasa Iyengar*[2]:

"The term, office, in the sense with which we are concerned, implies, of course, a duty in the office-holder to be discharged by him as such—see if authority were necessary, Kent's Commentaries—where it is pointed out, offices consist in a right and correspondent duty, to execute a public or private trust and to take the emoluments belonging to it."

With respect I am in entire agreement with the principle laid down by the learned Judges in this case.

To the same effect are the observations of Madhavan Nair, J., in *Chitti Babu Mudaliar* v. *Venkatasubba Mudaliar*[3]:

"To constitute an office, I think it will be essential to have some duties attached to it which the office-holder will be under a legal obligation to perform, the non-performance of which will be visited with penalties."

Applying the principles enunciated in the case above I must hold that the right claimed in this case is not an office, which could be enforced in a Court of law as there is no corresponding compellable duty. On their own showing, the plaintiffs cannot be compelled to hold the torch. It was argued by the learned counsel for the respondent that the trustees were at liberty to have the Sannidhikola carried by some one else whenever the plaintiffs or any member of their family was unwilling to do it and thus indirectly compel them to perform the duty. I do not think that this can in any way amounts to a compellable duty. The plaintiffs' witnesses admitted that the plaintiffs could not be compelled to hold the lighted torch if they are not willing to do so. In view of the several admissions by the plaintiffs' witnesses, I do not think that the holding of the torch can be held to be a compellable duty. In my opinion, the right such as the one claimed in this case is a religious honour or dignity, which is excluded from the purview of the civil Courts and not an office within the meaning of section 9 of the Code of Civil Procedure. This is a case in which no emoluments are attached to the office or at least any honours in lieu of the emoluments, however trifling they might be. As such, I fail to see how such a right can relate to an office or to a service. It follows that the decision of the lower appellate Court is wrong and ought to be set aside and the judgment and decree of the trial Court restored.

In the result the appeal is allowed and the suit is dismissed. I direct each party to bear their own costs throughout. (No leave.)

K.S. —— *Appeal allowed.*

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1. (1939) 2 M.L.J. 420 : I.L.R. (1940) Mad. 40.
2. (1899) 9 M.L.J. 355.
3. A.I.R. 1933 Mad. 264.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

The Public Prosecutor .. *Petitioner**

v.

K. C. Ayyappan Pillai and others .. *Respondents.*

Madras General Sales Tax Act (IX of 1939), *section* 15 (*b*)—*Offence before amendment—Sentence passed after amendment—Magistrate's duty to provide in the order for the recovery of the tax as fine—Article* 20 *of the Constitution of India,* 1950.

The Sales Tax Act originally provided that if any person wilfully acted in contravention of any of the provisions of the Act he shall on conviction be liable to pay a fine of Rs. 1,000 and where the breach was a continuing one to a further fine which may extend up to Rs. 50 for every day of the breach. This was omitted in the amended section which provided that if there is a failure to pay within the time allowed any tax assessed on the assessee under the Act and he is prosecuted for an offence under section 15, that assessee on conviction is liable to pay a fine and in case of a conviction under section 15 (*b*), the Magistrate shall specify in the order the tax which the person convicted has failed to pay and the tax so specified shall be recoverable as if it were a fine. The recovery of the tax as if it were a fine does not impose a greater penalty than the other mode of recovery as if it were an arrear of land revenue, for it is open to the Court in deserving cases not to prescribe default sentences and realise the fine otherwise—a mode which is far less onerous than the corresponding provisions under the Revenue Recovery Act. It merely alters the procedure which does not make what was not an offence, an offence or imposes a greater penalty than before.

So, where the offences were committed under the unamended provisions of the Act and the amended provisions came into force on the date of imposing sentences, the Magistrate was under a duty to specify in the order the defaulted tax and make it recoverable as if it were a fine and the Magistrate cannot split up the tax and give relief in regard to a portion of the year.

Petitions under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate, Fort, Cochin, dated 24th October, 1951 in C.C. No. 122 of 1951, etc.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) in person.

G. Vasanta Pai, T. Krishna Rao and *Ramaprasada Rao* for *John and Row* for Respondents.

The Court made the following

ORDER : *Crl. R.C. Nos.* 88 *to* 97, 99 *to* 105 *and* 108 *of* 1952.—These are 18 connected criminal revision cases filed by the State against the convictions and sentences of the learned Sub-Divisional Magistrate, Fort, Cochin, in C.C. No. 122 of 1951, etc.

The following tabular statement gives the details of these Sales-tax cases from which these revisions are preferred :—

Serial number.	Crl.R.C. number.	C.C. number.	Tax.	Year of assessment.	Conviction and sentence.
			Rs. A. P.		
1.	88/52	122/51	579 5 10	1946—47	Rs. 200 fine.
2.	89/52	107/51	501 6 0	1945—46	Rs. 50 fine on admission.
3.	90/52	104/51	931 13 4	,,	Rs. 300 fine.
4.	91/52	98/51	144 0 0	,,	Rs. 30 fine on admission.
5.	92/52	96/51	367 4 0	,,	Rs. 100 fine.
6.	93/52	92/51	1,750 0 0	1946—47	Rs. 150 fine.
7.	94/52	90/51	1,612 12 2	,,	Rs. 400 fine.
8.	95/52	84/51	2,639 13 6	,,	Rs. 300 fine.
9.	96/52	72/51	1,507 14 5 679 14 8 827 15 9	1947—48	Rs. 80 fine balance of tax Rs. 827-15-9 directed to be paid.

*Cr.R.C. Nos. 88 to 111 of 1952.
(Cr.R.P. Nos. 79 to 102 of 1952).

9th September, 1952.

Serial number.	Crl.R.C. number.	C.C. number.	Tax. Rs. A. P.	Year of assessment.	Conviction and sentence.
10.	97/52	68/51	896 7 9	1947—48	Rs. 100 fine.
11.	99/52	162/51	346 2 4	1945—46	Rs. 50 fine on admission.
12.	100/52	157/51	1,746 6 0 1,219 14 6 526 7 6	1947—48	Rs. 140, fine balance of tax Rs. 526-7-6 to be paid.
13.	101/52	156/51	1,273 1 8	1946—47	Rs. 130 fine.
14.	102/52	155/51	582 4 0	1945—46	Rs. 60 fine on admission.
15.	103/52	153/51	953 0 0 628 0 0 325 0 0	1947—48	Rs. 70 fine. Balance of tax Rs. 325-0-0 to be paid.
16.	104/52	152/51	1,232 0 8	1946—47	Rs. 120 fine on admission.
17.	105/52.	151/51	764 7 4	1945—46	Rs. 80 fine on admission.
18.	108/52	127/51	5,653 2 6	"	Rs. 600 fine on admission.

There is no dispute in all these 18 cases about the correct calculation of the turnover adopted by the Deputy Commercial Tax Officer or the assessment or the service of the demand notices or the non-payment of the taxes within the time fixed. The learned Public Prosecutor has preferred these criminal revision cases on the ground that the learned Sub-Divisional Magistrate in 14 of these cases has not provided in the order for the payment of the sales tax in respect of which the particular respondent was found guilty and convicted under section 15 (*b*) of the Madras General Sales Tax Act and that in three cases he has made the respondent liable to pay the tax only for the second half of 1947-48 in C.C. No. 72 of 1951 and for the last three months of 1947-48 in C.C. No. 153 of 1951 and for the last three months of 1947-48 in C.C. No. 157 of 1951 and that this direction for payment of the tax for the last quarter only is not in conformity with law and that the lower Court ought to have directed in the order the payment of the entire tax in respect of which default was committed and for which the respective respondent was found guilty and sentenced under section 15 (*b*) of the Madras General Sales Tax Act.

There can be no doubt that under section 10 of the said Act the tax assessed has got to be paid in such manner and in such instalments, if any, and within such time as may be specified in the notice of assessment and that if there is failure to pay within the time allowed any tax assessed on the assessee under the Act and he is prosecuted for an offence under section 15, that assessee on conviction is liable to pay a fine and in case of a conviction under clause (*b*) of section 15 the Magistrate shall specify in the order the tax which the person convicted has failed to pay and the tax so specified shall be recoverable as if it were a fine. Therefore, the contentions of the learned Public Prosecutor that in all these cases the defaulted tax should be specified in the order of the Magistrate and made recoverable as if it were a fine and that the Magistrate cannot split up this tax and give relief in regard to a portion of the year, are correct.

The learned advocates for respondents contend that the Magistrate was justified in the course which he has adopted, because under the law as it stood when these offences were committed the present provision that in cases of convictions under section 15 (*b*) the Magistrate having to specify in the order the tax which the person convicted has failed to pay and the tax so specified being made recoverable as if it were a fine did not exist, and that to pass such an order would offend Articles 20 and 265 of the Constitution of India.

I have carefully considered the appplication of both these Articles and find that there is no substance in this contention.

So far as Article 20 is concerned which prohibits retro-active criminal laws or *ex post facto* laws, the scope of that Article is nothing more than that no person

shall be convicted of any offence under any law not in force at the time of the commission of the offence and secondly, that no person shall be subject to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. The Sales Tax Act existed at the time of the commission of the offence and also at the time of the conviction for the offence. Then turning to the second contention, it is stated that when the tax is made recoverable as a fine it imposes a penalty greater than that which might have been inflicted before the Act was amended. In advancing this argument it is overlooked that any change in the mode of execution is not bad for its being *ex post facto* : see *Holden* v. *Minnesota*[1] and *Rooney* v. *North Dakota*[2]. A statute merely regulating procedure and leaving untouched all the substantial protection with which existing law surrounds a person accused of crime is not within the constitutional inhibition of *ex post facto* laws. *Thompson* v. *Utah*[3] and *Winston* v. *State*[4]. Even a statute which changes the punishment that may be imposed for a crime theretofore committed would be *ex post facto* only if it prescribes or permits the imposition of a greater sentence, which is not the case here, and not when it reduces the punishment, as is the case here. *People Ex Rel Pincus* v. *Adams*[5] and *Sakt* v. *Justices Court*[6]. It will be noticed that before the amendment any person who wilfully acted in contravention of any of the provisions of this Act shall on conviction be liable to a fine of Rs. 1,000 and where the breach is a continuing breach, to a further fine which may extend to Rs. 50 for every day after the first, during which the breach continues. This has been omitted in the amended section. Therefore, this new provision amounts to nothing more than an alteration of procedure which does not make the Act which was not an offence to be an offence or imposes a greater penalty than what was the case before. Before the Act was amended, under section 10 when the tax assessed was not paid and there was default the amount could be recovered as if it were an arrear of land revenue just as now it has been made as if it were a fine. The recovery by the procedure prescribed in the Madras Revenue Recovery Act is one of the modes of realising the tax.

But this is not the only mode. The Crown can even sue as on a debt within a period of six years (Article 120 of the Limitation Act), see *Inderchand* v. *Secretary of State*[7], get a decree and realise the debt by attachment of property as an ordinary debt. Suit for taxes is governed by Article 120 of the Limitation Act. See *Larkana Municipality* v. *Kaloomal Ponoomal*[8] ; *Masand Motiram* v. *Shekarput Municipality*[9] ; *Mathura Prasad* v. *Special Officer, Gaya Municipality*[10]; *Dipnarain* v. *A. D. M.*[11]; *President of Guntur Municipal Commission* v. *Padmaraju*[12] ; *Rajah of Vizianagaram* v. *Tammanna*[13] ; *Attakoya* v. *Kunhikoya*[14] ; *Ut Badrunnissa* v. *Municipal Board, Agra*[15].

Thirdly, the tax can after 1st January, 1948, be recovered also as fine by a Magistrate on conviction under section 15 (*b*) or 15 (*d*) of the Act. The recovery of the tax as if it were a fine does not impose a greater penalty than the other two modes. Even though tax collectable as arrear of land revenue may not be a first charge, the general principle of law preferring the Crown's debt to that of the subject when both stand on the same footing, nevertheless applies : *People's Bank* v. *Secretary of State*[16]. Thus, the Crown has priority over other unsecured creditors and when the property of an assessee is attached in execution of a simple money decree and money is deposited in Court, since the attachment by a decree-holder creates no right in property, the Crown can step in and recover any tax due to the Government without suit or attachment : See *Secretary of State* v. *Ma Mayein Me*[17].

1. 137 U.S. 483.
2. (1905) 196 U.S. 319.
3. (1898) 170 U.S. 343.
4. 118 A.L.R. 719.
5. 110 A.L.R. 1303.
6. 167 A.L.R. 833.
7. A.I.R. 1942 Pat. 87.
8. A.I.R. 1938 Sind 48.
9. A.I.R. 1936 Sind 184.
10. A.I.R. 1938 Pat. 192.
11. A.I.R. 1933 Pat. 65.
12. (1878) I.L.R. 3 Mad. 124.
13. (1937) 1 M.L.J. 91 : I.L.R. (1937) Mad. 498.
14. (1939) 2 M.L.J. 579 : I.L.R. (1940) Mad. 50.
15. A.I.R. 1939 All. 510.
16. A.I.R. 1935 Sind 232.
17. A.I.R. 1937 Rang. 380.

Varadachari v. *Secretary of State*[1] and *Manickam Chettiar* v. *Income-tax Officer, Madura*[2]. In the case of the collection of the tax as land revenue, the mode is indicated in the Madras Revenue Recovery Act II of 1864. Under section 5 of the Madras Revenue Recovery Act the arrear of revenue with interest and costs can be recovered by the sale of the defaulter's moveable or immoveable property or by execution against the person of the defaulter. The procedure regarding moveable property is governed by distraint as set out in sections 8 to 21 and sale of immoveable property, by sections 25 to 35 regulating attachment, and by sections 36 to 47 regulating sale ; and in regard to the procedure for arrest this is governed by sections 48 and 49. I do not see how the recovery of the tax as if it were a fine would be a greater penalty, because it is open to the Court in deserving cases not to prescribe default sentences and the realisation of the fine otherwise than by default sentence of imprisonment is regulated by rule 290-A of the Criminal Rules of Practice, which is certainly far less onerous than the corresponding provisions under the Madras Revenue Recovery Act. In such cases if steps taken in regard to the sale of moveables fail, the fine can even be written off. Therefore, Article 20 does not apply to this case; and on this footing the application of Article 265 does not arise.

On this conclusion the contentions of the Public Prosecutor are found to be correct and the orders of the lower Court as they stand cannot be allowed to stand. The orders of the lower Court are modified to the extent that in addition to the fines imposed in all these cases the taxes due by the respective respondent and for which these prosecutions had been launched will stand added and they are made recoverable as if they were fines. Petitions allowed.

Petitions allowed.

Crl.R.C. Nos. 98, 106, 107, 109, 110 *and* 111 *of* 1952.—As separate appeals against acquittal have been preferred in these cases by the State and are pending, these petitions are dismissed.

V.P.S. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Annamalai Reddi and others .. *Petitioners**

v.

Abdul Sathar Sahib .. *Respondent.*

Criminal Procedure Code (V of 1898), sections 133 to 143 and 147—Obstruction to public way and causing nuisance—Disputes as to title—Jurisdiction of Magistrate to go into—Scope of Chapter X of Criminal Procedure Code.

The powers embodied in sections 133 to 137, Criminal Procedure Code, with regard to the obstruction of public way are not intended to be exercised where there is a *bona fide* dispute as to existence of public right. It is quite true that when it is found that this claim of title is advanced in good faith and is supported by *prima facie* evidence the Magistrate cannot proceed further and decide whether the title set up does or does not exist but must leave the matter to be decided by the civil Court. But the mere assertion of a claim of title made without reasonable ground or honest belief in it or honest intention to support it will not oust a criminal Court of its jurisdiction under sections 133 to 137, Criminal Procedure Code.

Where on proceedings by petition under section 147, Criminal Procedure Code, but which were proceeded with under sections 133 to 143, Criminal Procedure Code (Chapter X) and the Magistrate found that the land was a Government poramboke and was a public place and was also used as a public way, any private erection of a wall so as to obstruct and cause nuisance not only to private parties but to the unascertained public, it would be a case within the scope of Chapter X of the Criminal Procedure Code.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional 1st Class Magistrate, Villupuram, dated 17th December, 1951, in M.C. No. 126 of 1951.

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1. (1935) 70 M.L.J. 601 : I.L.R. 59 Mad. 872.
2. (1938) 1 M.L.J. 351 : I.L.R. (1938) Mad. 744.

*Cr.R.C. No. 131 of 1952. 9th September, 1952.
(Cr.R.P. No. 122 of 1952).

L. S. Veeraraghava Aiyar for Petitioners.

V. Rajagopalachari for Respondent.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Court made the following

ORDER.—This is a Criminal Revision Case which has been filed against an order made under section 143, Criminal Procedure Code.

The facts are: On proceedings which were initiated by petitioners under section 147, Criminal Procedure Code, but which were taken on file and proceeded with under sections 133 to 143, Criminal Procedure Code, Chapter X (Public Nuisances) this order under section 143 came to be made in regard to the putting up of a wall in front of certain shops in Avalurpet village. In the village of Avalurpet there is a grama natham of the extent of 7 cents adjoining the village and comprised in R.S. No. 150/1-A. On the eastern side of this grama natham and inside that grama natham there are a number of shops belonging to Abdul Sathar Sahib. This village of Avalurpet consists of an overwhelming majority of Hindus and a small minority of Muslims. These Muslims among themselves are divided. The owners of these shops and other shops and supporting this Abdul Sathar Sahib are Muslim householders consisting of ten in number. There can be no dispute that in 1950 feelings between these ten Muslim householders and the Hindu inhabitants had become strained. Therefore what the Hindu respondents did was that they put up a wall practically adjoining the front of these shops and purported to enclose the rest of the grama natham and made it into Gandhi Park. On a portion of this grama natham a masonry platform has been put up on which a statue of Mahatma Gandhi has been installed and another cement platform has been put up but without anything being erected thereon. The learned Magistrate who enquired into this matter and who inspected this area found that this alleged conversion of the site into a park was nothing more than a mere pretence. He found there no shrubs or flower plants excepting two old rain trees. The only substantial structure was the cement granite wall six feet high put up in front of these shops and practically adjoining it and with a small opening at the place *DE* shown in the plan filed in this case. This opening itself was secured by doors and it was locked and the key was with the second respondent. In other words, by constructing this wall the respondents effectively walled in the shops and cut off all access thereto by the villagers. The result was that the shops remained closed for three months. Only after the Sub-Collector of Tindivanam came to the spot, he opened the door at *DE* and the shops became accessible through that opening. The narrow passage left between the front of the shops and the wall and the narrow opening let into the wall made the shops, according to the learned Magistrate who inspected the place, to look like cells in a prison enclosed by high prison walls and within the enclosure with very little elbow room. Therefore Abdul Samad Sahib, one of the shopkeepers therein, filed an application under section 145, Criminal Procedure Code against Annamalai Reddi and two others in the Court of the Sub-Divisional Magistrate, Tindivanam, on 31st January, 1950. Another application under sections 144, 147 and 148 was filed by Abdul Sathar Sahib, the undivided brother of that Abdul Samad Sahib, against the same respondents in respect of some other shop there on 3rd February, 1950. The former application was referred to the Circle Inspector of Police, Gingee, for report. The Circle Inspector who has inspected the place and who has been examined as a prosecution witness testified that he visited the place on 6th February, 1950 and submitted his report Exhibit P-2 and warned the Hindus not to persist in this course of conduct and that they did not heed his words and that he then visited the spot on 8th March, 1950, along with the District Superintendent of Police and they found the state of things unaltered and these Muslim shopkeepers put to trouble. Then these proceedings were proceeded with under section 133 and which it was perfectly competent for the Magistrate to do though the proceedings were presented under Chapters XI and XII, Criminal Procedure Code. There is no dispute that the correct procedure prescribed under sections 133 and 143 had been followed in this case. The learned Magistrate came to the conclusion that the place on which this wall had been cons-

tructed is a public place and a public way and that it constitutes an obstruction and a nuisance and that the public right set up by the respondents is bogus and passed an order for demolition of the same and it is against this order that the present Criminal Revision Case has been filed.

In this case we have to consider four points : *viz.*, (1) whether the wall which has been ordered to be demolished has been put up in a public way or a public place ; (ii) whether it constitutes an obstruction and a nuisance ; (iii) whether the public right set up by the respondents (in the lower court) is bogus or *bona fide*, and (iv) whether in a petition under section 147 the Magistrate can proceed under Chapter X, sections 133-143, Criminal Procedure Code.

On all these points I have come to the same conclusion as the learned Magistrate and here are my reasons :

Point 1.—That the place on which this wall has been constructed is a public place and a public way cannot be seriously disputed. The place itself is registered as grama natham bearing R. S. No. 150/1-A. It is in evidence that the public are using it not for the celebration of Muthalamman and Mariamman festivals as was sought to be set up but for display of fireworks on festive occasions. The celebration of festivals was set up in order to make out that the Hindus were in exclusive possession and had the exclusive user of the property. The respondents when examined by the Sub-Divisional Magistrate of Tindivanam on 1st March, 1950, took up this position. Then when examined by the Executive First Class Magistrate, Tindivanam, on 13th August, 1951, after the case was remanded they stated that the land in dispute was in their possession and the petitioners had no right to possession. The third respondent however admitted that the said place belongs to the public and in joint written statement filed on 13th August, 1951, before the same Magistrate they admitted that the concerned land is vacant site comprised in R. S. No. 150/1-A with the extent of 12 cents being grama natham intended for the use of the villagers. Exhibits D-1 and D-2 also did not lend any support to the contention of the respondents. It is clear that the land is Government poromboke and is a public place. The learned Magistrate who inspected the place found that it was also being used as a public way. This land lies between the Avalurpet-Chetput road and the private property of petitioners and others. Near the point *F* in the plan filed in this case the Avalurpet-Chetput road and the Bazar street meet and the former is bus route. This plot now enclosed by the compound wall is necessary for the convenient use of both the roads both for vehicular as well as passenger traffic. In short it falls within the definition of a public road within the meaning of section 3 (18) of the Madras Local Boards Act, 1920, where a public road is defined as meaning and including the drains attached to any such road, public bridge or causeway and the land which whether entered or not by any pavement, verandah or other structure, lies on either side of the road way up to the boundaries of the adjacent property, whether that property is private property or property belonging to Government. This public place and public way have not become the property of the villagers and the Panchayat Board which hastily passed a resolution, and which resolution is not being produced, had no authority to deal with this land. R.W. 1 admitted that the land is not vested in the Panchayat Board and for erecting a permanent structure or wall the orders of the Government are necessary. He also admitted that no such order has been passed either by the Revenue department or by the Government. Therefore, point 1 has to be decided in the affirmative.

Point 2.—I have already indicated sufficiently to show that this wall constructed on a public place and a public way constitutes an obstruction and nuisance. It was sought to be suggested that this will only hit the shop keepers and not the public. The evidence in this case shows that this obstruction would also affect the unascertained members of the public whose ordinary avocations may take them to the neighbourhood of such shops, apart from the customers and that therefore this would constitute both obstruction as well as public nuisance. Public nuisance is nuisance caused not only to the persons as in this case living in the shops but also to, as I have just now pointed out, unascertained members of the public whose

ordinary avocation may take them to neighbourhood. *Queen-Empress* v. *Jasodanand*[1] and *Begg* v. *Lamessor*[2]. In other words this is not merely a case of infringement of a private right or a private dispute which is outside the scope of Chapter X of the Criminal Procedure Code.

Point 3 : The powers embodied in sections 133 to 137 with regard to the obstruction of public ways, are not intended to be exercised where there is a *bona fide* dispute as to the existence of the public right ; see In re *Narayan Jivan Mestri*[3]. Where there is such a dispute, the Court should pass no order under those sections until the public right has been established by proper legal proceedings, civil or criminal. See *Basaruddin Bhuiah* v. *Bahar Ali*[4], In re *Venkanna*[5], *Budhainath* v. *Nil Mahanth*[6], *Asker Mia* v. *Sabdar Mia*[7], *Lalmian* v. *Nazir Kalashi*[8] and *Queen-Empress* v. *Bissessur Sahib*[9]. But the mere assertion of a claim of title made without reasonable ground, or honest belief in it, or honest intention to support it will not oust a criminal Court of its jurisdiction under sections 133 to 137 of the Code ; *Luckhee Narain Banerjee* v. *Ram Kumer Mukharjee*[10], *Queen-Empress* v. *Bissessur Sahib*[9], *Nasaruddi* v. *Akiluddi*[11], *Mukundalal Dey* v. *Haribole Saha*[12], *Upendranath Bhuttacharjee* v. *Krishnachandra Bhuttacharjee*[13], *Queen-Empress* v. *Kedarnath*[14], *Belat Ali* v. *Abdur Rahim*[15], In re *Maharana Shri Jaswat Sangji*[16]. It is not open to any person illegally causing obstruction to public property to set up a bogus question of title for the purpose of ousting the jurisdiction of the Magistrate and notwithstanding the raising of such a question the Magistrate is entitled to hear a case sufficiently to enable him to make up his mind whether or not *bona fide* question of title is raised. It is quite true that when it is found that this claim of title is advanced in good faith and is supported by *prima facie* respectable evidence the Magistrate cannot proceed further and decide whether the title so set up does or does not exist but must leave the matter to be decided by the civil Court : *Emperor* v. *Dost Muhammad*[17], *Matuk Dhari Tewari* v. *Hari Madhab Das*[18], *Preonath Dey* v. *Gaburdhonemalo*[19], *Rakhal Chandra Saha* v. *Kailash Chandra Sarkar*[20]. In this case the Magistrate has followed the correct procedure and has only come to the conclusion that the respondents' claim was not a *bona fide* question of title but only an attempt to cause annoyance and inconvenience to the persons with whom they were at enmity and their act amounted to obstruction and a public nuisance and made the order absolute under section 137, Criminal Procedure Code. *Nundo Gopala Chatterjee* v. *Kusum Kumar Banerjee*[21].

Point 4 : Section 133 does not oust the jurisdiction of a Magistrate to proceed under section 147 and *vice versa*. The contrary view held in In re *Lindsay*[22] and a similar *obiter dictum* in In re *Latchmiah Maistry*[23], was not followed in *Karuppanna Goundan* v. *Kandaswami Goundan*[24]. The only restriction naturally is that when proceedings are instituted and action taken under section 133, Criminal Procedure Code, orders under section 147 cannot be passed since the two sets of proceedings are under entirely different chapters, governed by different procedure in detail, and orders are made for entirely different purposes ; *Abdul Rahman Mia* v. *Safar Ali*[25]. The instant case is not one such instance.

There are no grounds to interfere with the correct order made by the learned Magistrate and it will be sufficient only to indicate to him that in regard to the

1. (1898) I.L.R. 20 All. 501.
2. (1868) 9 W.R. (Crl.) 70.
3. (1902) 4 B.L.R. 687.
4. (1884) I.L.R. 11 Cal. 8.
5. 2 Weir 61.
6. (1900) 4 C.W.N. 596.
7. (1885) I.L.R. 12 Cal. 137.
8. (1886) I.L.R. 12 Cal. 696.
9. (1890) I.L.R. 17 Cal. 562.
10. (1888) I.L.R. 15 Cal. 564.
11. (1899) 3 C.W.N. 345.
12. (1898) 2 C.W.N. 554.
13. (1896) I.L.R. 23 Cal. 499.
14. (1901) I.L.R. 23 All. 159.
15. (1903) 8 C.W.N. 143.
16. (1897) I.L.R. 22 Bom. 988 at 995.
17. (1905) I.L.R. 28 All. 98.
18. (1904) I.L.R. 31 Cal. 979.
19. (1897) I.L.R. 25 Cal. 278.
20. (1902) 7 C.W.N. 117.
21. (1904) 1 C.L.J. 434.
22. (1881) I.L.R. 4 Mad. 121.
23. (1893) 1 Weir 143.
24. (1914) 26 M.L.J. 233 : 15 Cr.L.J. 362.
25. (1910) 15 C.W.N. 667 : 12 Cr.L.J. 43.

further proceedings after section 143, Criminal Procedure Code, he must have recourse to the instructions given in G. O. No. 133, dated 14th January, 1933, dealing with the financing of the initial expenditure which might have to be incurred under section 140 (2), Criminal Procedure Code. The initial expenditure should be debited to contingencies and the costs, if any, recovered from the parties should be credited to the Miscellaneous head of account and in cases where the costs are not recovered separately but are included in the fine levied by the Court, the fine or realisation should be credited to "Administration of Justice General Fees, Fines and Forfeiture."

In the result, this revision case is dismissed.

K.C. ——— *Revision case dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE RAMASWAMI.

Kondavitti Brahmayya and others .. *Appellants**

v.

Sri Rajeswaraswami temple, situate at Ponnekallu, Guntur Taluk, by its trustees Guduru Sitaramayya and others .. *Respondents.*

Inam—Grant to deity—Archakas in possession of the lands as de facto *trustees found to have been performing the worship properly—If entitled to be allotted any definite share of the properties for carrying on the worship.*

Where it is found that an original grant was made to the deity, though the archakas had been in possession of the property they have no title to the same and the *de jure* trustees are entitled to possession of the properties. The question whether the archakas who have been doing the worship properly are to be allowed to continue in possession of any definite portion of the properties in lieu of their remuneration must depend on the facts and circumstances of each case. There is no invariable rule that the archakas should be allotted two-thirds of the properties in lieu of their remuneration. The allotment of a particular share to the archakas would depend upon the total income of the lands, the value of the articles required for worships, the amount of reasonable remuneration intended to be provided and other similar circumstances. Though in law the title to the properties will be in the deity and the archakas are not in law entitled to insist that they should be put in possession of a portion of the lands of the deity, it is proper that the temple authorities may in consultation with the Commissioner of Hindu Religious Endowments put the archakas in possession of a reasonable portion of the lands, having regard to the circumstances of the particular case. The archakas are not precluded from accepting a salary instead.

Decisions of Satyanarayana Rao and Chandra Reddy, JJ., in A.S. No. 218 of 1946; of the Chief Justice and Panchapakesa Ayyar, J., in A.S. No. 287 of 1945 and of Govinda Menon and Basheer Ahmed Sayeed, JJ., in C.M.A. No. 8 of 1949, considered.

Appeal against the decree of the Court of the Subordinate Judge, Guntur, dated 21st February, 1950, in O. S. No. 178 of 1949.

G. Venkatarama Sastri for Appellants.

K. Ramaseshayya, N. C. Sekhar, P. Rama Rao and *S. Mohan Kumaramangalam* for Respondents.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal arises out of O. S. No. 178 of 1949, a suit filed by the plaintiff-first respondent, for recovery of possession of the plaint schedule property and for mesne profits. The plaintiff, 27th defendant and one Nagayya are the trustees of the temple of Sri Rajeswaraswami of Ponnekallu. Defendants 1 to 7 are the archakas of the suit temple and defendants 8 to 26 are the lessees under defendants 1 to 7. The plaintiff alleging that the plaint schedule properties are the properties of the deity filed the aforesaid suit for recovery of possession. Defendants 1 to 7 denied that the properties are the properties of the deity and claimed that the suit lands were granted to the archakas burdened with service to the deity. They also claimed that they acquired a right by adverse possession. As many as seven issues were framed in the suit and they reflect the contentions of the parties. They are :

* Appeal No. 237 of 1950. 8th October, 1952.

1. Whether the plaintiff has title to the suit lands ?
2. Whether the defendants acquired title by adverse possession ?
3. Whether the suit lands are 'service inams' and whether the defendants are entitled to be in possession of the same ?
4. To what mesne profits if any is the plaintiff entitled ?
5. To what relief?
6. Whether plaintiff is legally constituted trustee ?
7. Whether plaintiff's suit is not maintainable on account of O. S. No. 103 of 1934, District Munsiff's Court, Guntur ?

The learned Subordinate Judge held that the deity is the owner of the plaint schedule properties and gave a decree for possession.

The first question that arises in the appeal is whether the deity has title to the plaint schedule items or whether they were granted to the archakas subject to the service to the deity. The Inam register is almost conclusive on this question. Col. 11 gives the name of the grantor. It shows that the lands were granted by Vasireddi Venkatadri Naidu. Col. 13 shows the name of the grantee. The name of the grantee is given as Sri Rajeswaraswami. Under Col. 8 the following recital is found :

"For the worship of the Idol in Pagoda of Ponnekallu. Worship is performed."

Under Cols. 16 and 17 giving particulars regarding the present owner, the name of the deity Sri Rajeswaraswami is given though under the name of the deity the worshipper's name is also given. Cols. 20 and 21 show that the Inam Commissioner confirmed the grant so long as the service is performed. It has been held that in the absence of the original grant, the recitals in the Inam register are of great evidentiary value. The recitals indicate beyond any reasonable doubt that the grantee is the deity and the object of the grant is the worship of the deity. The learned counsel relied upon the mention of the name of the worshipper in Col. 16 in support of the contention that the grant should have been made only to the archaka burdened with service. If that was the fact, under Col. 13 the name of the archaka would have been given and under cols. 16 and 17 the name of the deity would have been omitted. The name of the worshipper obviously was given in Col. 16 as there was no separate trustee at the time and the worshipper filed a statement before the Inam Commissioner giving the details of the inam. If there is any doubt, that is dispelled by the recitals in the Inam statement, Ex. A-2 filed by the archakas themselves. In Col. 1 under the heading "name of the Inamdar" the deity's name—Sri Rajeswaraswami is given. The "present enjoyer" is also described as the same. In Col. 4 under the heading "name of the original grantee and the relationship existing between him and the present enjoyers" Sri Swamivaru's Devastanam is mentioned. If really the archakas were the grantees their names would have been mentioned and their relationship would also have been given. Under Col. 5, particulars of the family of the present enjoyers, again the Devastanam is mentioned. These recitals are consistent with that found in the Inam register. We therefore have no hesitation to agree with the finding of the Court below that the original grant was made to the deity.

If so, it follows that the plaintiff would be entitled to a decree for possession and the learned Subordinate Judge rightly gave a decree for possession. But the learned counsel for the appellants contended that in view of some unreported Judgments of this Court they are entitled to continue to be in possession, at any rate, of two-thirds of the plaint schedule properties, even though the Subordinate Court and this Court have held that they have no title to the properties. In A. S. No. 218 of 1946, Satyanarayana Rao and Chandra Reddi, JJ., held that having regard to the circumstances of that case the archakas would be entitled to be put in possession of two-thirds of the temple properties in lieu of remuneration. Satyanarayana Rao, J., rightly observed in the judgment as follows :

"No doubt on our findings it would follow that the plaintiffs would have no right to retain possession of the lands."

But the learned Judges proceeded to make an allotment between the temple and the archakas and directed two-thirds of the lands to be put in possession of the archakas in lieu of remuneration. From the observations extracted above, it would appear that the learned Judges would have decreed possession of the plaint schedule properties; but obviously as the other side did not object, they made an equitable distribution of the properties having regard to the circumstances of that case. A copy of the judgment of the Chief Justice and Panchapakesa Aiyar, J., in A. S. No. 286 of 1945, has not been placed before us. We presume that in that case also the allotment was made as the parties agreed to that course. In C. M. A. No. 8 of 1949, Govinda Menon and Basheer Ahmed Sayeed, JJ., observed as follows:

"According to the decisions of this Court, if the archakas have been properly performing the *nitya naivedya aradhana* and other religious ceremonies in the temple, they are entitled to an allotment of nearly 2/3rd of the net income for performing these ceremonies and also for present services. If the Court, after evidence, is satisfied that since the filing of the suit, the defendant archakas have properly performed the ceremonies in the temple and have not committed any default, in this behalf, then the lower Court will direct that they be paid 2/3rd of the net income remaining in Court, after defraying all the expenses . . . . As regards the future, we direct that if and when the lower Court is satisfied that ceremonies are being properly conducted, the 2/3rd of the net income will be paid over to the archakas. If any default is committed in the performance of the ceremonies the lower Court will withhold payment to the archakas."

The learned Judges were dealing with an appeal filed against an order appointing a receiver to take possession and manage the properties pending the suit. The order made by the learned Judges was obviously intended to be an interim order and was presumably made without prejudice to the rights of the parties in the suit. We do not think that the learned Judges meant to lay down as a proposition of law that irrespective of the circumstances in a particular case, the archaka should be allotted two-thirds of the properties of the temple. If that is so, it may lead to the following anomaly among others. Suppose the archakas have been in possession of the temple properties which at present are fetching an income of Rs. 10,000. Though a few hundreds would quite suffice for the remuneration and *padithram* and other expenses, the trustee would be bound to put the archakas in possession of properties fetching an income of about Rs. 7,000. The learned Judges in the aforesaid three decisions we are sure never intended to lay down a proposition which would lead to this startling result. The allotment of a particular share would depend upon the total income of the lands, the value of the articles required for worships, the amount of reasonable remuneration intended to be provided and other similar circumstances.

At the same time we may observe that the archakas have been in uninterrupted possession of the plaint schedule properties for over a long period of time. It is also likely that they will continue to be in the village and function properly if they are given properties sufficient for the expenditure of *nitya naivedya deeparadhana* and remuneration. Though in law they are not entitled to insist that they should be put in possession of a portion of the lands of the deity, it appears to us proper, as it appeared to other Judges of this Court, that the temple authorities may in consultation with the Commissioner put the archakas in possession of a reasonable proportion of the lands, having regard to the circumstances of this particular case. Those observations are not intended to preclude archakas from accepting a salary. In the result the appeal fails and is dismissed with costs.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MACK AND MR. JUSTICE KRISHNASWAMI NAYUDU.

Chukkapalli Venkateswarlu .. *Appellant**

v.

Kanyadhara Challaiya and others .. *Respondents.*

Hindu Law—Widow—Surrender of estate—Tests of validity and bona fides—*Subsequent adoption by widow—Effect.*

The motives of a widow in renouncing and transferring her husband's estate in favour of the nearest reversioner, whatever they may be, should not be taken into account in determining the validity of the surrender. What has to be looked into is only her capacity to renounce and a complete effacement of her interest in favour of the nearest reversioner. If the transaction of surrender is a relinquishment of her entire interest in her husband's property and if such relinquishment is in favour of the nearest reversioner and so long as it is not in any way indicated that the arrangement evidenced by the surrender between the widow and the reversioners allows a benefit to accrue to the widow excepting a provision for maintenance, it must be held that that should be sufficient to stand the test of a valid surrender. It is difficult to say what generally influences or impels a widow to relinquish her property in favour of her husband's next of kin, that is the nearest reversioners.

The fact that she not only desires to provide for a relation of hers for whom she might have some affection, and where the reversioner who will be entitled to the estate accedes to her request in deference to her wishes to make such a provision, cannot characterise the surrender as not a *bona fide* one.

Krishnamurthi v. *Seshayya*, (1944) 1 M.L.J. 443 and *Akkamma* v. *Brahmadu*, (1950) 1 M.L.J. 750, considered and explained.

Even from the point of view of the texts and as explained by the commentators, a surrender by the widow of her entire interest in her husband's property in favour of the nearest reversioners does not become invalid by reason of the reversioners making a provision at the time of the surrender or subsequently of a portion of the property to the kindred of the widow's father and mother to satisfy her wishes.

Authorities reviewed.

A subsequent adoption by the widow will not divest the properties held by the reversioners under such surrender.

Appeal against the decree of the Court of the Subordinate Judge, Tenali, dated 6th December, 1947, in O.S. No. 52 of 1946.

K. Krishnaswami Ayyangar and *N. C. Ragavachari* for Appellant.

K. Kotayya and *Y. G. Krishnamurthy* for Respondents.

The Court delivered the following

JUDGMENTS, *Krishnaswami Nayudu, J.*—The plaintiff, who is the appellant, sued *in forma pauperis* to recover the suit properties, which consisted of 23 items of lands and two houses belonging to one Chukkapalli Pichayya as his adopted son having been adopted by his widow the 20th defendant (Achamma). Chukkapalli Pichayya died about 60 years prior to the suit leaving the 20th defendant a childless widow. Defendants 1 and 2 are the sister's sons of Pichayya. The widow, 20th defendant, purported to adopt P.W. 5, but that adoption was subsequently set aside by Court. On 25th February, 1940, she obtained an authorisation from two of the reversioners to adopt a son to her husband. But before any actual adoption took place, the widow surrendered her husband's estate in favour of defendants 1 and 2, the nearest reversioners. On 28th February, 1940, under Exhibit A-2 the widow and Pichamma, the sister of the deceased Pichayya and mother of defendants 1 and 2 jointly executed a deed of surrender in favour of defendants 1 and 2 conveying all the properties of Pichayya and the document mentions a payment of Rs. 2,000 to the widow for her maintenance for her lifetime and for spiritual benefit to her husband and for offering Gaya Pindams, etc. Prior to this document it may be stated that by a deed of gift (Exhibit B-1) dated 26th February, 1940, she had already made a gift of 2 acres of land to a temple. Immediately after the execution of Exhibit A-2, the surrender deed, the 1st and 2nd defendants and the other reversioners entered into a deed of settlement, Exhibit A-3, whereunder the properties of Chukkapalli Pichayya which were surrendered by the widow were divided as between defendants

*Appeal No. 300 of 1948. 14th October, 1952.

1 and 2 and the other reversioners in certain proportions, the plaintiff's grandfather, who was one of the reversioners, also getting a share. It is found that there was a sale deed by the 1st and 2nd defendants on the same date, namely, 2nd March, 1940, Exhibit B-2, of the 3 acres and 6 cents of land to D.W. 1 for a sum of Rs. 3,000 out of which Rs. 2,000 is mentioned as having been received by the 1st and 2nd defendants to enable them to pay the widow the maintenance as provided under Exhibit A-2, the balance being the amount due under a prior transaction between the 1st and 2nd defendants and D.W. 1. More than three years thereafter on 30th September, 1943, by Exhibit B-20; D.W. 1 sold the 3 acres and 6 cents of land, which he purchased under Exhibit B-2, to the 15th defendant for the same price of Rs. 3,000. The 15th defendant is the brother's son of the widow. From a reading of Exhibit B-20, it is seen that the sum of Rs. 2,000, which was paid by D.W. 1, as part of the sale consideration of Exhibit B-2 for payment of the sum provided under Exhibit A-2 to the widow, was in fact borrowed by D.W. 1 from the 15th defendant even on the date of Exhibit B-2 and that there was an arrangement between D.W. 1 and the 15th defendant that if the amount is not repaid he should execute a conveyance of the property which he purchased under Exhibit B-2 to the 15th defendant. The recitals in Exhibit B-20 show that the 15th defendant was the person who in fact paid the sum of Rs. 2,000 which enabled defendants 1 and 2 to pay the widow as and for her maintenance.

It may also be mentioned that the properties were subject to an usufructuary mortgage in favour of P.W. 5, and defendants 1 and 2 and others instituted O.S. No. 292 of 1941 on the file of the District Munsif's Court of Tenali, for redemption and P.W. 5 in turn instituted O.S. No. 32 of 1942 on the file of the Subordinate Judge's Court of Tenali for a declaration that the surrender deed and the settlement were fictitious transactions not binding on him. There was a compromise, which was recorded in O.S. No. 292 of 1941, Exhibit B-7, on 2nd August, 1943, whereby the mortgagee was given about 3 acres in satisfaction of his mortgage. The widow was a party to the compromise and all the parties including the widow, Achamma, declared under the compromise that the surrender deed and the settlement deed were true and valid. Achamma was nearly 75 years at the time of the deed of surrender, and 5 years thereafter on 17th February, 1945, she executed a deed of adoption, Exhibit A-1 in favour of the plaintiff evidencing the adoption of the plaintiff.

The plaintiff instituted the suit claiming to be entitled to the suit properties and alleging that the surrender deed executed by the widow in favour of defendants 1 and 2 was not valid. It is also alleged that it was the result of a conspiracy between the widow, defendants 1 and 2 the sister's sons and the nearest reversioners, and the other reversioners, that the surrender, settlement and the sale deeds, Exhibits A-2, A-3, B-2 and B-20, though of different dates were the result of an arrangement between the parties to benefit the 13th defendant, who is the brother's son of the widow, with a portion of the property and also to benefit the other reversioners, though none of them were the nearest reversioners, and that being the result of such an arrangement, the surrender was not valid nor *bona fide*.

The factum of the adoption was not disputed ; but it was contended that the adoption was not valid as the widow had no authority from the husband and she had not even the consent of the nearest sapindas, and further that in any event the widow having surrendered her interest in her husband's estate in favour of the 1st and 2nd defendants, the plaintiff, even though validly adopted, was not entitled to recover the suit properties. The trial Court held against the plaintiff on both these questions, found that the adoption was not valid and upheld the surrender.

The two questions that arise therefore for determination in this appeal are (1) whether the surrender is invalid for the reasons stated by the plaintiff and (2) whether the adoption is true and valid. Learned Counsel addressed arguments on the first of these questions, since if the finding of the lower Court is upheld by us, it would be unnecessary to decide as to the validity of the adoption since the suit being one for possession has to fail. Though there are certain features that can be gathered

from the documentary and the oral evidence which would throw suspicion as to whether the transactions were not the result of an arrangement between the widow and the reversioners as to the best way of disposing of the properties, we feel unable to agree with the appellant's contention that Exhibits B-2 and B-20 are fictitious transactions brought into existence with a view to benefit the 15th defendant by the widow setting apart a portion of her husband's property in favour of her brother's son. The reference in Exhibit B-20 to an agreement between the 15th defendant and D.W. 1 the vendee under Exhibit B-2 as to the conveyance of this property in his favour, the circumstance that Exhibit B-20 was executed after the compromise in O.S. No. 292 of 1941 and the relationship of the parties are certain of the circumstances which are urged in support of the plaintiff's contention. But since a sum of Rs. 2,000 had to be paid to the widow under the surrender deed and the major portion of the consideration of Exhibit B-2 being the said sum of Rs. 2,000 was borrowed for the purpose and the person from whom it was borrowed now transpiring to be the 15th defendant and not D.W. 1, neither Exhibit B-2 nor Exhibit B-20 can be held to be not supported by consideration. It is not suggested that defendants 1 and 2 secured the sum from other sources and paid the widow. We are unable therefore to hold that Exhibits B-2 and B-20 are nominal transactions intended to benefit the 15th defendant. If the surrender is otherwise valid, the fact of the surrenderees disposing of the properties obtained by them under the deed of surrender in favour of third parties would not affect in any manner the validity of the surrender.

It is, however, further urged that the settlement deed between the 1st and 2nd defendants, who are the nearest reversioners, and the other reversioners was the result of an arrangement entered into between them to which the widow was a party, which settlement was contemplated prior to the execution of the surrender deed. No doubt mention is made in Exhibit A-3, the settlement deed, as to the gift of 2 acres of wet land to the temple two days earlier than the date of the surrender deed and to an objection having been raised by the other reversioners as to the validity of the surrender. It is stated that as it was intended by the widow to adopt the 13th defendant in pursuance of a deed of consent obtained by her on 25th February, 1940, to make an adoption and as there were these disputes, there was a mediation and the mediators settled, that the surrender deed was executed *bona fide* and as per the advice of the mediators defendants 1 and 2 and the other reversioners divided the property. It is therefore urged that the surrender is not *bona fide* being the result of an arrangement whereby the property was divided as between the nearest reversioners and the other prospective reversioners as also the 15th defendant, the brother's son of the widow.

The Privy Council held in *Rangaswami Goundan* v. *Nachiappa Goundan*[1], that an alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation and that in such circumstances the question of necessity does not fall to be considered, but the surrender must be a *bona fide* surrender and not a device to divide the estate with the reversioner. Excepting getting a sum of Rs. 2,000 for maintenance no portion of the property of her husband had been retained by her and it has been consistently held that a reasonable provision by way of maintenance reserved to the widow does not affect the validity of the surrender, if it is in other respects unobjectionable. The fact therefore of a payment of Rs. 2,000 from and out of the estate would not affect its validity in this case. The surrender should not be a device to divide the estate with the reversioner. The division that is prohibited is a division of the estate between the widow and the surrenderee, not any division of the property surrendered as between the surrenderee and others. It may be said in this case in view of the proximity of time between the surrender and the settlement, the settlement and the sale, namely, Exhibits A-2, A-3 and B-2, that in fact there has been a division of the estate between the nearest reversioners and the prospective reversioners. In the view we have taken of the effect of Exhibits

1. (1918) 36 M.L.J. 493 : L.R. 46 I.A. 72 : I.L.R. 42 Mad. 523 (P.C.).

B-2 and B-20, we cannot say that it amounts to a division of the estate with the 15th defendant also. Such a division of the estate between the nearest and the prospective reversioners of the husband is not what is contemplated by Lord Dunedin, who delivered the judgment of the Board in *Rangaswami Goundan* v. *Nachiappa Goundan*[1]. This is made clear by the same Law Lord in a later decision of the Judicial Committee in *Chowdhury Sureshwar Misser* v. *Mst. Maheshrani Misrain*[2], where the dictum in *Rangaswami Goundan* v. *Nachiappa Goundan*[1] is repeated, namely, that the surrender must be a *bona fide* surrender not a device to divide the estate with the reversioners and it was held that a *bona fide* arrangement whereby a Hindu widow surrendered all right of succession to the immoveable property in favour of the nearest reversioner who in turn made over half the property to daughters cannot be stigmatised as a device to divide the estate between the surrendering lady and the nearest reversioner and cannot be taken exception to. The surrender would cease to be *bona fide* if such a device is adopted whereby the widow would secure a division of the property for her individual benefit.

It is not suggested in the present case that by the transfer of 3 acres and 6 cents of lands by defendants 1 and 2 in favour of the widow's brother's son the widow was personally benefited or she intended to retain any benefit in the sense that the sale of lands was a benami or colourable transaction brought about for the ultimate benefit of the widow, the 15th defendant being only a benamidar. It is therefore a case where there has been a transfer of the widow's whole interest in her husband's estate in favour of the nearest reversioners, the widow retaining nothing out of it. If that be the case could it be said that there has not been such self-effacement or renunciation by the widow as to constitute the giving up of her entire interest in her husband's properties? There can be no doubt that there has been such a renunciation. Could an arrangement entered into between the nearest reversioners and other reversioners and even a relation of the widow whereby the properties are divided among them to which the widow might be a consenting party invalidate the surrender where the widow herself does not retain any interest? That a surrender should be not only of her whole interest in favour of the nearest reversioner or reversioners but must also be *bona fide* it appears to us, was for the first time laid down by Lord Dunedin in *Rangaswami Goundan* v. *Nachiappa Goundan*[1]. By "*bona fide*" it must be understood that the transaction is a real transaction, not a colourable one, whereby there is not a complete renunciation or the relinquishment of the widow's interest. What impels a widow to surrender is not of any consequence.

In *Challa Subbiah Sastri* v. *Palury Pattabhiramayya*[3], it was held that where a widow conveys the whole of her limited estate to the next reversioner in consideration of an undertaking by such reversioner that he would reconvey a portion of such property to a person named by the widow, the conveyance is valid and is not vitiated by such agreement and the title of such reversioner and that of the person to whom the property is reconveyed in pursuance of such agreement cannot be impeached by other reversioners. Sankaran Nair, J., observed

"It is difficult to see how the validity of a surrender by a widow which stands on a higher footing can therefore be affected by her motives or by any such conditions that may be imposed by her as referred to above. Further, there is nothing in the reason of the law to support this contention. Supposing this succession is accelerated by the widow becoming a sanyasi or remarrying, can it be contended that the actual reversioner at the time of her death is entitled to claim the property on the ground that her renunciation of the world or remarriage was made in order to vest the property in a favourite presumptive reversioner, or that it was made under an arrangement by which he was to convey a portion of the property to another? On her renunciation of the world, or remarriage, the Hindu Law vests the property in the reversioners and it is not the less his property because he has promised the widow to give a portion of that property to some stranger who himself could not enforce that agreement."

The motive of a widow in renouncing and transferring her husband's estate in favour of the nearest reversioner, whatever they may be, should not be taken into

1. (1918) 36 M.L.J. 493 : L.R. 46 I.A. 72 : I.L.R. 48 Cal. 100 (P.C.) : I.L.R. 42 Mad. 523 (P.C.). 3. (1908) I.L.R. 31 Mad. 446.
2. (1920) 39 M.L.J. 161 : L.R. 47 I.A. 233 :

account in determining the validity of the surrender. What has to be looked into is only her capacity to renounce and a complete effacement of her interest in favour of the nearest reversioner.

This principle as to motive being immaterial in judging whether a transaction of surrender is valid or not is still good law. In *Subbalakshmiammal* v. *Narayana Aiyar*[1], Venkatasubba Rao, J., expresses his agreement with the dictum of Sankaran Nair, J., in the above referred case that the validity of a surrender does not depend upon the motive of the widow, though the learned Judge is of the opinion that the actual point decided upon in that case must be treated to have been overruled in view of the subsequent Privy Council decision in *Rangaswami Goundan* v. *Nachiappa Goundan*[2]. In the course of the judgment while referring to that decision the learned Judge observes as follows :

> "Their Lordships of the Judicial Committee in *Rangaswami Goundan* v. *Nachiappa Goundan*[2] and *Chowdhury Sureshwar Misser* v. *Mst. Maheshrani Misrain*[3], explain clearly what is meant by the expression '*bona fide*' used in this connection. The transaction must be *bona fide* in the sense that the widow retains no benefit either directly or indirectly, *i.e.*, there must be a complete relinquishment ; if in the guise of a surrender, the widow enlarges her own estate in regard to a part, the so-called surrender will not be upheld. I do not think there is any warrant for importing a third and further condition namely, that the motives operating on the mind of the widow must be of a religious or spiritual character. In regard to adoptions by widows according to the Bombay courts, the motive is irrelevant, but the law, as administered in this presidency, makes the motive material. There being no authority declaring that the motive of the surrendering widow has any bearing, I should, for my part, be disinclined to introduce an uncertain and puzzling element, making it incumbent upon the Courts to embark upon an enquiry, often difficult and fruitless, as regards the motive for the transaction."

What is therefore understood by "*bona fide*" is that the surrender must not be a ruse to secure for the widow an interest in her husband's property which she is not entitled in law, that is, retaining any benefit under it after purporting to renounce it in favour of the nearest reversioner. The surrender must be complete and effective and not colourable and nominal. If the transaction of surrender is a relinquishment of her entire interest in her husband's property and if such relinquishment is in favour of the nearest reversioner and so long as it is not in any way indicated that the arrangement evidenced by the surrender between the widow and the reversioners allows a benefit to accrue to the widow excepting a provision for maintenance, it must be held that that should be sufficient to stand the test of a valid surrender. It is difficult to say what generally influences or impels a widow to relinquish her property in favour of her husband's next of kin, that is, the nearest reversioners. It is in exceptional cases that such a renouncement arises out of a conviction on the part of the widow to renounce not only her husband's estate but also the world and become a sanyasin. But apart from it cases have occurred where Hindu widows have relinquished their interests for various reasons ; mainly if the widow is of a retiring disposition, being a woman she would like to be relieved of the management of the estate and to hand over the estate to the nearest reversioner being content with a suitable provision for maintenance. There are cases where along with a suitable provision for maintenance she may desire that a near relation of hers may also be provided for. These are considerations which generally weigh with a Hindu widow to renounce her estate. The fact that not only she desires to be free from the trouble of administering the estate but also desires to provide for a relation for whom she might have some affection, and where the reversioner who will be entitled to the estate accedes to her request in deference to her wishes to make such a provision, cannot characterise the surrender as not a *bona fide* one.

Learned counsel referred to the decision of Lakshmana Rao and Happell, JJ., in *Krishnamurthi* v. *Seshayya*[4], cited with approval by Raghava Rao, J., in *Chundru Akkamma* v. *Chundru Brahmadu*[5], in support of his contention. In *Krishnamurthi* v. *Seshayya*[6], it was held that the surrender deed, the retention of some of the properties

1. (1934) 67 M.L.J. 179.
2. (1918) 36 M.L.J. 493 : L.R. 46 I.A. 72 ; I.L.R. 42 Mad. 523 (P.C.).
3. (1920) 39 M.L.J. 161 : L.R. 47 I.A. 233 : I.L.R. 48 Cal. 100 (P.C.).
4. (1944) 1 M.L.J. 443
5. (1950) 1 M.L.J. 750.
6. (1944) 1 M.L.J. 443.

covered by it by the surrenderee and the alienation of the rest by him benami for the brother's son of the widow, all formed part of the same transaction; that in the circumstances, the surrender was not a *bona fide* transaction and the whole arrangement was only a device to divide the estate so as to give a part of the estate to the widow's brother's son in order that the sister's son might get the remainder *in praesenti* and that accordingly the surrender was not binding on the reversion. The finding in those decisions is that the transactions which they were considering were benami transactions in the sense that the transfer by the reversioners in favour of a near relation of the widow was really for her benefit and the effect of it was a retention of a portion of the property in the widow by adopting the transfer in favour of the relation as a device to divide the estate. Those decisions might be supported on the particular facts of those cases. But it is necessary to point out that Raghava Rao, J., observed that the dictum in *Chella Subbiah Sastri* v. *Palu Pattabhiramayya*[1], was accepted in Mayne as good law, namely, that the widow's motive in making a surrender is immaterial and that therefore a surrender by her cannot be called in question on the ground of improper motive.

The doctrine of surrender has been understood in some decisions to have been evolved out of judicial decisions and to have no foundation in the original texts. That was the view taken by Kumaraswami Sastriar, J., in *Vaidyanatha Sastri* v. *Savitri Ammal*[2], where the learned Judge observed that

> "the whole doctrine of surrender and consequent acceleration of the estate of the reversioner has no basis in Hindu Smritis, but has been evolved by Courts of Justice on general principles of jurisprudence."

With respect to the learned Judge that statement cannot be said to be quite accurate. Though the surrender by a widow in favour of the nearest reversioners is not specifically mentioned in the texts, such of the Hindu law texts that pertain to the widow's right of inheritance to her husband's property and the extent and scope of such rights are certainly derived from the texts and the right of the widow to surrender is one of the incidents of the right to succeed to her husband's property and to enjoy it. This was pointed out by Mitter, J., in *Ramakrishna* v. *Sm. Kousalya Mani*[3]. In *Arunachala Moopanar* v. *Arumugha Moopanar*[4], a decision of Govinda Menon, J., and myself, our attention was drawn to the view of Kumaraswami Sastriar, J. In that case the question arose as to the right of the reversioner-surrenderee to recover possession and dispossess the alienee from the widow before the lifetime of the widow as a logical consequence of the surrender. We, however, did not think it then necessary to examine the original texts and preferred to follow the rulings on the subject. But now it appears to me it may be necessary in view of the textual law on the subject to reconsider the rulings on which we relied in coming to a decision in that case.

Mookerjee, J., in *Debi Prosad Chowdhury* v. *Golap Bhagat*[5], has referred to some of these texts. The main text is that of Katyayana as explained by Jimutavahana in the Dayabhaga, Chapter XI, section. 1, para. 56, which says:

> "Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation, the property until her death. After her let the heirs take it."

In paragraph 64 he refers to the text of Narada which says:

> "When the husband is deceased, his kin are the guardians of his childless widow. In the disposal of the property, and care of herself, as well as in her maintenance, they have full power. But, if the husband's family be extinct or contain no male, or be helpless, the kin of her own father are the guardians of the widow, if there be no relations of her husband within the degree of a *sapinda*."

With reference to this text of Narada, his commentary is that

> "in the disposal of property by gift or otherwise, she is subject to the control of her husband's family, after his decease, and in default of sons,"

and with their consent she may bestow gifts on the kindred of her own father and mother. Dayakrama-Sangraha, a commentary on the Dayabhaga of Sri Krishna

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1. (1908) I.L.R. 31 Mad. 446.
2. (1917) 33 M.L.J. 387 : I.L.R. 41 Mad. 75 (F.B.).
3. (1935) 40 C.W.N. 208.
4. (1952) 2 M.L.J. 280.
5. (1913) I.L.R. 40 Cal. 721 (F.B.).

Tarkalankara. Chapter I, section 2, refers to Katyayana and Narada's texts and commenting upon them states in para. 7:

> ". . . . . . On these (Sapindas, daughter's sons, sister's sons, maternal uncles of her husband) and on the others should she bestow presents, and not on the members of the family of her own father, while these persons are living, for then the specification of 'paternal uncles' and the rest would be superfluous. With their consent, however, she may make gifts to the kindred of her own father and mother, as declared by Narada . . . . . In the disposal of property that is by gift, etc., the wife is liable to the control of the family of her husband, after the death of her husband and on failure of sons; so it is declared in the Dayabhaga."

Emphasis is laid in the texts on the parental position occupied by the nearest reversioners, who are considered to be the guardians of the widow and are expected to protect her interests and guide and direct her in dealing with the properties of her husband.

The rights of the widow to inheritance of her husband's estate and power to dispose of her husband's property owe their origin to the Dayabhaga and the commentaries thereon; and that the principles as derived from the texts are applicable to the Madras Presidency do not admit of any doubt, since the Bengal rulings based on the Dayabhaga on these matters have been applied and followed in the decisions of our Court. Subramania Aiyar, J., in *Marudamuthu Nadan* v. *Srinivasa Pillai*[1] observed:

> "I think it unnecessary to go into the question, whether the Hindu law according to the texts or the commentaries lends support to the doctrine that a female holding a qualified estate can validly surrender such an estate, so as to entitle the then immediate reversioner to enter upon the inheritance and to hold it absolutely as if the succession had opened by the natural or civil death of the qualified owner. Though there has been no course of decisions on the point in this Presidency as in Bengal, yet instances have occurred which show that parties have acted upon the view that such surrenders are valid in these parts as well. This appears even from some of the cases which have come before the Courts. Since, there is nothing in the doctrine itself which makes it less suited to the community in this Presidency than to the community in Bengal, it is not surprising that the Calcutta rulings have in practice been followed in this Presidency also."

So long as the widow does nothing to contravene the injunctions of the nearest reversioners such acts of the widow could be said to be permitted. This is also evident from the commentary of Dayabhaga in Dayakrama-Sangraha that in the disposal of property the wife is liable to the control of the family of her husband, after the death of her husband and on failure of sons, and with their consent, she may make gifts to the kindred of her own father and mother. The reason behind the principle laid down in the texts is that the husband's relations, that is, the nearest reversioners being the persons that are ultimately interested in the properties are themselves persuaded to part with a portion of the properties at the request of the widow, they must be deemed to have done for proper and justifiable reasons since they are the guardians and advisers of the widow. When the widow expresses a desire to surrender her interest and also wishes that a gift of a portion of the property may be made to the kindred of her own father and mother, the reversioners are entitled to give effect to it and nothing prevents them from doing so. The nearest reversioners are not bound to secure the property without any dismemberment or disposal for the benefit of any other kin or reversioner, since the reversioners, even the presumptive much less the prospective reversioner have no vested right in the widow's husband's property. Such disposal of property at the time of the surrender would not be against the injunctions laid down in the texts. The principle of relinquishment or surrender as observed by Mookerjee, J., in *Debi Prasad Chowdhury* v. *Golap Bhagat*[2], is contemplated in the texts. The learned Judge states at page 771 as follows:

> "As a matter of fact, the theory of relinquishment is foreshadowed in the Dayabhaga, Chapter XI, section 1, para. 59, where Jimutavahana lays down that the persons who would be the next heirs on failure of prior claimants, succeed to the residue of the estate remaining after her use of it, upon the demise of the widow in whom the succession had vested, in the same manner as they would have succeeded if the widow's right had never been taken effect. The words used by Jimutavahana
>
> "जाताधिकारायाः पत्न्या अधिकार प्रध्वंसेपि भोगावशिष्टं धनं गृह्णीयुः".

1. (1897) 8 M.L.J. 69: I.L.R. 21 Mad. 128 at 133 (F.B.).
2. (1913) I.L.R. 40 Cal. 721 (F.B.).

("if her right ceases or never takes effect") are comprehensive enough to include not merely the case of the death of the widow, but all cases where her right ceases; in other words, the reversioners take the estate not merely when the widow dies, but also when her title is extinguished, for instance by renunciation, remarriage or the like."

Though the term surrender is not expressly mentioned in the texts, the circumstances and conditions under which a widow could dispose of her husband's property as laid down in the texts will with equal force apply to the case of a disposal by the widow as and by way of surrender in favour of the nearest reversioners and thus accelerate the reversion. Even from the point of view taken in the texts and as explained by the commentators, we are of the opinion that a surrender by the widow of her entire interest in her husband's property in favour of the nearest reversioners does not become invalid by reason of the reversioners making a provision at the time of the surrender or subsequently of a portion of the property to the kindred of the widow's father and mother to satisfy her wishes. Reservation of a small portion of the property as provision for maintenance out of the estate is *a fortiori* permissible and has been so held in a number of decisions of the several High Courts. We are therefore of the view that even if the transfer of 3 acres and 6 cents in favour of the 15th defendant, who is a kindred of the widow's parents, being her brother's son, out of an extent of 25 acres and other properties is a gift, it is a permissible disposal of the property which does not vitiate the validity of the surrender. We, however, hold in this case that it is not a gift, but a transfer for consideration to D.W. 1, who in turn sold it to the 15th defendant. In view of our holding that the surrender is valid, it is unnecessary to examine the finding of the lower Court that the adoption is invalid, since the adoption would not divest the properties from the possession of defendants 1 and 2, who hold the same under a valid surrender.

In the result, the appeal is dismissed with costs of the contesting respondents. Appellant will pay the court-fee payable to Government.

Mack, J.—I have perused with great interest and advantage the judgment of my learned brother, with which I am in complete agreement. I am greatly indebted to him for his research into ancient Hindu texts, which appear to me to set at rest all doubts attaching to the surrender of a widow's life-estate. It is, indeed, refreshing, nor is it in any way surprising, to find that the ancient texts give direct support to a common sense and reasonable position that a childless widow can, with the consent of her husband's kins, make a valid surrender to the nearest reversioners after making gifts with their consent to any of her own relations. It is also settled law, so far as case-law on any subject in the domain of Hindu law can be regarded as settled, as both the learned counsel agree and as my learned brother has pointed out, that a Hindu widow can, with the consent of the reversioners make a valid surrender at the same time reserving for herself a portion of property for her maintenance over which she will have absolute powers of alienation.

The ancient texts themselves, as analysed by my learned brother, throw considerable light on the obscurity of a series of decisions, some progressive and some, which with great respect may be called reactionary, the general effect of which have imposed on the conveyancer of the necessary documents in connection with a widow's surrender and gift with the consent of the reversioners or sapindas an extremely difficult problem. Some decisions have treated the widow's power of acceleration and the reversioner's power of validation as distinct and independent powers. Wallis, J., in *Rangappa Naick* v. *Kamti Naik*[1] observed that the Bombay High Court had consistently refused to treat the reversioner's power to validate as derived from the widow's power to accelerate, as, though the former had the authority of the Hindu texts, the latter was regarded as being based upon the application of the English doctrine of merger. The widow herself has no power of acceleration as such without the consent of the reversioners, except in the very rare case of a widow making a complete renunciation of her whole husband's estate without reserve to the reversioners leaving to herself absolutely nothing at all. In all other cases of surrender, the widow's power of acceleration and the reversioners' power of

1. (1908) 18 M.L.J. 309: I.L.R. 31 Mad. 366 (F.B.).

consent or validation are mutually inter-dependent and one cannot operate without the other.

I have never been able to appreciate the many legal impediments, which have been sought to be placed in the way of a childless widow with the consent and approval of the reversioners' disposing of the estate in order to free herself from the botheration of its management. The widow of course has an unfettered right to the enjoyment of the income of the entire estate till her death if she so desires. Similarly, the reversioners are entitled to refuse to agree to any surrender by the widow, which involves the retention of any portion of the corpus by the widow even for her maintenance. I have never been able to see what spiritual benefit any one dead or living can derive from obstacles various decisions have placed in the way of a childless widow in the domain of surrender. The limited estate provided by Hindu law for a childless widow is something peculiar to Hindu law, and any endeavour to apply the principles attaching to other forms of limited interest to this kind of estate can only be fraught with much involved complication. The one condition necessary for a surrender by a childless widow to be valid is, as my learned brother has pointed out, that it should be *bona fide*. It must not be a division of the estate between the widow and a reversioner in order that each should have premature and absolute powers of alienation over a portion. To cite an extreme case, if a young widow and an elderly reversioner without children should agree between themselves to divide the estate and this agreement is embodied in the form of a surrender deed with reservation for maintenance, it would clearly be a *mala fide* transaction with the object of defeating the other reversioners. I am unable to see any impediment in the early Hindu texts referred to by my learned brother in the way of the widow executing a valid surrender in favour of reversioners and with their consent making contemporaneously small gifts to her own relations and also reserving a portion of the property to be enjoyed by her absolutely for her maintenance.

It is becoming increasingly necessary that the law on these difficult branches of Hindu law, which have been made extremely complicated by much developed case-law in the past should be expressed in as clear and simple terms as possible for the guidance of those on whom the heavy burden of conveyancing rests. In this case we have perused with much appreciation, the ability, care and thoroughness with which the widow's surrender deed Ex. A-2, a contemporaneous gift deed Ex. B-1 gifting some land to a temple and other related documents have been prepared by unrecognised, unlicensed and unqualified *de facto* solicitors, who appear to have the carriage of all litigation in areas from which the suit arises. In striking contrast with these documents prepared in 1940 with a sense of responsibility we have no hesitation in describing as a thoroughly irresponsible document, the adoption deed Ex. A, by which this widow adopts this plaintiff on 17th February, 1945, without any reference whatsoever to the surrender to the reversioners she had previously made in 1940. It is on the basis of this document that a first-class pauper litigation has been evolved in which no less than 23 defendants have been impleaded. The fact that the plaintiff's grandfather was admittedly a consenting reversioner to the widow's surrender and received a share of land is in itself sufficient ground for dismissing the suit. His grandson has been put forward as a pauper plaintiff in another wholly untenable legal capacity, in the circumstances, as a son adopted by the widow after this perfectly valid surrender.

K.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Pachiripalli Satyanarayana .. *Petitioner.**

Madras Prohibition Act (X of 1937), section 4 (1) (a)—"Possession"—Proof of.

In the case of a family living jointly in the same house, the head of the family will be presumed to be in possession of an illicit article found in the house; but this presumption is rebuttable and

*Crl. R. C. No. 189 of 1952. (Crl.R.P. No. 175 of 1952). 9th September, 1952.

the weight to be attached to it must vary according to the circumstances. The strength of the presumption also varies according to the improbabilities that the article owing to its size, etc., shall have escaped the notice of the head of the family or it was unlikely that such incriminating article would have been found by chance or that any of the sons could have taken possession of the article and hidden it in the house without informing the father or that such article could have escaped notice or could remain in the house without his knowledge. Possession in order to justify a conviction need not necessarily be the exclusive possession. The only point that must be proved in all the cases is that accused or all the accused persons were aware of the presence of the illicit article and had control over the same.

Where the evidence is that the accused is the head of the family who rented the house in a room of which brandy was found in bottles, who is occupying a fairly important position, whose health was such that brandy might have been recommended as palliative, who did not offer an explanation at the earliest opportunity of the finding of the brandy bottles even though opportunity was twice given,

Held, the finding by the lower Court that the accused was in possession of the illicit articles is justified and the accused is guilty of an offence under section 4 (1) (*a*) of the Act.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the District Magistrate, Vizagapatam, dated 16th November, 1951, in Crl. Appeal No. 30 of 1951 (C. C. No. 1046 of 1950, Sub-Magistrate's Court, Vizagapatam).

L. S. Veeraraghava Aiyar for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Court made the following

ORDER.—This is a criminal revision case which has been filed against the conviction and sentence of the learned District Magistrate, Visakhapatnam, in C. A. No. 30 of 1951, confirming the conviction and modifying the sentence in C. C. No. 1046 of 1950, Sub-Magistrate, Visakhapatnam.

2. The facts are: The petitioner-accused before us was the Head Establishment Clerk, D.T.O.'s office, Bengal-Nagpur Railway. He is an elderly man who is suffering from heart trouble and is also said to be otherwise sickly. This accused has got a grown up son who has been examined as D.W. 4 in this case and that son's wife is one Jayalakshmi, who has not been examined. The accused and his son and daughter-in-law all lived in the same house and the evidence is that they are undivided and the accused is the tenant of that house. It is in these circumstances that the following incident took place.

3. P.W. 1, Sri G. N. Brahma, who is the Inspector of the Special Police Establishment of the Government of India with heardquarters at Puri on information received in regard to certain other matters, with which we are not concerned here and which might well be guessed, obtained a search warrant from the District Magistrate, Visakhapatnam, on 4th December, 1949, and searched the house of the accused.

4. In the course of the search on 5th December, 1949, in the presence of the then Stationary Sub-Magistrate, who has been examined as P. W. 5, Mr. S. N. Singh, Section Controller of B. N. Railway, Waltair, who was residing close to the house of the accused and who has been examined as P. W. 3, the local Sub-Inspector Mr. C. V. Naidu and the Railway Sectional Officer, Mr. S. J. Naidu, attached to the Special Police Establishment with headquarters at Puri and who has been examined as P.W. 2. 2½ bottles of Haywoods Fine Brandy VAT No. 4, were found in the house of the accused. The half bottle, M. O. 1, was found in the bottom drawer of the mirror almirah in the southernmost room of the house of the accused. The full bottles with the original company seals were found in the iron safe in the same room. They were seized along with other articles concerned in the other case for which the search was made in the first instance and a search list Ex. P-1 was prepared. These bottles of brandy were handed over along with a report the same day by the Special Establishment Police Inspector, P.W. 1 to the local Prohibition Sub-Inspector Mohamad Lal Sheriff, examined as P.W. 4. This Prohibition Sub-Inspector came to the spot took up the investigation and prepared another Panchayatnama and which has also been signed by the aforesaid persons

It is not disputed that before the search the person of the searching officers was searched by the Magistrate as well as by the outside witness Mr. S. N. Singh. The accused was present at the time of the search. On 5th December, 1949, the Prohibition Sub-Inspector enquired the accused in regard to the recovery of these bottles of brandy and possession of the same by him. The accused in Ex. P-4 stated that he was suffering from fever and that he was unable to give any statement. The accused was again called upon to appear and give a statement on 7th December, 1949, and in regard to which also he sent a report Ex. P-5, that he was still sick and was unable to give a statement.

5. On the accused being charge-sheeted for an offence under section 4 (i) (*a*) of the Madras Prohibition Act that he was found to have been in possession of two full bottles of brandy in his iron safe and a half bottle in a mirror almirah in his house without being covered by permit, he came forward with the version that these bottles were found in the southern room of the house and that his only son, who is D. W. 4, and his wife Jayalakshmi are living separately in that house in that separate room and that the keys for these receptacles were in the possession of Jayalakshmi and that the accused had nothing to do with that southern room or the receptacles and that he should not be construed to have been in possession of these brandy bottles within the meaning of the Madras Prohibition Act rendering him liable to be convicted under section 4 (i) (*a*).

6. Therefore the short point for determination in all the courts is whether the prosecution has brought home possession of these brandy bottles to this accused.

7. The word "possession" as can be summarised from Chapters 13 and 14 (pages 236-267) of Sir John Salmond's Jurisprudence, Chapter XI (pages 162-174) of Holland's Jurisprudence and Markby's "Elements of Law," Chapter IX (pages 177-203) implies a physical capacity to deal with the thing as we like to the exclusion of every one and a determination to exercise that physical power on one's own behalf. These two elements, physical and mental, are described by Roman Jurists as *corpus* and *animus* respectively.

8. But as the Authors of the Indian Penal Code point out in their note appended to their draft of the Indian Penal Code :

"We believe it to be impossible to mark with precision by any words the circumstances which constitute possession. It is easy to put cases about which no doubt whatever exists and in which the language of lawyers and of the multitude would be the same. It will hardly be doubted for example that a gentleman's watch lying on the table in his room is in his possession, though it is not in his hand and though he may not know whether it is on his writing table or on his dressing table ; as little it will be doubted that a watch which a gentleman lost a year ago on a journey and which he has never heard of since is not in his possession. It will not be doubted that when a person gives a dinner his silver forks while in the hands of guests are still in his possession ; and it will be as little doubted that the silver forks are not in his possession when he has deposited them with a pawn-broker as a pledge. But between these extreme cases there will be many cases in which it will be difficult to pronounce with confidence whether the property is or that it is not in a person's possession."

9. A person may have possession of a thing through his representative provided (i) the representative has physical control over the thing ; (ii) the physical control is exercised on behalf of the principal ; and (iii) the principal agrees to such exercise.

10. It is not necessary, however, as shown in the above illustration that this physical power of dealing with the thing should be retained at every moment of time. It would be enough for the purpose of retaining possession if that physical power can be produced at any moment the possessor wishes it. Possession is lost with the loss of physical control. Similarly, it is not necessary that the intention to possess should be constantly in the mind of the person exercising possession. It is enough if the determination to keep is not lost. As soon as that mental element ceases to exist the possession is lost.

11. The case-law on the subject to which we have got to resort to because the Indian Penal Code does not define the word "possession" though section 27 says that when property is in the possession of a person's wife, clerk or servant on account of that person, it is in that person's possession—is not always clear. But if these

cases are rightly studied the principle to be deduced therefrom regarding possession is that a man has not the possession of that the existence of which he is unaware of. Possession implies dominion and consciousness in the mind of the person having dominion over an object that he has it and that he can exercise it. Possession must be conscious and intelligent possession and not merely the physical presence of the accused in proximity or even in close proximity to the object : *Shiwe Kyo* v. *King-Emperor*[1], *Dula Singh* v. *Emperor*[2], *Ramcharan* v. *Emperor*[3], *Kuldipchand* v. *Emperor*[4], *Lakhan Singh* v. *Emperor*[5], *Cyril C. Baker* v. *Emperor*[6], *Jayaramulu Naidu* v. *Emperor*[7], *Emperor* v. *Abdul Ram*[8], *Sarju Prasad* v. *Emperor*[9] and *Sundar Singh* v. *Emperor*[10].

12. The difficulty under this head arises when prohibited articles are recovered from places under joint family possession. It is now however well settled that in the case of a family living jointly in the same house the head of the family is presumed to be in possession of any illicit article found in the house : *Emperor* v. *Mir Ahmed*[11], *Weston* v. *Peary Mohan Das*[12], *Emperor* v. *Mst. Ram*[13], *Harbans Singh* v. *Emperor*[14]. The presumption is rebuttable and the weight attached to it must vary according to circumstances. It can be easily rebutted by showing that the room or receptacle in question was in the particular and exclusive possession of one member of the joint family. Similarly, where two or more persons are charged with joint illegal possession it is incumbent on the State to prove (*a*) that each of the accused had either physical or constructive possession of the property or (*b*) that one or more of them had possession thereof either physical or constructive on behalf of themselves and the other accused to the knowledge of the latter : *Narumal Dayaldas* v. *Emperor*[15] *Mataro* v. *Emperor*[16] and *Dodo Racho* v. *Emperor*[17].

13. This is the line of decisions arising under four important heads, *viz.*, (*a*) section 114, Indian Evidence Act—illustration (*a*) ; (*b*) Arms Act ; (*c*) Abkari Act, and (*d*) Opium Act. It will be remembered that under section 114, illustration (*a*), in order to draw the presumption the possession must be exclusive. But where stolen goods were found in a house inhabited by a joint Hindu family composed of a father, his son, and grandson and the circumstances were such that it was very improbable that such property could possibly have been placed where it was found without the connivance of some or all the members of the family, held that under the above circumstances the conviction of the managing member under section 411, Indian Penal Code, was a proper conviction : *Emperor* v. *Budhlal*[18], *Queen Empress* v. *Sangamlal*[19]. referred to.

In *Algoo Misir* v. *Rex*[20], Saran, J., held that

"to render a person liable to conviction under section 19 (*f*) of the Arms Act, arms should be recovered from his possession or control. Merely because arms are found in a house belonging to a family, it cannot be said that the head of the family who is in possession of the house must also be in possession of the arms in the rooms in the house and is therefore liable. It has to be proved by evidence that the room in which the arms or the offending articles are found or are recovered were indeed in possession of that person or was under his control. It has to be proved that some particular person or individual was in possession or control of the room or that portion of the house from which the arms were recovered in order to justify a conviction under section 19 (*f*)."

Possession of the key of a box containing arms in the house of the accused, must be held to be possession of arms for purposes of section 19 (*f*) of the Arms Act, as the possession of the key of the box by the accused tends to show that the accused must have knowledge of the presence of the arms in the box. Vide *Mahtabali Shah Hussain Shah* v. *Emperor*[21].

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1. (1928) I.L.R. 7 Rang. 11.
2. (1928) I.L.R. 9 Lah. 531 A.I.R. 1928 Lah. 272.
3. A.I.R. 1933 All. 437.
4. A.I.R. 1934 Lah. 718.
5. (1934) I.L.R. 9 Luck. 607 : A.I.R. 1934 Oudh 200.
6. A.I.R. 1930 Cal. 668.
7. (1922) 43 M.L.J. 553 : I.L.R. 45 Mad. 842.
8. I.L.R. (1940) All. 657.
9. (1941) I.L.R. 17 Luck. 577 : A.I.R. 1942 Oudh 270.
10. A.I.R. 1936 Lah. 758.
11. A.I.R. 1937 Pesh. 73.
12. (1912) 40 Cal. 898.
13. A.I.R. 1931 Oudh 115.
14. A.I.R. 1941 Nag. 296.
15. A.I.R. 1936 Sind 44.
16. A.I.R. 1929 Sind 9.
17. A.I.R. 1937 Sind 154.
18. (1907) I.L.R. 29 All. 598.
19. (1893) I.L.R. 15 All. 129.
20. 4 D.L.R. (All.) 264.
21. A.I.R. 1947 Sind 192.

15. Then coming to Bombay Abkari Act, construing section 43 (1) (*a*) (*h*) it was held in *Appa Rama Mali* v. *Emperor*[1], as follows :

"The accused lived jointly with his two brothers in a clump of huts. Of the three huts that were there the middle one was occupied by accused with his family, the two adjoining huts by his two brothers and their families. At the back of the huts there were some fields jointly cultivated by the brothers. In each of three huts were found articles which suggested that the inhabitants were or had been in possession of illicit liquor and in the fields were found some bottles containing liquor and tins of jaggery-wash intended for the preparation of illicit liquor. *Held*, that the only reasonable inference which could be drawn from the possession of the articles would be that the accused or the accused and his brothers were manufacturing illicit liquor and that the possession of these articles which could not be explained on any other hypothesis was for the purpose required by clause (*h*) of section 43 of the Bombay Abkari Act. *Held also*, the fact that the evidence of possession would tell with almost equal force against the brothers of the accused was no ground for holding that possession has not been proved against the accused himself."

If the evidence as to possession is adequate in the case of the accused it does not assist him at all to say that on the same evidence other persons might have been tried and convicted along with him. But when illicit liquor was found in the room occupied for the night by the son and his wife for sleeping, it does not necessarily mean that the son was in the exclusive possession of the room. The legal possession still remains with the father, the house-master, and there is obvious possibility that the liquor was stored there by the father. We must look to attendant circumstances to establish some element of knowledge on the part of the son and if evidence forthcoming is found insufficient, son is not guilty of possession. (*Bholanath Sarma* v. *Emperor*[2], and *Wazir* v. *Emperor*[3]).

16. Similarly, under the Opium Act, it has been held by Thadani, C.J., and Ram Labhaya, J., in *Bolanath Sarma* v. *Emperor*[2], that where substantial amount of opium is found in the bed room of the accused with weighing scales and small weights, knowledge of the presence of the opium in the house can reasonably be attributed to him under section 10, Opium Act. The accused is then required to account satisfactorily for his possession and his failure renders him liable to a conviction under section 9 of the Act. In *Wazir* v. *Emperor*[3], it was held that the possession of the husband does not necessarily connote that the wife also was liable under section 9. Where opium is recovered on a search of the house in which the accused lived with his wife, the husband alone is responsible for the opium discovered and it cannot be presumed that the wife was also jointly in possession with him.

17. To sum up, in the case of a family living jointly in the same house the head of the family will be presumed to be in possession of any illicit article found in the house ; but this presumption is rebuttable and the weight to be attached to it must vary according to the circumstances as laid down in *Emperor* v. *Mir Ahmed*[4], and *Weston* v. *Das*[5]. The strength of the presumption also varies according to the improbabilities that the article owing to its size, etc., should have escaped the notice of the head of the family ; *Harban Singh* v. *Emperor*[6], or it was unlikely that such incriminating article would have been found by chance or that any of the sons could have taken possession of the article and hidden it in the house without informing the father or that such article could have escaped notice or could remain concealed in the house without his knowledge : *Jwala* v. *Emperor*[7], or the nature of the occupation, *Emperor* v. *Ismail*[8], or the nature of the participation of the other members in the manufacture, storing and disposal of the illicit article : *Emperor* v. *Parmidi*[9] and *Nga Shew Toe* v. *Emperor*[10]. Possession in order to justify a conviction under the Abkari Act need not necessarily be exclusive possession : *Appa Rama Mali* v. *Emperor*[1]; *Harsh Nath Chatterjee* v. *Emperor*[11], and *Parmai* v. *Emperor*[12]. The

1. A.I.R. 1934 Bom. 16.
2. A.I.R. 1949 Assam 73.
3. A.I.R. 1935 Pesh. 68.
4. A.I.R. 1937 Pesh. 73.
5. (1912) I.L.R. 40 Cal. 898.
6. A.I.R. 1941 Nag. 296.
7. A.I.R. 1934 All. 548.
8. (1929) I.L.R. 51 All. 747 : A.I.R. 1929 All. 705.
9. (1934) I.L.R. 56 All. 594 : A.I.R. 1934 All. 129.
10. A.I.R. 1937 Rang. 434.
11. (1915) I.L.R. 42 Cal. 1153.
12. A.I.R. 1934 All. 129.

only point that must be proved in all these cases is that the accused or all the accused persons were aware of the presence of the illicit article and had control of the same.

18. Bearing these principles in mind when we examine the evidence in this case we find that the possession of the brandy bottles has been brought home beyond reasonable doubt to this accused. This accused is the head of the undivided family. It was he who rented the house. He was occupying an important position in life and was suffering from heart trouble and a certain amount of weakness for which a particular type of Doctors recommend brandy in small quantities both for bracing of heart as well as to prevent depression and alleviate pain also. The keys for opening the almirah and iron safe were handed over by this accused. It is quite possible as spoken to by the servant of this accused that the keys were in the actual custody of the daughter-in-law as this elderly man may not like to carry about a bunch of keys with him and might have left to his daughter-in-law the household duties of keeping the keys, etc. This would not make that Jayalakshmi the culprit because the suggestion made that these brandy bottles might have been purchased by her for confinement was found to be wholly untrue and her last child was more than a year old at the time of this offence and there is no suggestion that she was carrying. On the other hand, Jayalakshmi's husband comes forward and says that neither his wife nor himself ever took brandy. Similarly, the fact that the articles of Jayalakshmi and her husband have been kept in the safe and the almirah is neither here nor there. It would not disprove the possession of this accused. One significant circumstance showing that the present suggestions are after-thoughts is the fact that this accused stoutly declined to give an explanation regarding the presence of the brandy bottles either on the 5th or on the 7th on the pretext that he was unwell though one would imagine that the fever from which he is stated to have been suffering could not have prevented him from saying in a few words as to how the brandy bottles came into the almirah and the iron safe. Therefore, putting all these circumstances together both the lower Courts rightly found that the accused was in possession of these illicit articles.

19. The conviction is correct and the sentence of imprisonment till the rising of the Court and a fine of Rs. 200 imposed by the Sub-Magistrate are equally correct. I am unable to understand the setting aside of this imprisonment till the rising of the Court, which had already been undergone by the accused, by the District Magistrate (Judicial) of Visakhapatnam. In fact he need not have gone to the extent of setting aside the imprisonment which he could not set aside because this imprisonment till the rising of the Court would not disentitle the accused from getting any of the benefits of gratuity, etc., if otherwise he is entitled to them.

20. There are no grounds to interfere and this criminal revision case is dismissed.

V.P.S. — *Revision case dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

Kannan ... *Prisoner (Accused).**

Penal Code (XLV of 1860), section 300, Explanation 1 and section 304—Beating with shoe—Whether grave and sudden provocation which will convert the offence into culpable homicide not amounting to murder.

In this country if a person were to beat another with a shoe that is considered to be the height of shame and particularly in the midst of number of villagers right in the middle of the street. Where on account of the mothers of the accused and deceased quarrelling with each other the sons joined the fray and when the deceased beat or attempted to beat the accused with a shoe, he retaliated by stabbing the deceased with a pen-knife which he was carrying in his shorts pocket, and where there is no evidence that the accused came on the scene with the object of causing injury to anybody,

Held, the offence is one of culpable homicide not amounting to murder as the accused had grave and sudden provocation.

* R.T. No. 58 of 1952 (Crl. App. No. 342 of 1952). 3rd November, 1952.

Trial referred by the Court of Session of the South Arcot Division for confirmation of the sentence of death passed upon the said Prisoner in case No. 36 of the Calendar for 1952 on 8th August, 1952.

K. Narayanaswamy Mudaliar and *V. Gopala Goundar* for Accused.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

The Judgment of the Court was delivered by

Govinda Menon, J.—This is a case in which there can be no doubt or dispute as to whether the appellant-accused has caused the death of the deceased Kannayiram. But the only point which requires consideration is whether the offence comes within the ambit of section 302, Indian Penal Code or whether it is reduced to one under section 304, Indian Penal Code.

The prosecution case is short and simple. There have been instances of previous ill-feeling between the accused and the deceased. On the 2nd April, 1952, at about 4 P.M., when the deceased his mother P.W. 1 and another person, P.W. 2, were returning from a shandy along the village street, had passed certain houses and approached the house of the accused, the mother of the accused came out and abused the mother of the deceased P.W. 1 in a very vile and foul language. There was exchange of words between the two women. The deceased sat in front of one Arunachala Goundan's house. Thereafter it is stated that the accused's mother advanced with a broomstick and brandished it against the deceased. On hearing this confusion and noise, the accused, who was in his shop, came out and there was exchange of words between the accused and the deceased. Then, P.W. 3 a neighbour, who was there intervened and separated them. At that time the accused is alleged to have taken out a pen-knife from the pocket of his shorts and given a stab to the deceased on the left chest. The injury, according to the doctor, was a very serious one, which resulted in immediate death. The deceased fell down and died instantaneously. P.W. 5, a brother of the deceased, who came on the scene, straightaway went to the Village Munsiff, P.W. 9 and gave him a complaint at 4-30 P.M., which is marked in the case as Ex. P-3. The body of the deceased was taken from the place where he fell down, and put on a cot in the vicinity. The accused is also alleged to have gone straightaway to the Village Munsiff and asked him for protection. The Village Munsiff detained him and sent a report to the Police. The Police Officer P.W 13, arrived on the scene at about 6 A.M., the next day. The accused was in the Village Munsiff's house and was taken into custody. The Sub-Inspector investigated the matter and a charge-sheet was filed against the accused which resulted in a committal to the Sessions Court and subsequent trial by the Sessions Judge. The Sessions Judge found him guilty of an offence under section 302, Indian Penal Code and imposed the extreme penalty of law. Though, according to P.W. 9, the accused admitted the offence of stabbing the deceased and prostrated before P.W. 9 imploring him to save him, both before the Committing Magistrate and the learned Sessions Judge the accused did not admit having stabbed the deceased. He gave a version, which, on the face of it, cannot be accepted. Before the Sessions Judge, he has stated that he was not having any knife and that he did not know what he did in his anger.

The question, which we have to consider, is whether first of all, it was the accused that stabbed the deceased. On this aspect of the case, we have the evidence of the eye-witnesses, P.Ws. 1 to 4. All these witnesses speak about the quarrel and the accused stabbing the deceased. P.Ws. 1 and 2 say that after the deceased was stabbed he took out a shoe from his foot and tried to beat the accused with it. As against this, we have the evidence of P.W. 13, the Sub-Inspector that at the time of the investigation P. W. 1 told him that the deceased began to beat the accused with a sandal and it was then that the accused took out a knife from his shorts pocket and stabbed the deceased. P.W. 13 also deposed that a shoe was recovered from the scene of occurrence. P.W. 1 in cross-examination had to admit that she told the Police that her son threw a sandal at the accused after he was stabbed. So far as P.W. 2 is concerned he also admits that the deceased went a few steps, threw a sandal against the accused, fell down and died. P.W. 3's evidence is to the effect that there was wordy quarrel between the deceased and the accused

and then the accused said that he would beat the deceased with a sandal and that the deceased thereafter took off a shoe and kept in his hands. He further deposed that the deceased attempted to beat the accused with the shoe, but he prevented him from doing so. P.W. 4 in cross-examination had to state that the deceased had a shoe in his hands and went to beat the accused. Though these witnesses now went to say that the incident regarding the attempt to beat with the shoe was after the stab, it seems to us that that portion of the prosecution evidence is not entitled to credence at our hands. It is unlikely that, after the deceased sustained a very serious injury as the one which was inflicted on him, it would have been possible for him to take the shoe from his foot and try to beat the deceased. The Doctor, P.W. 8, says that the injury was an oblique punctured wound 1½ inches by 1 inch on the left side of the chest in the region of the breast, 2 inches internal to the left nipple. According to the doctor the death was due to shock and haemorrhage due to injury of the heart as is evident from the internal examination. When the Doctor says that a small portion of the left lung was protruding through the wound, that the pectoral muscles were pierced through the costal cartillege of the left 4th rib at the junction of the sternum, which was cut through, and that also the intercostal space obliquely extending from 3 inches costo-condral junction to the junction of costal cartillege of the 4th rib with the sternum, the injuries were very severe which fact cannot be disputed. After having received such serious injuries, where the heart and lungs were affected we do not believe that the deceased would have had the strength to attempt to beat the accused with a shoe. What would have happened is, that on account of the mother of the accused and the deceased quarrelling with each other the sons joined the fray and when the deceased either beat or attempted to beat the accused with a shoe, he retaliated by stabbing the deceased with a pen-knife, which he was carrying in his shorts pocket. It may also be remembered that it was the deceased, according to the evidence, that threw out the first challenge. He should have been considered to be the aggressor. In such circumstances we are of opinion that the accused had not only provocation, but such provocation was grave and sudden. In this country if a person were to beat another with a shoe, that is considered to be the height of shame and particularly in the midst of a number of villagers right in the street. We are inclined to hold that the attempt to beat a man with a shoe would give sufficient provocation to the man intended to be beaten. The accused must therefore be said to have had not only grave provocation but sudden provocation as well. There is no evidence to show that the accused came there with the object of causing anybody any injury. The knife which had been produced and which is found stained with human blood is a small pen-knife which is usually carried by persons. It is not the prosecution case that there was any pre-meditation so far as the offence is concerned. In such circumstances we do not feel justified in agreeing with the Sessions Judge that the offence is one of murder for the reasons stated by us above, but we are of opinion that the accused can be found guilty only of an offence under section 304, Indian Penal Code, Part I. We therefore set aside the conviction under section 302, Indian Penal Code and sentence to be hanged by neck; but convict the accused of an offence under section 304, Indian Penal Code and sentence him to rigorous imprisonment for seven years.

V.P.S. ——— *Conviction varied.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AYYAR.

H. Chandanmull and Company .. *Appellant**

v.

Mohambal M. Mehta and others .. *Respondents.*

Limitation Act (IX of 1908), section 5—If applicable to an application filed under the Arbitration Act (X of 1940) to set aside award—Arbitration Act (X of 1940), section 37 (1)—Scope.

The true scope of section 37 (1) of the Arbitration Act, 1940, is that when proceedings are taken before the arbitrator the parties are entitled to plead limitation exactly as if the proceedings had been

* O. S. A. No. 122 of 1951. 27th October, 1952.

taken in a civil Court. That being the scope of that section, its operation should be limited to proceedings before the arbitrator and not to proceedings taken in Court, though they might arise out of arbitration proceedings. Accordingly section 37 (1) does not have the effect of making section 5 of the Limitation Act applicable to an application to set aside an award. There is no power in the Court to extend the time prescribed by Article 158 of the Limitation Act.

On appeal from the order of the Hon'ble Mr. Justice Krishnaswami Nayudu dated 6th November, 1951 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 2355 of 1951 in O.P. No. 66 of 1951.

K. C. Doraiswami for Appellant.

T. T. Srinivasan and *A. N. Rangaswami* for Respondents.

The Judgment of the Court was delivered by

Venkatarama Ayyar, J.—The question that is raised in this appeal is whether section 5 of the Limitation Act is applicable to an application filed under the Indian Arbitration Act to set aside an award. In certain arbitration proceedings to which the appellant was a party an award was pronounced and it was filed on the original side of this Court in O.P. No. 66 of 1951. Notice of this petition was served on the appellant on 27th March, 1951. Article 158 of the Limitation Act provides that an application to set aside an award should be filed within 30 days from the date of the service of the notice of filing of the award. The appellant did not file any application to set aside the award within the time limited by Article 158. The High Court was closed for summer recess on the 28th April, 1951 and on the day of reopening the appellant filed Application No. 2355 of 1951 under section 5 of the Limitation Act for excusing the delay in filing the application to set aside the award. That application was dismissed by Krishnaswami Nayudu, J., on the ground that section 5 of the Limitation Act was inapplicable, and this appeal has been brought against that order of dismissal.

Section 5 of the Limitation Act runs as follows:

"Any appeal or application for a review of judgment or for leave to appeal or any other application to which this section may be applicable by or under any enactment for the time being in force may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfied the Court that he had sufficient cause for not preferring the appeal or making the application within such period."

As we are concerned in these proceedings with an application to set aside an award, the only question to be determined is whether there is any enactment which had made section 5 applicable to such proceedings.

Before the Arbitration Act of 1940 the law was well settled that the Court had no power under section 5 of the Limitation Act to extend the time prescribed by Article 158 for filing an application to set aside an award. That was held by Mookerjee and Holmwood, JJ., in *Surja Narain* v. *Buraxari Jha*[1] and that view was followed by the Lahore High Court in *Devi Ditta* v. *Balu Ram*[2]. The learned Advocate for the appellant does not dispute the correctness of the law as laid down in those decisions. What he contends is that the law has been changed by the Arbitration Act, and under section 37 (1) of the Act properly construed, section 5 of the Limitation Act would be applicable to an application to set aside an award. Section 37 (1) runs as follows:

"All the provisions of the Indian Limitation Act, 1908, shall apply to arbitrations as they apply to proceedings in Court."

The question is, what is the precise meaning of the word "Arbitration" in this section? The contention of the appellant is that arbitration proceedings mentioned in the section include not only proceedings before the arbitrators, but also applications taken out for filing the awards in Court or for setting them aside. He contends that they are also arbitration proceedings and that by virtue of section 37 (1) the provisions of the Limitation Act including section 5 will apply. He relied upon certain observations of the Privy Council occurring in *Ram Dutt Ram Kissen Dass* v. *E. D. Sasoon and Co.*[3] as supporting this position. The facts in that case were

1. (1912) 18 C.L.J. 35.
2. (1927) I.L.R. 8 Lah. 274.
3. (1929) 56 M.L.J. 614 : L.R. 56 I.A. 128 : I.L.R. 56 Cal. 1048 (P.C.).

these. There were certain arbitration proceedings which resulted in an award. But that award was set aside. Subsequently the applicant commenced fresh arbitration proceedings with reference to the same subject-matter. The opposite party pleaded that at the time of the new proceedings an action by the applicant would be barred and that therefore no relief should be granted to him in arbitration proceedings. The applicant pleaded that he was entitled to the benefit of section 14 of the Limitation Act and to deduction of the time taken in the prior arbitration proceedings. It was this question that came up for consideration before the Privy Council. Lord Salvesan held that the applicant was entitled to the benefit of section 14 of the Limitation Act. His Lordship observed that the Limitation Act was in its own terms inapplicable to proceedings before the arbitrators and that if the opposite party was entitled to rely on a plea of limitation based on the Limitation Act the applicant would likewise be entitled to rely on section 14 of that Act. Then occur the observations on which the advocate for the appellant relies :

> " Arbitrations under the Indian Arbitration Act are not prosecuted by filing suits and preferring appeals from the decrees in such suits but by procuring awards and filing them in Court and resisting applications to set them aside."

It is contended on the strength of these observations that proceeding taken in Court for setting aside awards must also be considered to be arbitration proceedings. We are unable to agree that that was what was intended in those observations. The Privy Council was dealing with the question as to whether the provisions of the Limitation Act were applicable to proceedings before the arbitrator. They were not concerned with an application before the Court arising out of arbitration proceedings, and taken in their context the observations do not amount to a decision that an application to set aside an award must be taken to be an arbitration proceeding. The matter has to be decided on an interpretation of the language of section 37 (1). Whatever force there might have been in the contention of the appellant if section 37 (1) had stopped with the words " apply to the arbitrations," it is wholly untenable in view of the words that follow, namely, "as they apply to proceedings in Court". The section makes a sharp distinction between arbitrations and proceedings in Court. Whatever justification there might be for considering an application to set aside an award in a Court as an arbitration proceeding, there can be none for holding it to be not a proceeding in Court. In the context, therefore, the word ' arbitration ' should be limited to proceedings before the arbitrators ; and an application to set aside an award being a proceeding in Court, cannot be held to be an arbitration proceeding. Moreover section 37 (1) is intended to apply to proceedings in arbitration the provisions of the Limitation Act which would otherwise be inapplicable. But even apart from section 37 (1), Article 158 in terms applies to an application to set aside an award. On the construction of the section therefore we are of opinion that " Arbitration " referred to in section 37 (1) cannot include a proceeding taken in Court for setting aside the award.

That this is the correct conclusion will be clear if regard is had to the history of the legislation on the subject. Section 37 (1) is a reproduction of section 16 (1) of the English Arbitration Act of 1934. Before that Act the statutory law in England relating to arbitration contained no provision similar to section 16 (1). In the absence of such a provision the question was raised whether a party could plead limitation in proceedings before the arbitrators. In the decision in In re *Astley and the Tyldesley Coal and Salt Co.*[1], a Bench of the Divisional Court in England had held that it was open to the defendant to plead limitation in proceedings before the arbitrator. That the law laid down in that case was not accepted without question would be clear from the observations of the Court of appeal in the cases reported in *Cayzer Irvine and Company, Limited* v. *Board of Trade*[2] where Scrutton, L.J., in particular expressed doubts as to the correctness of the decision in In re *Astley and the Tyldesley Coal and Salt Co*[1]. When that case was taken in appeal to the House of Lords, Viscount Cave, L.C., observed that it was not necessary in that

1. (1899) 68 L.J. Q.B. 252.
2. (1927) 1 K.B. 269.

case to express an opinion as to whether in In re *Astley and the Tyldesley Coal and Salt Co.*[1] was correctly decided. It was only in 1929 that the Privy Council held in the case reported in *Ramdutt Ramkissen Dass* v. *E D. Sasoon Co.*[2] that the law as laid down in *Cayzer Irving Company, Limited* v. *Board of Trade*[3] was correct. As late as 1931 in Halsbury's Laws of England, Vol. I, page 653, para. 1104 the law on the subject is stated in these terms :—

" In mercantile references it is an implied term of the contract that the arbitrator must decide the dispute according to the existing law of contract and every defence which would have been open in a Court of law can be legally raised for the arbitrator's decision unless the parties have agreed to exclude the defence,"

and the statute of Limitations is mentioned as one of the laws in accordance with which the arbitrators should pronounce their decision. It was in this state of the law that the Arbitration Act of 1934 was enacted and section 16 (1) provided that the rules of limitation applicable to proceedings in Civil Court should also be applicable to proceedings before the arbitrators. It was this provision that has been enacted in section 37 (1) of the Indian Arbitration Act. The true scope of this provision is therefore that when proceedings are taken before the arbitrator the parties are entitled to plead limitation exactly as if the proceeding had been taken in a Civil Court. That being the scope of section 37 (1), its operation should be limited to proceedings before the arbitrator and not to proceedings taken in a Court, though they might arise out of arbitration proceedings. In this view we are of opinion that section 37 (1) does not have the effect of making section 5 of the Limitation Act applicable to an application to set aside the award.

We agree with Krishnaswami Nayudu, J., that there is no power in the Court to extend the time prescribed by Article 158 of the Limitation Act. This appeal is accordingly dismissed. The parties will bear their own costs in the appeal.

K.S. ——— *Appeal dismissed.*

[THE SUPREME COURT OF INDIA.]

[Original Jurisdiction.]

PRESENT:—MEHRCHAND MAHAJAN, S. R. DAS AND N. H. BHAGWATI, JJ.

Boppana Venkateswaraloo, son of Lakshmaiah .. *Petitioner**

v.

Superintendent, Central Jail, Hyderabad State and two others .. *Respondents.*

Preventive Detention Act (IV of 1950), section 11 and section 11-A (inserted by Act LXI of 1952)—Construction and scope—Amendment coming into force only on 30th September, 1952—Order on 22nd September, 1952, extending an existing order of detention up to 30th September to 31st December, 1952—Validity—General Clauses Act (X of 1887), section 22—Applicability—Substantive orders under new Act—If can be passed before the coming into force of such enactment.

The petitioner was served with an order of detention on the 20th October, 1951. The grounds of detention were furnished on the 1st November, 1951. His case was referred to the Advisory Board on the 13th December, 1951. The appropriate Government confirmed the detention on the 21st January, 1952. It specified 31st March, 1952, as the date up to which the detention was to continue. On the 29th March, 1952, the petitioner's detention was extended till the 30th September, 1952, and on 22nd September, 1952, his detention was again extended till 31st December, 1952. It was contended on behalf of the petitioner that on the 22nd September, the State Government had no jurisdiction to make an order of extension so as to continue the detention beyond the 1st October, 1952, *viz.*, beyond the life of the Act then in force and that the order extending the period of detention up to 31st December, 1952, was illegal. On behalf of the State Government the order made on the 22nd September, 1952, was sought to be justified on the ground that it had power to enlarge the period of detention under the provisions of the Preventive Detention (Second Amendment) Act, 1952 (LXI of 1952) and that it could exercise that power after that Act had been passed by the parliament even though the amended Act had not yet come into force.

Held, the order in question extending the period of detention was illegal. Section 22 of the General Clauses Act is an enabling provision its intent and purpose being to facilitate the making of

1. (1899) 68 L.J. Q.B. 252. I.L.R. 56 Cal. 1042 (P.C.).
2. (1929) 56 M.L.J. 614 : L.R. 56 I.A. 128 : 3. (1927) 1 K.B. 261.

* Petition Nos. 335, 350, 356, 362, 366 of 1952. 24th November, 1952.

rules, bye-laws and orders before the date of commencement of an enactment in anticipation of its coming into force. It does not authorise or empower the State Government to pass substantive orders against any person in exercise of the authority conferred by any particular section of the new Act. Orders can only be issued with respect to the time when or the manner in which anything is to be done under the Act. An order for the extension of detention made under the purported exercise of the powers conferred by any of the provisions of the new Act is not an order with respect to the time when or the manner in which anything is to be done under the Act. Such an order could only be made under the Act and after the Act had come into force and not in anticipation of its coming into force. The Act having no retrospective operation, it cannot validate an order made before it came into force.

Held further, when sub-section (2) of the new section 11-A of the Preventive Detention Act refers to specification of a period in the order, it intends to refer to the detention order as confirmed under section 11 (1) and not the initial order of detention. As the existing order of detention was specified to continue up to 30th September, 1952, their detention cannot continue after that date by force of the provisions of sub-section (2) of section 11-A merely because that date by accident or coincidence happens to be identical with the date on which the first amendment Act (1952) was to expire.

The word "shorter" in section 11-A (2) has reference to the 1st April, 1952, or the date of expiry of the period of twelve months mentioned in the section and cannot mean a date antecedent to 30th September, 1952.

Petitions under Article 32 of the Constitution of India for writs in the nature of *Habeas Corpus*.

A. S. R. Chari, Advocate, *amicus curiae*. (The Petitioners were also present.)

R. Ganapathy Iyer, Advocate for Respondents in Petition Nos. 335 and 356 of 1952.

Hanmanth Rao Vaishnav, Advocate for Respondents in Petition Nos. 350, 362 and 366.

C. K. Daphtary, Solicitor-General for India (*P. A. Mehta*, Advocate, with him) for Intervener (Union of India).

The Judgment of the Court was delivered by

Mahajan, J.—This petition and four others, *viz.*, Nos. 350, 356, 362 and 366 of 1952, raise a question regarding the construction of section 11-A, inserted in Act IV of 1950 by the Preventive Detention (Second Amendment) Act (LXI of 1952).

Act IV of 1950, as it originally stood, was to expire on 1st April, 1951, but in that year an amending Act was passed which, among other things, prolonged its life till the 1st April, 1952. A fresh Act was passed in 1952 (Act XXXIV of 1952) called the Preventive Detention (Amendment) Act, 1952. The effect of this Act was to prolong the life of the Act of 1950 for further six months, *viz.*, till the 1st October, 1952. On the 22nd August, 1952, an act further to amend the Preventive Detention Act, 1950, called the Preventive Detention (Second Amendment) Act LXI of 1952, received the assent of the President, by which the life of the Act was extended till the 31st December, 1954. It was to come into force on a date appointed by the Central Government. By a notification dated 15th September, 1952, the Central Government appointed the 30th September, 1952, as the date when the new Act was to come into force.

The petitioner was served with an order of detention on the 20th October, 1951. The grounds of detention were furnished to him on the 1st November, 1951. His case was referred to the Advisory Board on the 24th November, 1951. The Advisory Board submitted its report on the 13th December, 1951. The appropriate Government confirmed the detention on the 21st January, 1952. It specified 31st March, 1952, as the date up to which the detention was to continue. On the 29th March, 1952, the petitioner's detention was extended till the 30th September, 1952 and on the 22nd September, 1952, his detention was again extended till 31st December, 1952. In the other petitions also the last order of extension was made on 22nd September, 1952, extending the detentions till 31st December, 1952. But for this extension the detentions could not continue beyond 30th September, 1952, except by use of the powers under the new Act.

It was contended on behalf of the detenus that on the 22nd September, 1952, the State Government had no jurisdiction to make an order of extension so as to continue the detention beyond the 1st October, 1952, *viz.*, beyond the life of the Act then in force and that the order extending the period of detention upto 31st December, 1952, was illegal. In our opinion, this contention is well founded. On behalf of the State Government the order made on the 22nd September, 1952, was sought to be justified on the ground that it had power to enlarge the period of detention under the provisions of the Preventive Detention (Second Amendment) Act of 1952 and it could exercise those powers after that Act had been passed by the Parliament even though the amended Act had not yet come into force. Reliance for this proposition was placed on the provisions of section 22 of the General Clauses Act (X of 1897). Section 22 provides as follows :

" Where, by any Central Act or Regulation which is not to come into force immediately on the passing thereof, a power is conferred to make rules or bye-laws, or to issue orders with respect to the application of the Act or Regulation . . . ., or with respect to the time when, or the place where or the manner in which . . . . . anything is to be done under the Act or Regulation, then that power may be exercised at any time after the passing of the Act or Regulation ; but rules, bye-laws or orders so made or issued shall not take effect till the commencement of the Act or Regulation."

This section corresponds to section 37 of the English Interpretation Act of 1899. It is an enabling provision, its intent and purpose being to facilitate the making of rules, bye-laws and orders before the date of the commencement of an enactment in anticipation of its coming into force. In other words, it validates rules, bye-laws and orders made before the enactment comes into force provided they are made after the passing of the Act and as preparatory to the Act coming into force. It does not authorize or empower the State Government to pass substantive orders against any person in exercise of the authority conferred by any particular section of the new Act. The words of the section " *with respect to* " prescribe the limit and the scope of the power given by the section. Orders can only be issued with respect to the time when or the manner in which anything is to be done under the Act. An order for the extension of detention made under the purported exercise of the powers conferred by any of the provisions of the new Act is not an order with respect to the time when or the manner in which anything is to be done under the Act. Such an order could only be made under the Act and after the Act had come into force and not in anticipation of its coming into force. The Act having no retrospective operation, it cannot validate an order made before it came into force. It seems to us that the expression " order " in the section means an order laying down directions about the manner in which things are to be done under the Act and it is an order of that nature that can be issued before the Act comes into force but it does not mean that a substantive order against a particular person can be made before the Act comes into force. In our opinion, therefore, the contention raised on behalf of the State Government has no force and the order extending the detention of the detenus on the 22nd September, 1952, upto the 31st December, 1952, is illegal.

The learned Solicitor-General on behalf of the Union Government intervened and contended that the detention of the petitioner as well as of others concerned in the connected petitions was legal because in the initial order of detention made in all these cases no period of detention had been specified and by force of section 11-A (2), the detention of the petitioners stood automatically extended till 1st April, 1953.

Section 10 of the new Act [Preventive Detention (Second Amendment) Act, 1952] adds the new Section 11-A, which is in these terms :

" (1) The maximum period for which any person may be detained in pursuance of any detention order which has been confirmed under section 11 shall be twelve months from the date of detention.

(2) Notwithstanding anything contained in sub-section (1), every detention order which has been confirmed under section 11 before the commencement of the Preventive Detention (Second Amendment) Act, 1952, shall, unless a shorter period is specified in the order, continue to remain in force until the 1st day of April, 1953, or until the expiration of twelve months from the date of detention, whichever period of detention expires later.

(3) The provisions of sub-section (2) shall have effect notwithstanding anything to the contrary contained in section 3 of the Preventive Detention (Amendment) Act, 1952 (XXXIV of 1952), but nothing contained in this section shall affect the power of the appropriate Government to revoke or modify the detention order at any earlier time."

It was suggested that on a grammatical construction of this section the word "order" in sub-section (2) means the initial order of detention and cannot refer to the order of confirmation as no such order is contemplated by the Act. In our opinion, this contention is not sound. It was held by this Court in Petition No. 308 of 1951, *Makkan Singh Tarsikka* v. *The State of Punjab*[1], that the fixing of the period of detention in an initial order of detention is contrary to the scheme of the Act and cannot be supported as it tends to prejudice a fair consideration of the petitioner's case when it is placed before the Advisory Board. That decision was pronounced on the 10th December, 1951 and according to well-known canons of construction of statutes and principles of legislation it has to be presumed that when Parliament enacted section 11-A in Act LXI of 1952 it was aware of the decision of this Court that no period could be specified in the initial order of detention. It follows that when Parliament in sub-section (2) provided that

"every detention order which has been confirmed under section 11 before the commencement of the Preventive Detention (Second Amendment) Act, 1952, shall, unless a shorter period is specified in the order, continue to remain in force"

till a certain date, it plainly intended by the words "the order" to refer, not to the initial order of detention, for no period of detention could legally be specified in that order, but to the order of detention as eventually confirmed under section 11 (1). We are not on any debatable ground when we say that at that stage it is open to an appropriate Government to specify the period of detention in the case of every detenu. We are satisfied that when sub-section (2) refers to specification of a period in the order, it intends to refer to the detention order as confirmed under section 11 (1) and not the initial order of detention.

It was next contended that the period specified in the order in question being coterminous with the date fixed for the life of the Act, the specification of the period was wholly unnecessary and therefore the order of detention could continue till the 1st April, 1953, by force of sub-section (2) of section 11-A in the new Act, as if no period had in fact been specified in the order. This argument cannot be sustained on the language employed in section 11-A (2). The phraseology employed in the section is in sharp distinction to the language employed in section 3 of Act XXXIV of 1952 and if the object was to convey the same intention, then Parliament would have used similar language in section 11-A (2) as in section 3 of Act XXXIV of 1952. That section runs thus :—

"Every detention order confirmed under section 11 of the principal Act and in force immediately before the commencement of this Act shall have effect as if it had been confirmed under the provisions of the principal Act as amended by this Act; and accordingly, where the period of detention is either not specified in such detention order or specified (by whatever form of words) to be for the duration or until the expiry of the principal Act or until the 31st day of March, 1952, such detention order shall continue to remain in force for so long as the principal Act is in force . . . . ."

The Parliament, when it intended to say that if the date specified in an order is coterminous with the life of the Act the detention will continue for a further period automatically, said so in clear and unambiguous language and by use of apt words. It knew that there may be cases in which the date specified for the determination of the detention may be coterminous with the date on which the Act is to expire, and it made a clear provision in section 3 to cover all such cases. In section 11-A (2), however, it simply said that if a shorter period is specified in the order, then the detenu would be entitled to his release on that date. In the order passed against the petitioner and also in the orders passed in the connected petitions, 30th September, 1952, was the date specified up to which detention could continue and that being so, their present detention cannot continue after that date by force of the provisions of sub-section (2) of section 11-A merely because that

1. (1952) S.C.J. 835 ; (1952) S.C.R. 368.

date by accident or coincidence happens to be identical with the date on which the first amendment Act was to expire.

Then it was contended that even if the date up to which detention was to continue was specified in the order, it does not fix a period shorter than 30th September, 1952 (the date on which Act XXXIV of 1952 was to expire), and the detenus are not entitled to the benefit of the provisions of sub-section (2) of section 11-A. This contention is difficult to sustain grammatically. The words " unless a shorter period is specified in the order " clearly have reference to the periods mentioned immediately thereafter, namely, the first April, 1953 or the date of expiry of twelve months from the date of detention. They have no reference at all to the date of expiry of Act XXXIV of 1952. When the attention of the learned Solicitor-General was drawn to the plain reading of the section and the grammar of it, he conceded that the adjective " shorter " there had reference to the 1st April, 1953 or the date of expiry of the period of twelve months mentioned in the section and could not mean a date antecedent to 30th September, 1952.

For the reasons given above, in our Judgment, the detention of the petitioner in this petition and of those in the other petitions mentioned above, after the 30th September, 1952, became illegal and we therefore direct that the petitioners in this petition and in petitions Nos. 350, 356, 362 and 366 of 1952 be released forthwith. They are in detention by reason of the extension order made on the 22nd September extending their detention up to 31st December, 1952. On that date the State Government has no jurisdiction to make that order under the law in force as it stood on that date. 30th September, 1952 had been specified as the date up to which their detention was to last by a subsisting and perfectly valid order and their detention beyond that date is illegal and cannot be justified on the provisions of section 11-A (2) or on the provisions of section 11 (1) of the original Act.

Agent for Respondents in all the petitions and for Interveners : *G. H. Rajadhyaksha.*

G.R./K.S. ——— *Petitions allowed.*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT :—MEHRCHAND MAHAJAN, S. R. DAS AND N. H. BHAGWATI, JJ.

Vishwamitra Press (Karyalaya), Kanpur .. *Appellant**

v.

The Workers of Vishwamitra Press .. *Respondents.*

The State of Uttar Pradesh .. *Intervener.*

Industrial Disputes Act (XIV of 1947), section 3—Industrial Tribunal constituted under—If " Court " within the meaning of Uttar Pradesh General Clauses Act (I of 1904), section 10—Time for giving decision expiring on a holiday—Decision pronounced on next working day—Within time and valid.

An Industrial Tribunal constituted under section 3 of the Industrial Disputes Act, 1947, is a " Court " within the meaning of section 10 of the U. P. General Clauses Act. Where the time within which the decision of the tribunal was to be made, according to the Order promulgated by the State Government and subsequently extended expired on a holiday when the Industrial Court was closed, the decision can be pronounced on the next day on which it was open. Such a decision is well within time valid and binding on the parties.

Appeal from the award dated the 17th November, 1951, made by the Labour Appellate Tribunal of India, Calcutta, in Appeal No. Cal. 280 of 1951.

K. P. Khaitan, Senior Advocate (*Harnam Das*, Advocate, with him), for Appellant.

K. B. Asthana, Advocate, for Respondents.

Gopalji Mehrotra, Advocate, for Intervener.

* Civil Appeal No. 65 of 1952. 2nd December, 1952.

The Judgment of the Court was delivered by

Bhagwati, J.—This is an appeal by special leave against the decision of the Labour Appellate Tribunal, Calcutta, upholding the award made by the State Industrial Tribunal, Uttar Pradesh, with certain modifications.

An industrial dispute arose between the Appellant the Vishwamitra Press Karyalaya, Kanpur and the Respondents, the workers of the Vishwamitra Press as represented by the Kanpur Samachar Patra Karamchari Union, Kanpur, in regard to the alleged victimisation of certain workmen under the guise of retrenchment. That industrial dispute was referred to the Industrial Tribunal, by a notification, dated the 24th April, 1951. The time for making the award expired on the 9th June, 1951 and on the 9th June, 1951, a further notification was issued extending the time for making the award upto the 30th June, 1951. The 30th June, 1951, was a public holiday and the 1st July was a Sunday. The Industrial Tribunal made its award on the 2nd July, 1951 and pronounced it in open Court on that day. It was, however, thought by the Uttar Pradesh Government that the award was beyond time and invalid and on the 18th July, 1951, a notification was issued extending the period upto the 3rd July, 1951. This award was challenged by the appellant before the Labour Appellate Tribunal. The Labour Appellate Tribunal negatived the contentions of the appellant. The appellant applied for special leave which was granted by this Court on the 21st December, 1951, limited to the following grounds :

"(1) The Government had no power to extend the time of the making of award after the expiry of the time originally fixed, and the award made by the Adjudicator after such time is illegal, *ultra vires*, inoperative and void.

(2) In any case the State Government had extended the time for making the award till 30th June, 1951, and the Adjudicator's award made after that date is void.

(3) That the extension of time by the Government on 21st July, 1951, after even the time extended previously had expired, was *ultra vires*, and it could not make a void award as a valid award."

The industrial dispute which arose between the appellant and the respondents was referred by the Uttar Pradesh Government to the Industrial Tribunal in exercise of the powers conferred by sections 3 and 4 of the Uttar Pradesh Industrial Disputes Act, 1947. The Uttar Pradesh Government had in exercise of the powers conferred by section 3 (*d*) of the Act promulgated an order *inter alia* providing for the adjudication of the industrial disputes referred by it to the Industrial Tribunals. Paragraph 16 of that order ran as under :

" The Tribunal or the Adjudicator shall hear the dispute and pronounce its decision within 40 days (excluding holidays observed by Courts subordinate to the High Court) from the date of reference made to it by the State Government, and shall thereafter as soon as possible supply a copy of the same to the parties to the dispute, and to such other persons or bodies as the State Government may in writing direct.

Provided that the State Government may extend the said period from time to time."

Paragraph 9 which prescribed the powers and functions of Tribunals *inter alia* provided :—

" (9) The decision shall be in writing, and shall be pronounced in open Court and dated and signed by the member or members of the Tribunal, as the case may be, at the time of pronouncing it."

It was not disputed before us that the original period calculated in accordance with paragraph 16 above expired on the 9th June, 1951 and the Uttar Pradesh Government validly extended the period upto the 30th June, 1951. It was, however, contended that the Industrial Tribunal should have made its award on the 30th June, 1951 and not on the 2nd July, 1951, as it purported to do. It was urged that the provision as to excluding holidays observed by Courts subordinate to the High Court which obtained in paragraph 16 above did not apply when the period was extended upto a particular date. It would apply only if the period was extended by a particular number of days when for the purpose of the computation of those days the holidays would have to be excluded in the manner therein mentioned. The Uttar Pradesh Government having extended the period upto the 30th June, 1951, it was submitted that the award should have been made by

the 30th June, 1951 and not later and having been made on the 2nd July, 1951, was therefore beyond time and invalid.

This argument might well have prevailed but for the provisions of section 10 of the U.P. General Clauses Act, 1904. That section provides :—

"Where, by any United Provinces Act, any act or proceeding is directed or allowed to be done or taken in any Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or the last day of the prescribed period, the Act or proceeding shall be considered as done or taken on the next day afterwards on which the Court or office is open."

The Industrial Court was closed on the 30th June, 1951, which was declared a public holiday. The 1st July, 1951, was a Sunday and it was competent to the Industrial Court to pronounce its decision on the next day afterwards on which the Industrial Court was open, *i.e.*, the 2nd July, 1951. *Prima facie* therefore the award which was pronounced on the 2nd July, 1951, was well within time.

The only thing which Shri Khaitan, counsel for the appellant, urged before us therefore was that the Industrial Court was not a Court within the meaning of section 10 of the Uttar Pradesh General Clauses Act. The Court according to his submission could only be construed to mean a Court in the hierarchy of the civil Courts of the State and an Industrial Court did not fall within that category. We are unable to accept this contention of Shri Khaitan. The Uttar Pradesh Industrial Disputes Act, 1947, was an Uttar Pradesh Act. The general order, dated the 15th March, 1951, which provided *inter alia* for the reference of the industrial dispute for adjudication and the manner in which it was to be adjudicated, was promulgated by the Uttar Pradesh Government in exercise of the powers conferred upon it by section 3 (*d*) of the Act. Paragraph 9 (9) of the general order provided for the decision being pronounced by the Industrial Tribunal in open Court and we fail to understand how it could ever be urged that the Industrial Tribunal was not a Court within the meaning of section 10 of the U. P. General Clauses Act. If the Industrial Tribunal was thus a Court within the meaning of section 10 of the U. P. General Clauses Act the Court was closed on the 30th June, 1951, as also on the 1st July, 1951, and the decision could be pronounced by the Industrial Court on the next day afterwards on which it was open, *i.e.*, on the 2nd July, 1951. In our opinion therefore the decision which was pronounced on the 2nd July, 1951, was well within time and was valid and binding on the parties.

The above decision is determinative of this appeal, and the appeal will therefore stand dismissed with costs.

Agent for Appellant : *B. P. Maheshwari.*

Agent for Respondents and Intervener : *C. P. Lal.*

G.R./K.S. —————— *Appeal dismissed.*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT :—MEHRCHAND MAHAJAN, S. R. DAS AND N. H. BHAGWATI, JJ.

The Buckingham and Carnatic Company, Ltd. .. *Appellant**

v.

The Workers of the Buckingham and Carnatic Company, Ltd. .. *Respondents.*

Factories Act (XXV of 1934), *section* 49-B (1)—*Workers going on illegal lightning strike for two to four hours in a textile factory (a public utility industry)—If breaks continuity of service so as to deprive them of annual holidays with pay—Industrial Disputes Act (XIV of* 1947), *section* 2 (q)—" *Strike* "—*Essentials.*

Constitution of India (1950), *Article* 136—*Substantial question of law—Test.*

Where it is found on the evidence and the circumstances that there was concert and combination of the workers in stopping and refusing to resume work on a particular day without giving notice to the management in a textile factory which was a public utility industry such stopping will amount to a " strike " within the meaning of section 2 (*q*) of the Industrial Disputes Act. The failure to give notice of stopping work to the management makes the strike illegal. Such interruption of work though for only two to four hours, breaks the continuity of service when the strike is illegal and deprives the workers of their right to annual holidays with pay.

* Civil Appeal No. 89 of 1952. 2nd December, 1952.

Although the Mills in question were exempted from the provisions of Chapter IV-A of the Factories Act, the leave rules being similar to those provisions a construction of such rules involves a substantial question of law to sustain an appeal under Article 136 of the Constitution of India.

On appeal by special leave granted by the Supreme Court from the Judgment dated the 27th June, 1951, of the Labour Appellate Tribunal of India at Calcutta in Appeals Nos. 94 and 142 of 1950 arising out of the award of the Second Industrial Tribunal, Madras and published in the *Fort St. George Gazette*, Madras, dated the 3rd October, 1950.

N. C. Chatterjee, Senior Advocate (*S. N. Mukherjee*, Advocate, with him) for Appellant.

S. C. C. Anthoni Pillai, President, Madras Labour Union, for Respondents.

The Judgment of the Court was delivered by

Mahajan, J.—This is an appeal by special leave from a decision dated 27th June, 1951, of the Labour Appellate Tribunal of India at Calcutta in Appeals Nos. 94 and 138 of 1950, arising out of the award of the Second Industrial Tribunal, Madras.

The relevant facts and circumstances giving rise to the appeal are as follows: On 1st November, 1948, 859 night shift operatives of the carding and spinning department of the Carnatic Mills stopped work, some at 4 P.M., some at 4-30 P.M., and some at 5 P.M. The stoppage ended at 8 P.M. in both the departments. By 10 P.M. the strike ended completely. The apparent cause for the strike was that the management of the Mills had expressed its inability to comply with the request of the workers to declare the forenoon of the 1st November, 1948, as a holiday for solar eclipse. On the 3rd November, 1948, the management put up a notice that the stoppage of work on the 1st November, amounted to an illegal strike and a break in service within the meaning of the Factories Act (XXV of 1934) and that the management had decided that the workers who had participated in the said strike would not be entitled to holidays with pay as provided by the Act. This position was not accepted by the Madras Labour Union. The Madras Government by an Order dated the 11th July, 1949, made under section 10 (1) (*c*) of the Industrial Disputes Act (XIV of 1947), referred this dispute along with certain other disputes to the Industrial Tribunal, Madras. The adjudicator gave the award which was published in the Gazette on 12th October, 1950. By his award the adjudicator found that there could be little doubt that the stoppage of work by the night shift workers on the night of the 1st November, 1948, was a strike, that it was an illegal strike since the textile industry is notified as a public utility industry and there could be no legal strike without a proper issue of a notice in the terms prescribed by the Industrial Disputes Act. No such notice had been given. In view of this finding he upheld the view of the management that the continuity of service of the workers was broken by the interruption caused by the illegal strike and that as a consequence the workers who participated in such strike were not entitled to annual holidays with pay under section 49-B (1) of the Factories Act. He, however, considered that the total deprivation of leave with pay ordered by the management was a severe punishment and on the assumption that he had power to scrutinize the exercise of the discretion by the management in awarding punishment, reduced the punishment by 50 per cent. and held that the workers would be deprived of only half their holidays with pay. The decision of the management was varied to this extent.

The Mills as well as the Union appealed against this decision to the Labour Appellate Tribunal. That Tribunal upheld the contention of the Mills that the adjudicator had no power to interfere with and revise the discretion of the management exercised by it under section 49-B (1). It also upheld the contention of the Union that what happened on the night of the 1st November, did not amount to a strike and did not cause any interruption in the workers' service. This is what the Tribunal said:—

"It would be absurd to hold that non-permitted absence from work even for half an hour or less in the course of a working day would be regarded as interruption of service of a workman for the

purpose of the said section. We are inclined to hold that the stoppage of work for the period for about 2 to 4 hours in the circumstances of the case is not to be regarded as a strike so as to amount to a break in the continuity of service of the workman concerned."

In the result the appeal of the Union on this point was allowed and it was ordered that holidays at full rates as provided for in section 49-A of the Factories Act will have to be calculated in respect of the operatives concerned on the footing that there was no break in the continuity of their service by the stoppage of work on 1st November, 1948.

In this appeal it was contended on behalf of the Mills that on a proper construction of section 49-B (1) of the Factories Act (XXV of 1934) the management was right in its decision that the continuity of service was broken by the interruption caused by the illegal strike and that the workers were not entitled to annual holidays with pay under the said section inasmuch as they would not have completed a period of twelve months' continuous service in the factory, and that the non-permitted absence as a result of concerted refusal to work even for two to four hours in the course of a working day amounts to an illegal strike and consequently an interruption of service of a workman for the purpose of section 49-B.

In our judgment, this contention is well founded. Section 49-B provides—

"Every worker who has completed a period of twelve months continuous service in a factory shall be allowed, during the subsequent period of twelve months, holidays for a period of ten, or, if a child, fourteen consecutive days, inclusive of the day or days, if any, on which he is entitled to a holiday under sub-section (1) of section 35 . . . . . ."

Explanation.—" A worker shall be deemed to have completed a period of twelve months continuous service in a factory notwithstanding any interruption in service during those twelve months brought about by sickness, accident or authorized leave not exceeding ninety days in the aggregate for all three or by a lockout, or *by a strike which is not an illegal strike*, or by intermittent periods of involuntary unemployment not exceeding thirty days . . . . . ."

It is clear that the benefit of this section is not available in cases where the interruption in service is brought about by an illegal strike. Section 2 (*q*) of the Industrial Disputes Act (Act XIV of 1947), defines " strike " as meaning—

" a cessation of work by a body of persons employed in any industry acting in combination, or a concerted refusal, or a refusal under a common understanding, of any number of persons who are or have been so employed to continue to work or to accept employment."

The adjudicator found on the evidence and circumstances of the case that there was concert and combination of the workers in stopping and refusing to resume work on the night of the 1st November. He observed that the fact that a very large number of leave applications was put in for various reasons pointed to the concerted action and that the application given by the workers and their representatives also indicated that they were acting in combination both in striking and refusing to go back to work on the ground that they were entitled to leave for the night shift whenever a half a day's leave was granted to the day shift workers. He further held that the refusal of the workers to resume work in spite of the attempts made by the officers and their own Madras Labour Union representatives indicated that they were not as a body prepared to resume work unless their demand was conceded.

In our opinion, the conclusion reached by the adjudicator was clearly right and the conclusion cannot be avoided that the workers were acting in concert. That being so, the action of the workers on the night of the 1st November, clearly fell within the definition of the expression " strike " in section 2 (*q*) of the Industrial Disputes Act. We have not been able to appreciate the view expressed by the Appellate Tribunal that stoppage of work for a period of two to four hours and such non-permitted absence from work cannot be regarded as strike. Before the adjudicator the only point raised by the Union was that it was a spontaneous and lightning strike but it was not said by them that stoppage of work did not fall within the definition of " strike " as given in the Act. It cannot be disputed that there was a cessation of work by a body of persons employed in the Mills and that they were acting in combination and their refusal to go back to work was concerted. All the necessary ingredients, therefore, of the definition exist in the present case and the stoppage

of work on 1st November, 1948, amounted to a strike. It was not a case of an individual worker's failure to turn up for work. It was a concerted action on the part of a large number of workers. The Appellate Tribunal was thus in error in not regarding it as a strike and it had no discretion not to regard what in law was a strike as not amounting to a strike. If it cannot be denied that the stoppage of work on 1st November, 1948, amounted to a strike, then it was certainly an illegal strike because no notice had been given to the management, the Mills being a public utility industry.

It was contended by the President of the Union, who argued the case on behalf of the workers, that the Factories Act had no application to this case because by a notification of the Government of Madras dated 23rd August, 1946, the Buckingham and Carnatic Mills had been exempted from the provisions of Chapter IV-A of the Act and the provisions of section 49-A and B were not therefore attracted to it and that no substantial question of law in respect to the construction of the section fell to be decided by this Court and that being so, this Court should not entertain this appeal under Article 136 of the Constitution. This contention has no validity. The Mills were granted exemption from the provisions of Chapter IV-A of the Factories Act because their leave rules were in accordance with the provisions of Chapter IV-A of the Factories Act. These rules being in similar terms, the decision of the matter depends on the construction of the rules and this involves a substantial question of law.

Reliance was next placed on section 49-A of the Factories Act which provides that the provisions of the new Act would not operate to the prejudice of any rights which the workers were entitled to under the earlier rules and it was argued that under the leave rules of the Mills which prevailed prior to the coming into force of the Factories Act, the workers were entitled to privilege leave and there was no provision in those rules similar to the one that has been made in section 49-B or in the new rules and that the Mills had no right to deprive them of leave by reason of the strike. This contention cannot be sustained because section 49-A (2) of the Factories Act has no application to the case of the Carnatic Mills in view of the notification dated 23rd August, 1946.

Lastly, it was urged that the stoppage of work on 1st November, 1948, was not a concerted action on the part of the workers and that several workers in their own individual capacity wanted leave on that date. In our opinion, in view of the facts and circumstances detailed in the adjudicator's award this contention cannot be seriously considered. We concur in the view of the facts taken by the adjudicator that the action of the 859 workers on the night of 1st May, 1948, fell within the definition of the word " strike " as given in section 2 (*q*) of the Industrial Disputes Act and it was an illegal strike and the workers thus lost the benefit of holidays that they would have otherwise got under the rules.

The learned counsel for the appellant undertook on behalf of the management *ex gratia* that it would condone the default of the workers on 1st November, 1948, and the cessation of work on that night would not be treated as depriving them of the holidays under the rules and we appreciate the spirit in which this undertaking was given and hope that the workers would also take it in that spirit. The result is that the appeal is allowed, and the decision of the Labour Appellate Tribunal on this point is set aside. In the circumstances of this case we make no order as to costs.

Agent for Appellant: *S. P. Varma.*

G.R./K.S. *Appeal allowed.*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT :—M. PATANJALI SASTRI, C.J., B. K. MUKHERJEA, N. CHANDRASEKHARA AIYAR, VIVIAN BOSE AND GHULAM HASAN, JJ.

D. N. Banerji, Administrator of the Budge Budge Municipality .. *Appellant**

v.

P. R. Mukherjee, Chairman, Industrial Tribunal and others .. *Respondents.*

Industrial Disputes Act (XIV of 1947)—*Question as to dismissal of a Head Clerk and a Sanitary Inspector of a Municipality (who were members of the Municipal Workers' Union) taken up by the Union at whose instance the dispute was referred to an Industrial Tribunal—If " Industrial dispute "—Award of Tribunal—Validity—Interference on application under Articles* 226 *and* 227, *Constitution of India* (1950)—*When proper—Conflict of Act XIV of* 1947 *with Bengal Municipal Act (XV of* 1932), *sections* 66 *and* 67—*Effect.*

A Head Clerk and a Sanitary Inspector of a Municipality were also members of the Municipal Workers' Union. On receipt of complaints against them for negligence, insubordination and indiscipline, the Chairman suspended them, drew up separate proceedings and called for explanations within a specified date. After the explanations were received they were considered at a meeting of the Commissioners and by a majority the Commissioners confirmed the order of suspension and directed the dismissal of the two employees. At the instance of the Municipal Workers' Union who questioned the propriety of the dismissal, the matter was referred by the State of West Bengal to the Industrial Tribunal for Adjudication under the Industrial Disputes Act. The Tribunal made its award that the suspension and punishment of the two employees were cases of victimisation and it directed their reinstatement in their respective offices. The Municipality took the matter to the High Court at Calcutta by means of a writ of *certiorari* under Articles 226 and 227 of the Constitution and having failed to get the award cancelled went on appeal to the Supreme Court under Article 132 (1).

Held : (i) The power to reinstate dismissed employees held in *Western India Automobile Association* v. *Industrial Tribunal, Bombay,* (1949) F.C.R. 321 : (1949) F.L.J. 154 (F.C.), to be within the competence of a Tribunal under the Act, will trench no doubt on the power to appoint and dismiss conferred on the Chairman and Commissioners of Municipalities under sections 66 and 67 of Bengal Municipal Act. But this invasion of the Provincial field of legislation does not however render the Industrial Disputes Act of the Central Legislature invalid as one has to pay regard primarily to the pith and substance of the challenged Act in considering the question of conflict between the two jurisdictions. Industrial and labour disputes are within the competence of the central Legislature, and the impugned Act deals with this subject and not with local Government. *Profulla Kumar Mookherjee* v. *Bank of Commerce, Khulna,* (1947) F.L.J. 34 : L.R. 74 I.A. 23 : (1947) 2 M.L.J. 6 (F.C.), followed.

(ii) Whether on the facts of a particular case the dismissal of an employee was wrongful or justified is a question primarily for the Tribunal to decide. Where the Tribunal has held (as in the instant case) that the dismissals were clear cases of victimisation and hence wrongful, unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under Articles 226 and 227 of the Constitution to interfere.

(iii) The dismissal of the two employees was taken up by their Workers' Union who challenged it as grossly improper. Thus there was a dispute between the employer, *viz.*, the Municipality on the one side and the workmen represented by the Union on the other.

(iv) Having regard to the definitions found in the Industrial Disputes Act, the aim or objective that the Legislature had in view, and the nature, variety and range of disputes that occur between employers and employees it must be held that the definitions in the Act includes also disputes that might arise between Municipalities and their employees in branches of work that can be said to be analogous to the carrying out of a trade or business.

Quaere :—Whether disputes arising in relation to purely administrative work fall within their ambit ? After all whether there is an Industrial Dispute at all is for the Government primarily to find out, for it is only then that it has jurisdiction to refer. Moreover it is not every case of an industrial dispute that the Government is bound to refer. They may refer some but may not also. It is a question of expediency.

(v) The dispute in the instant case was an " industrial dispute " within the meaning of the Act.

Appeal under Article 132 (1) of the Constitution of India from the Judgment and Order dated the 1st June, 1950, of the High Court of Judicature at Calcutta (Harries, C.J. and Banerjee, J.) in Civil Rule No. 563 of 1950 and Original Side Matter No. 25 of 1950.

Panchanan Ghose, Senior Advocate (*A. K. Dutt* and *R. L. Jarafdar,* Advocates, with him), for Appellant.

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* Case No. 282 of 1951. 5th December, 1952.

B. Sen, Advocate, for Respondents Nos. 1 and 2 and *S. N. Mukherjee*, Advocate, for Respondent No. 3.

The Judgment of the Court was delivered by

Chandrasekhara Aiyar, J.—Pratul Chandra Mitra was the Head Clerk, and Phanindra Nath Ghose, the Sanitary Inspector of the Budge Budge Municipality, and they were also members of the Municipal Workers' Union. On receipt of complaints against them for negligence, insubordination and indiscipline, the Chairman of the Municipality suspended them on 13th July, 1949, drew up separate proceedings, and called for an explanation within a specified date. After the explanations were received, they were considered at a meeting of the Commissioners held on 6th July, 1949, and by a majority, the Commissioners confirmed the order of suspension and directed the dismissal of the two employees. At the instance of the Municipal Workers' Union who questioned the propriety of the dismissal, the matter was referred by the State of West Bengal on 24th September, 1949, to the Industrial Tribunal for adjudication under the Industrial Disputes Act. The Tribunal made its award on 13th February, 1950, that the suspension and punishment of the two employees were cases of victimisation, and it directed their reinstatement in their respective offices.

The Municipality took the matter to the High Court at Calcutta by means of a petition for a writ of *certiorari* under Articles 226 and 227 of the Constitution. There were prayers in the petition for quashing the proceedings before the Tribunal, for cancellation of the award, and for an order restraining the authorities from giving effect to the award and from taking any steps in pursuance thereof. At the instance of the High Court, a separate application was filed under Article 227. Both the petitions were heard by Harries, C.J. and Sambhu Nath Banerjee, J.

The points raised before them on behalf of the petitioners were five in all: (*a*) that there was no industrial dispute, and therefore there could be no reference under the Industrial Disputes Act to any Tribunal; (*b*) that the said Act was not applicable to disputes with Municipalities; (*c*) that even if it did, it was *ultra vires*; (*d*) that the Tribunal should not have directed reinstatement of the dismissed employees; and (*e*) that the award was bad on the merits. These contentions were negatived by the learned Judges, and the petitions were dismissed. But leave was granted under Article 132 (1) of the Constitution, and that is how the matter has now come up before us.

It is not necessary to dwell at any length on points (*c*), (*d*) and (*e*). If the Industrial Disputes Act applies to Municipalities and their employees, the power to reinstate dismissed employees, held in *Western India Automobile Association* v. *Industrial Tribunal, Bombay and others*[1] to be within the competence of a Tribunal under the Act, will trench no doubt on the power to appoint and dismiss conferred on the Chairman and Commissioners of Municipalities under sections 66 and 67 of the Bengal Municipal Act. This invasion of the provincial field of legislation does not however render the Industrial Disputes Act of the Central Legislature invalid, as we have to pay regard primarily to the pith and substance of the challenged Act in considering the question of conflict between the two jurisdictions. Industrial and labour disputes are within the competence of the Central Legislature, and the impugned Act deals with this subject and not with local Government. The point is covered by *Profulla Kumar Mookerjee* v. *Bank of Commerce, Ltd., Khulna*[2].

Whether on the facts of a particular case the dismissal of an employee was wrongful or justified is a question primarily for the Tribunal to decide, and here the Tribunal held that the dismissals were clear cases of victimisation and hence wrongful. Unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under Articles 226 and 227 of the Constitution to interfere.

1. (1949) F.C.R. 321 : 1949 F.L.J. 154 (F.C.). 74 I.A. 23 (P.C.).
2. (1947) F.L.J. 34 : (1947) 2 M.L.J. 6 : L.R.

Points (*a*) and (*b*) are interlaced. The dismissal of the two employees was taken up by the Municipal Workers' Union who challenged it as grossly improper. Thus it is clear that there was a dispute between the employer, *viz.*, the Municipality on the one side and the workmen represented by the Union on the other. But what is urged by the Municipality is that it was not an "industrial dispute" within the meaning of the Act, and hence there was no jurisdiction in the Government to refer the dispute to a Tribunal. It is contended on their behalf that the Municipality in discharging its normal duties connected with local self-government is not engaged in any industry as defined in the Act. It is this question that we have to consider, and for this purpose it becomes necessary to examine rather closely some of the provisions in the Act to ascertain their true scope and meaning.

"Industry" and "Industrial dispute" are defined in the Act in section 2, clauses (*j*) and (*k*) as follows:

"(*j*) 'industry' means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen;

(*k*) 'industrial dispute' means any dispute or difference between employers and employees, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person."

As clause (*k*) refers to workmen, we must also look at the definition of "workman" in clause (*s*) which is in these terms:

"'workman' means any person employed (including an apprentice) in any industry to do any skilled or unskilled manual or clerical work for hire or reward and includes, for the purposes of any proceedings under this Act in relation to an industrial dispute, a workman discharged during that dispute, but does not include any person employed in the naval, military or air service of the Government."

Corresponding definitions of "trade dispute" and "workman" are found in section 8 of the Industrial Courts Act, 1919 (9 and 10, George 5), and they run in these terms:

"The expression 'trade dispute' means any dispute or difference between employers and workmen, or between workmen and workmen connected with the employment or non-employment, or the terms of the employment or with the conditions of labour of any person:

The expression 'workman' means any person who has entered into or works under a contract with an employer whether the contract be by way of manual labour, clerical work, or otherwise, be expressed or implied, oral or in writing, and whether it be a contract of service or of apprenticeship or a contract personally to execute any work or labour."

"Trade dispute" as defined in the English Act and "industrial dispute" as defined in our Act mean the same thing practically.

It has to be conceded, even at the outset, that an industry can be carried on by or under the authority of the Central, or State Government, or by or on behalf of a local authority. This is made clear not only by the provision in sub-clause (i) of clause (*a*) of section 2 but also by the definition of "employer" in clause (*g*) to the following effect:

"'employer' means—

(i) in relation to an industry carried on by or under the authority of any department of the Central Government or a State Government, the authority prescribed in this behalf, or where no authority is prescribed, the head of the department;

(ii) in relation to an industry carried on by or on behalf of a local authority, the chief executive officer of that authority;"

Where a dispute arises in such an industry between the employees on the one side and the Central Government or the State or the local body on the other, it would be an industrial dispute undoubtedly. But where a dispute arises in connection with the discharge of the normal activities of Government or of a local body, it is argued for the appellant that the dispute cannot be regarded as an industrial dispute. The soundness of this contention falls to be examined.

In the ordinary or non-technical sense, according to what is understood by the man in the street, industry or business means an undertaking where capital

and labour co-operate with each other for the purpose of producing wealth in the shape of goods, machines, tools, etc., and for making profits. The concept of industry in this ordinary sense applies even to agriculture, horticulture, pisciculture and so on and so forth. It is also clear that every aspect of activity in which the relationship of employer and employee exists or arises does not thereby become an industry as commonly understood. We hardly think in terms of an industry, when we have regard for instance, to the rights and duties of master and servant, or of a Government and its secretariat, or the members of the medical profession working in a hospital. It would be regarded as absurd to think so; at any rate, the layman unacquainted with advancing legal concepts of what is meant by industry would rule out such a connotation as impossible. There is nothing however to prevent a statute from giving the word "industry" and the words "industrial dispute" a wider and more comprehensive import in order to meet the requirements of rapid industrial progress and to bring about in the interests of industrial peace and economy, a fair and satisfactory adjustment of relations between employers and workmen in a variety of fields of activity. It is obvious that the limited concept of what an industry meant in early times must now yield place to an enormously wider concept so as to take in various and varied forms of industry, so that disputes arising in connection with them might be settled quickly without much dislocation and disorganisation of the needs of society and in a manner more adapted to conciliation and settlement than a determination of the respective rights and liabilities according to strict legal procedure and principles. The conflicts between capital and labour have now to be determined more from the standpoint of status than of contract. Without such an approach, the numerous problems that now arise for solution in the shape of industrial disputes cannot be tackled satisfactorily, and this is why every civilised government has thought of the machinery of Conciliation Officers, Boards and Tribunals for the effective settlement of disputes.

It is therefore incumbent on us to ascertain what the statute means by "industry" and "industrial dispute," leaving aside the original meaning attributed to the words in a simpler state of society, when we had only one employer perhaps, doing a particular trade or carrying on a particular business with the help of his own tools, material and skill and employing a few workmen in the process of production or manufacture, and when such disputes that occurred did not go behind individual levels into acute fights between rival organisations of workmen and employers, and when large scale strikes and lock-outs throwing society into chaos and confusion were practically unknown. Legislation had to keep pace with the march of times and to provide for new situations. Social evolution is a process of constant growth, and the State cannot afford to stand still without taking adequate measures by means of legislation to solve large and momentous problems that arise in the industrial field from day to day almost.

These remarks are necessary for a proper understanding of the meaning of the terms employed by the statute. It is no doubt true that the meaning should be ascertained only from the words employed in the definitions, but the set-up and context are also relevant for ascertaining what exactly was meant to be conveyed by the terminology employed. As observed by Lord Atkinson in *Keats Lewis Merthyr* v. *Consolidated Collieries*[1],

"In the construction of a statute it is, of course, at all times and under all circumstances permissible to have regard to the state of things existing at the time the statute was passed, and to the evils, which as appears from its provisions, it was designed to remedy."

If the words are capable of one meaning alone, then it must be adopted, but if they are susceptible of wider import, we have to pay regard to what the statute or the particular piece of legislation had in view. Though the definition may be more or less the same in two different statutes, still the objects to be achieved not only as set out in the preamble but also as gatherable from the antecedent history

1. (1911) A.C. 641.

of the legislation may be widely different. The same words may mean one thing in one context and another in a different context. This is the reason why decisions on the meaning of particular words or collection of words found in other statutes are scarcely of much value, when we have to deal with a specific statute of our own; they may be helpful, but cannot be taken as guides or precedents.

The words "industrial dispute" convey the meaning to the ordinary mind that the dispute must be such as would affect large groups of workmen and employers ranged on opposite sides on some general questions on which each group is bound together by a community of interests—such as wages, bonuses, allowances, pensions, provident fund, number of working hours per week, holidays and so on. Even with reference to a business that is carried on, we would hardly think of saying that there is an industrial dispute where the employee is dismissed by his employer and the dismissal is questioned as wrongful. But at the same time, having regard to the modern conditions of society where capital and labour have organised themselves into groups for the purpose of fighting their disputes and settling them on the basis of the theory that in union is strength, and collective bargaining has come to stay, a single employee's case might develop into an industrial dispute, when as often happens, it is taken up by the trade union of which he is a member, and there is a concerted demand by the employees for redress. Such trouble may arise in a single establishment or a factory. It may well arise also in such a manner as to cover the industry as a whole in a case where the grievance, if any, passes from the region of individual complaint into a general complaint on behalf of all the workers in the industry. Such widespread extension of labour unrest is not a rare phenomenon but is of frequent occurrence. In such a case, even an industrial dispute in a particular business becomes a large scale industrial dispute, which the Government cannot afford to ignore as a minor trouble to be settled between the particular employer and workman.

When our Act came to be passed, labour disputes had already assumed big proportions, and there were clashes between workmen and employers in several instances. We can assume therefore that it was to meet such a situation that the Act was enacted, and it is consequently necessary to give the terms employed in the Act referring to such disputes as wide an import as reasonably possible. Do the definitions of "industry," "industrial dispute" and "workmen" take in the extended significance, or exclude it? Though the word "undertaking", in the definition of "industry" is wedged in between business and trade on the one hand and manufacture on the other, and though therefore it might mean only a business or trade undertaking, still it must be remembered that if that were so, there was no need to use the word separately from business or trade. The wider import is attracted even more clearly when we look at the latter part of the definition which refer to "calling, service, employment, or industrial occupation or avocation of workmen." "Undertaking" in the first part of the definition and "industrial occupation or avocation" in the second part obviously mean much more than what is ordinarily understood by trade or business. The definition was apparently intended to include within its scope what might not strictly be called a trade or business venture.

Another provision in the Act defining "public utility service" and contained in sub-clause (*n*) of section 2 is very relevant, and important in the interpretation of "industry" and "industrial dispute," and it is to the following effect:

"'public utility service' means—

(i) any railway service;

(ii) any section of an industrial establishment, on the working of which the safety of the establishment or the workmen employed therein depends;

(iii) any postal, telegraph or telephone service;

(iv) any industry which supplies power, light or water to the public;

(v) any system of public conservancy or sanitation;

(vi) any industry specified in the Schedule which the appropriate Government may, if satisfied that public emergency or public interest so requires, by notification in the official Gazette declare

to be a public utility service for the purposes of this Act, for such period as may be specified in the notification :

Provided that the period so specified shall not, in the first instance, exceed six months but may, by a like notification, be extended from time to time, by any period not exceeding six months, at any one time if in the opinion of the appropriate Government public emergency or public interest requires such extension."

A public utility service such as railways, telephones and the supply of power, light or water to the public may be carried on by private companies or business corporations. Even conservancy or sanitation may be so carried on, though after the introduction of local self-government this work has in almost every country been assigned as a duty to local bodies like our Municipalities or District Boards or Local Boards. A dispute in these services between employers and workmen is an industrial dispute, and the proviso to section 10 lays down that where such a dispute arises and a notice under section 22 has been given, the appropriate Government shall make a reference under the sub-section. If the public utility service is carried on by a corporation like a municipality which is the creature of a statute, and which functions under the limitations imposed by the statute, does it cease to be an industry for this reason? The only ground on which one could say that what would amount to the carrying on of an industry if it is done by a private person ceases to be so if the same work is carried on by a local body like a Municipality is that in the latter there is nothing like the investment of any capital or the existence of a profit-earning motive as there generally is in a business. But neither the one nor the other seems a *sine qua non* or necessary element in the modern conception of industry.

In specifying the purpose to which the municipal fund is applicable, section 108 of the Bengal Municipal Act (XV of 1932) enumerates under 36 separate heads several things such as the construction and maintenance of streets, lighting, water supply, conservancy, maintenance of dairy farms and milk depots, the taking of markets on lease, etc. They may be described as the normal functions or ordinary activities of the Municipality. Some of these functions may appertain to and partake of the nature of an industry, while others may not. For instance, there is a necessary element of distinction between the supply of power and light to the inhabitants of a Municipality and the running of charitable hospitals and dispensaries for the aid of the poor. In ordinary parlance, the former might be regarded as an industry but not the latter. The very idea underlying the entrustment of such duties or functions to local bodies is not to take them out of the sphere of industry but to secure the substitution of public authorities in the place of private employers and to eliminate the motive of profit-making as far as possible. The levy of taxes for the maintenance of the services of sanitation and conservancy or the supply of light and water is a method adopted and devised to make up for the absence of capital. The undertaking or the service will still remain within the ambit of what we understand by an industry though it is carried on with the aid of taxation, and no immediate material gain by way of profit is envisaged.

In *National Association of Local Government Officers* v. *Bolton Corporation*[1], after referring to the definitions of "trade dispute" and "workman" contained in the order of reference to the National Arbitration Tribunal and pointing out that they are identical with and have the same meaning as the definitions contained in the Industrial Courts Act, 1919, Lord Wright observed as follows at page 184 of the Report :

"The appellants contended that they include the members of the appellant trade union. The respondents disputed this because, they said, the definitions do not include employees of a public or local authority like the respondents, and, in particular, such employees who are engaged in professional, technical or administrative services. In my opinion, the respondents' contention would unduly narrow and limit the wide connotation which should here be given to 'trade' and to 'workman.' Section 11 of the Act of 1919 shows that 'trade' is used as including 'industry' because it refers to a trade dispute in the industry of agriculture. The same inference appears from the short title. It is described as an Act to provide for the establishment of an Industrial Court in connexion with trade disputes. Trade and industry are thus treated as interchangeable terms. Indeed 'trade' is not only in the etymological or dictionary sense, but in legal usage, a term of the widest scope. It is connected originally with the word 'tread' and indicates a way of life or an occupation. In

1. (1943) A.C. 166.

ordinary usage it may mean the occupation of a small shopkeeper equally with that of a commercial magnate. It may also mean a skilled craft. It is true that it is often used in contrast with a profession. A professional worker would not ordinarily be called a tradesman, but the word 'trade' is used in the widest application in the appellation 'trade unions.' Professions have their trade unions. It is also used in the Trade Boards Act to include industrial undertakings. I see no reason to exclude from the operation of the Industrial Courts Act the activities of local authorities, even without taking into account the fact that these authorities now carry on in most cases important industrial undertakings. The order expressly states in its definition section that 'trade or industry' includes the performance of its functions by a 'public local authority.' It is true that these words are used in Part III, which deals with 'recognized terms and conditions of employment,' and in Part IV, which deals with 'departures from trade practices' in 'any industry or undertaking,' and not in Part I, which deals with 'national arbitration' and is the part material in this case, but I take them as illustrating what modern conditions involve—the idea that the functions of local authorities may come under the expression 'trade or industry.' I think the same may be said of the Industrial Courts Act and of Reg. 58-AA, in both of which the word 'trade' is used in the very wide connotation which it bears in the modern legislation dealing with conditions of employment, particularly in relation to matters of collective bargaining and the like."

The justification for this rather long quotation is that it deals with the specific point now in issue before us.

The same question as the one now before us came up for decision in an Australian case reported in *Federated Municipal and Shire Council Employees' Union of Australia v. Melborne Corporation*[1], and the judgments of some of the learned Judges are instructive. There was a Union called the Federated Municipal and Shire Council Employees' Union of Australia, which was registered as an organisation under the Commonwealth Conciliation and Arbitration Act, 1914-1915 as having been constituted in connection with municipal and shire councils, municipal trusts and similar industries. The organisation made claims in respect of work done by its members employed by certain municipal corporations in respect of the making, maintenance, control, and lighting of public streets. The original reference stated the dispute as one which "relates to such operations of the said municipal corporations as do not consist of municipal trading," but it was subsequently amended during argument by substituting for the words "as do not consist of municipal trading" the words "as consist of the making, maintenance, control and lighting of public streets or any of them." Two points were argued before the High Court. The first one raised the question of the existence and extent of the immunity of municipalities as instrumentalities of Government of the States, but it has no relevance here. The second point which is material was whether the employees of municipalities could be said to be engaged in an industrial dispute within the meaning of section 51, sub-section 35 of the Constitution. The corporations contended that they were not carrying on any industry but only the normal functions assigned to them under the statute, and that there was therefore no industrial dispute that could be referred to the arbitration Court. The meaning of the words "industrial disputes" used in the said sub-section had therefore to be ascertained and adjudged. The majority of the learned Judges—four against two—decided in favour of the Union. Each side put forward an extreme contention. For the claimant it was urged that "industrial" meant simply "relating to industry in the abstract," whether it be in the exercise of trade, commerce, science or learned professions. The corporations contended that "industrial dispute" meant a "trade dispute," and that "trade dispute" meant "a dispute in trade carried on by the employer for profit." A formula midway between these two extremes was postulated in these terms by Isaccs and Rich, JJ., who were two out of the four who constituted the majority :

"Industrial disputes occur when, in relation to operations in which capital and labour are contributed in co-operation for the satisfaction of human wants and desires, those engaged in co-operation dispute as to the basis to be observed, by the parties engaged, respecting either a share of the product or any other terms and conditions of their co-operation."

After giving copious extracts from the report of the Royal Commission appointed in 1890 in England to deal with labour problems, they summed up their final conclusion in these words at page 564 :

1. 26 Commonwealth Law Reports 508.

"The question of profit-making may be important from an income-tax point of view, as in many municipal cases in England; but, from an industrial dispute point of view, it cannot matter whether the expenditure is met by fares from passengers or from rates."

Dealing with the insistence by the corporations of the need for the profit-making motive as an essential element before one can say that a trade dispute or industrial dispute has arisen, Powers, J., who was also the Deputy President of the Arbitration Tribunal observed :

"So far as the question in this case is concerned, as the argument proceeded the ground mostly relied upon (after the Councils were held not to be exempt as State instrumentalities) was that the work was not carried on by the municipal corporations for profit in the ordinary sense of the term, although it would generally speaking be carried on by the Councils themselves to save contractors' profits. If that argument were sufficient, then a philanthropist who acquired a clothing factory and employed the same employees as the previous owner had employed would not be engaged in an occupation about which an industrial dispute could arise, if he distributed the clothes made to the poor free of charge or even if he distributed them to the poor at the bare cost of production. If the contention of the respondents is correct, a private company carrying on a ferry would be engaged in an industrial occupation. If a municipal corporation carried it on, it would not be industrial. The same argument would apply to baths, bridge-building, quarries, sanitary contracts, gas-making for lighting streets and public halls, municipal building of houses or halls, and many other similar industrial undertakings. Even coal-mining for use on municipal railways or tramways would not be industrial work if the contention of the respondents is correct. If the works in question are carried out by contractors or by private individuals it is said to be industrial, but not industrial within the meaning of the Arbitration Act or Constitution if carried out by municipal corporations. I cannot accept that view."

Having regard to the definitions found in our Act, the aim or objective that the Legislature had in view, and the nature, variety and range of disputes that occur between employers and employees, we are forced to the conclusion that the definitions in our Act include also disputes that might arise between municipalities and their employees in branches of work that can be said to be analogous to the carrying out of a trade or business. It is unnecessary to decide whether disputes arising in relation to purely administrative work fall within their ambit. After all, whether there is an industrial dispute at all is for the Government primarily to find out, for it is only then it has jurisdiction to refer. Moreover, it is not every case of an industrial dispute that the Government is bound to refer. They may refer some, but may not also. It is a question of expediency.

There was no ground urged before us or before the High Court that the sanitary Inspector and the Head Clerk of the Municipality were officers and not "workmen" within the meaning of the Act. The dispute raised on their behalf by the Workers' Union of which they were members is, in our view, an "industrial dispute" within meaning of the Act.

The order of the High Court is affirmed, and this appeal is dismissed with costs only one set to be shared between Respondent 2 and Respondent 3.

Agent for Appellant: *Sukumar Ghose.*

Agent for Respondents Nos. 1 and 2: *P. K. Bose.*

Agent for Respondent No. 3: *P. K. Chatterjee.*

G.R./K.S. *Appeal dismissed.*

[THE SUPREME COURT OF INDIA.]

[Original Jurisdiction.]

PRESENT :—M. PATANJALI SASTRI, C.J., B. K. MUKHERJEA, N. CHANDRASEKHARA AIYAR, VIVIAN BOSE AND GHULAM HASAN, JJ.

Mrs. Godavari Parulekar w/o Shamrao V. Parulekar .. *Petitioner**

v.

The State of Bombay and two others .. *Respondents.*

Preventive Detention Act (IV of 1950) as amended by Act (LXI of 1952), section 11-A (2)—Scope—Order of detention without specifying any period and order of confirmation on the 4th January, 1952, which also did not specify any period—Detention if can be continued by virtue of newly added section 11-A (2) up to 31st March, 1953—Section 11-A (2)—Classification if discriminatory or bad as offending Articles 14 and 22 (7) (b) of the Constitution of India (1950).

Where *G* was detained on 16th October, 1951, under the Preventive Detention Act under an Order which merely said that *G* be detained without specifying any period and the order of confirmation passed on the 4th January, 1952, also did not specify any period, the detention can validly be continued under section 11-A which was added in 1952 to the original Act till the 1st of April, 1953. There is no "shorter period" specified in the order. It cannot be said that there is any discriminatory classification (by reason of longer or shorter periods of detention) in section 11-A (2) such as would render it bad as offending Articles 14 and 22 (7) (*a*) of the Constitution.

(Under Article 32 of the Constitution of India for a writ in the nature of *habeas corpus.*)

The Petitioner in person.

M. C. Setalvad, Attorney-General for India (*G. N. Joshi* and *P. A. Mehta*, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Bose, J.—This is a *habeas corpus* petition under Article 32 of the Constitution.

The petitioner was detained on the 16th of October, 1951, under the Preventive Detention Act of 1950 as amended in 1951. Her detention was actually longer than this but the earlier detentions were under a different set of orders which are not relevant to the present matter. The present detention is based on an order of the District Magistrate, Thana, and merely says that the petitioner be detained, without specifying any period. The order of confirmation was passed on the 4th of January, 1952, and there again no period was specified. The petitioner's case is that as no period was specified in the order her period of detention expired on the 31st of March, 1952, because of the amending Act of 1951 ; or at the outside of the 30th of September, 1952, because of Act XXXIV of 1952, which effected a further amendment.

The reply on behalf of the State of Bombay is that the Preventive Detention Act of 1950 was again amended by Act LXI of 1952 and that the effect of this amendment was to carry the petitioner's detention on to the 31st of March, 1953, because of section 11-A which was added to the original Act of 1950.

The petitioner counters by saying that the new Act does not apply to cases in which the order of detention is not silent about its duration and so section 11-A does not serve to extend the period of her detention. She relies on the following portion of section 11-A (2) :

"... every detention order which has been confirmed under section 11 before the commencement of the Preventive Detention (Second Amendment) Act, 1952, shall, *unless a shorter period is specified in the order*, continue to remain in force until the 1st day of April, 1953 . . . . . ."

The petitioner concedes that no shorter period is specified in her order of detention but contends that as her detention would have expired either on the 31st of March, 1952 or the 30th of September, 1952, one of those two dates must now be read into the order and when that is done we have an order which specifies a shorter period, therefore section 11-A (2) does not serve to extend her detention.

* Petition No. 399 of 1952. 5th December, 1952.

We are unable to accept this contention. The section is clear and unless a shorter period is specified in the *order*, section 11-A (2) applies. We cannot add the words "or must be deemed to have been specified by reason of the expiry of the earlier Act" into the section. We hold therefore that section 11-A (2) validly extended the period of detention till the 1st of April, 1953.

The petitioner's next point is based on Articles 14 and 22 (7) (*b*) of the Constitution. It arises in this way. Section 3 (1) (*a*) of the Preventive Detention Act of 1950 classifies grounds of permissible detention into three categories. Article 22 (7) (*b*) empowers Parliament to prescribe the maximum period for which any person may "in any class or classes of cases" be detained. The petitioner argues that this permits only one maximum for each class and that if different maxima are provided for "equals" within a class it offends not only Article 22 (7) (*b*) but also Article 14 as interpreted by the decisions of this Court. She next argues that section 11-A, now introduced by the second amending Act of 1952 (Act LXI of 1952), does just that and so is *ultra vires*. Her point is put as follows.

Sub-section (1) of section 11-A states that the maximum period for which any person may be detained in pursuance of any detention order which has been confirmed under section 11 shall be twelve months from the date of detention. But sub-section (2) qualifies this by dividing detentions into two classes: (*a*) those in which the detention order was confirmed before 30th September, 1952 and (*b*) those in which the confirmation was after that date, and it provides that in the former case, unless a shorter period is specified in the order, the detention shall continue either till the 1st of April, 1953 or for twelve months from the date of detention, whichever expires later. This, she says, introduces a fresh classification which divides detentions into those before the Act and those after. That she says is *ultra vires*, first, because it introduces a discriminatory classification in the class to which she belongs under section 3 of the Act and, second, because it entails discrimination even in the fresh class into which she has been thrown by the new sub-division made by the second amending Act of 1952.

As regards the first point, the *ratio decidendi* in *Shamrao V. Parulekar* v. *The District Magistrate, Thana and others*[1], applies here. In that case, detentions were divided into those which had already been considered by an Advisory Board and those which had not. This was upheld. The dividing line here is different, namely a certain date, but the principle is the same and its reasonableness is apparent from a consideration of the various amendments which have been made from time to time.

The life of the Act of 1950, which was the principal Act, was extended till the 1st of October, 1952, by section 2 of the amending Act (Act XXXIV of 1952), and the effect of section 3 was to prolong the life of all detentions in force on 14th March, 1952 (provided they had been confirmed before that date) for so long as the principal Act was in force. At that date this meant till the 1st of October, 1952. But the second amending Act of 1952 extended the life of the principal Act till the 31st of December, 1954. Therefore, in the absence of section 11-A all those detentions would have been extended till that date. But section 11-A modified that and put 1st April, 1953, as the latest date for these old detentions. It therefore conferred a benefit and cannot be deemed unreasonable. Sub-section (3) of section 11-A shows that that was the object.

But the petitioner attacked the provisions on the ground of discrimination. She said that even assuming the new classification of detentions into those before and after the 30th September, 1952, to be good, section 11-A is nevertheless discriminatory because it discriminates amongst those in her class, namely those whose detentions were made and confirmed before the 30th of September. She put it in this way.

Taking the case of her own detention, she pointed out that, if section 11-A is good, it will continue till the 1st of April, 1953, that is to say, her detention will have

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1. (1952) S.C.R. 683 at 691 and 693: 1952 S.C.J. 476.

been for a period of 17½ months from the 16th of October, 1951, till the 1st of April, 1953. On the other hand, a person detained after her on, say, the 1st of September, 1952, would also be due for release on the 1st of April, 1953, and so would have had only six months' detention.

This, in our opinion, is not discrimination within the meaning of Article 14. A maximum can be fixed, either by specifying a particular period, such as twelve months, or by setting an outside limit, and it is inevitable in such a case that the length of detention will vary in each individual case. Those taken into detention at a later date are bound to be detained for a shorter time. Government is not bound to detain everybody for the same length of time. It has a discretion. Moreover, the appropriate Government has been left power to revoke or modify the detention order at any earlier time. This point was considered in *Shamrao V. Parulekar* v. *The District Magistrate, Thana and others*[1] and was decided against the detenu.

The petitioner endeavoured to have her application reopened on the merits contending again that the grounds of detention are vague. She relies on *Shamrao V. Parulekar* v. *The State of Bombay*[2], where another detenu was released by another Bench of this Court in circumstances which, according to her, are very similar. We are unable to allow this as her petition has already been rejected on the merits. She was only allowed to appear on constitutional points. We understand that in the other petition this fact was not brought to the notice of the Court.

The application is dismissed.

Agent for Respondents : *G. H. Rajadhyaksha.*

G.R./K.S. —————— *Application dismissed.*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT :—M. PATANJALI SASTRI, C.J., B. K. MUKHERJEA, N. CHANDRASEKHARA AIYAR, VIVIAN BOSE AND GHULAM HASAN, JJ.

T. B. Ibrahim, Proprietor, Bus Stand, Tanjore .. *Appellant**

v.

The Regional Transport Authority, Tanjore .. *Respondent.*

Motor Vehicles Act (IV of 1939), section 68 and Madras Motor Vehicles Rules, rule 268 (as amended)—Scope—Validity of rule 268—Power of Transport Authority to shift bus stand thereby ousting a private stand owner—Madras District Municipalities Act (V of 1920), section 270—Effect—Order if repugnant to Fundamental rights under Article 19 (1) (g) of the Constitution—Consultation required by rule 268 (Madras Motor Vehicles Rules)—Nature and scope of.

The purpose of Chapter IV of the Motor Vehicles Act is described by the compendious expression ' control of transport vehicles' and the Provincial Government is invested with plenary powers to make rules for carrying out that purpose. Keeping in view the purpose underlying the chapter it cannot be held that the fixing or alteration of bus stands is foreign to that purpose.

Sub-section 2 (*r*) of section 68 prohibits the picking up or setting down of passengers at specified places, in specified areas and at places other than duly notified stands or halting places. If the power to make rules in regard to these matters is given to the Government, then it follows that a specified place may be prohibited from being used for picking up or setting down passengers. This will inevitably result in the closing of that specified place for the purpose of picking up or setting down of passengers. Similarly a specified area may be excluded for the same purpose. The expression ' duly notified stands ' is not defined in the Act, but it is reasonable to presume that a duly notified stand must be one which is notified by the Transport Authority and by none else. There is no warrant for the presumption that it must be notified by the Municipality.

Section 270 of the District Municipalities Act empowering the Municipality to construct cart stands and halting places, etc., do not affect the power of the Transport Authority to regulate traffic control or impose restrictions upon the licence of any such cart stand. Rule 268 (as amended) of the Madras Motor Vehicles Rules conferring power on the Transport Authority to direct the fixing or alteration of a bus stand is within the powers conferred under section 68 of the Act and it cannot be challenged as being void because it is not consistent with some general law.

1. (1952) S.C.R. 683 at 691 and 693 ; 1952 S.C.J. 476.

2. Petition No. 86 of 1952.

* Civil Appeal No. 16 of 1952. 5th December, 1952.

The order challenging the termini of bus routes from an existing stand owned by a private citizen cannot be said to be repugnant to Article 19 (1) (g) of the Constitution. The restriction on the use of bus stands cannot be said to be unreasonable. Whether the abolition of a stand was conducive to public convenience or not is a matter entirely for the transport authority to judge, and it is not open to the Court to substitute its own opinion for the opinion of the authority, which is in the best position having regard to its knowledge of local conditions to appraise the situation.

The consultation of the local body required under rule 268 of the Madras Motor Vehicles Rules is not obligatory but only discretionary. The fact that the Municipality is owner of a new bus stand does not render the Municipality not the proper public body to be consulted.

The fact that the District Collector in his executive capacity presided over the meeting of the Transport Authority in the exercise of his normal functions and also opened the new municipal stand which he was entitled to do as the head of the District, does not affect the validity or fairness of the order complained of.

On Appeal from the Judgment and Order dated the 6th February, 1951, of the High Court of Judicature at Madras (Rajamannar, C.J. and Somasundaram, J.) in Civil Miscellaneous Petition No. 11307 of 1950, arising out of the Order dated the 10th November, 1950, made in C. No. 2216-A-3-49 on the file of the Regional Transport Authority, Tanjore.

G. R. Jagadisa Iyer, Advocate, for Appellant.

V. K. T. Chari, Advocate-General of Madras (*V. V. Raghavan*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Ghulam Hasan, J.—This appeal brought by special leave under Article 136 (1) of the Constitution is directed against the order dated 6th February, 1951, of the High Court of Judicature at Madras, dismissing the petition of the appellant under Article 226, praying for the issue of a writ of *certiorari* to quash the order dated 10th November, 1950, passed by the respondent in the following circumstances :—

The appellant is the lessee of a site in the town of Tanjore in the State of Madras upon which he has a bus-stand. The bus-stand originally belonged to the Tanjore Municipality and the appellant merely held a licence from that authority. Later on, the title of the Municipality to the site was questioned by a third party and in a civil litigation which ensued the title to the Municipality was negatived. Thereupon the appellant obtained the lease-hold right of the site from the true owner and constructed a bus-stand conforming to the design approved by the municipality. Besides sheds for passengers and vehicles it provided other amenities. It was situate near the Railway Station and most of the buses leaving Tanjore for out-station journeys used this bus-stand both as the starting point and the terminus. It appears that the site was approved as convenient and suitable for the bus-stand both by the Municipality and the District authorities for buses plying from and into Tanjore. The appellant held the licence for running the bus-stand year after year. In 1939 the Municipality granted him a licence for four months only instead of one year as required by section 270 (*c*) of the Madras District Municipalities Act (V of 1920), and the appellant succeeded in vindicating his right for a whole year's licence in the Civil Court by obtaining the relief for injunction and an order directing the issue of a licence against the municipality for 1940-41. The appellant carried on the business without let or hindrance until 1950 when the Municipality refused to renew his licence, whereupon he obtained a mandatory injunction from the Civil Court directing the Municipality to grant him a licence for the year 1950-51. This decree was passed on 7th October, 1950.

On 21st February, 1950, however, the Regional Transport Authority, Tanjore, which is the respondent in the present appeal, declared the bus-stand as unsuitable with effect from 1st April, 1950, and altered the starting and the terminal points from that date. This order resulted in the closing of the appellant's bus-stand. This decision which was given by means of a resolution was confirmed subsequently by another resolution passed on 31st March, 1950. The appellant challenged the validity of these resolutions by a petition under Article 226 before the Madras High Court on the ground that they were passed without jurisdiction and were

contrary to the principles of natural justice as they were passed without notice to the appellant and without giving him an opportunity to defend his right. The resolutions purported to have been passed under section 76 of the Motor Vehicles Act, 1939, which runs thus :—

> "The Provincial Government or any authority authorized in this behalf by the Provincial Government may, in consultation with the local authority having jurisdiction in the area concerned, determine places at which motor vehicles may stand either indefinitely or for a specified period of time, and may determine the places at which public service vehicles may stand either indefinitely or for a specified period of time, and may determine the places at which public service vehicles may stop for a longer time than is necessary for the taking up and setting down of passengers."

The Division Bench of the Madras High Court consisting of the learned Chief Justice and another learned Judge quashed the two orders as prayed for by the appellant on the grounds that the orders were passed *ex parte*, and that section 76 did not authorize the respondent to close the bus-stand. In the opinion of the Bench, section 76 deals with provision for parking places and halting stations and has no application to a permanent bus-stand which is a sort of a radiating centre of all the bus traffic for the town. It was held therefore that the Regional Transport Authority could not under section 76 fix starting and terminus places for motor-buses.

Reference was made in the course of the arguments to rule 268, Madras Motor Vehicles Rules, 1940, and the learned Judges observed that though the rule does empower the Transport Authority to fix starting places and termini between which public service vehicles other than motor cars shall be permitted to be used, but that this could be done only if starting places and termini had not already been fixed in accordance with the provisions of any Statute. In the present case as these had already been fixed in accordance with rule 27-D, Motor Vehicles Rules, 1923, the Transport Authority could not fix new starting places and termini under rule 268 of the rules passed in 1940. The Bench pointed out that the rule was defective and would lead to an impasse if the starting places and termini already fixed become unsuitable and have to be shifted. Accordingly they suggested that the rule should be amended and a provision introduced conferring on the appropriate authority the requisite power to alter from time to time the starting places and termini . . . . See *T. E. Ebrahim Sahib* v. *The Regional Transport Authority, Tanjore*[1].

It appears that, within two months of the decision of the High Court, rule 268 was amended by the Government. Before the decision of the High Court was given, the bus-stand was shifted to a place belonging to the Municipality in another area. Rule 268 as it originally stood ran thus :—

> " In the case of public service vehicles (other than motor cabs) if starting places and termini have not been fixed in accordance with the provisions of any statute, the transport authority may, after consultation with such other authority as it may deem desirable, fix starting places and termini between which such vehicles shall be permitted to be used within its jurisdiction. A list of such places shall be supplied by such authority to every holder of a permit for such vehicles.
>
> When such places have been fixed, every such vehicle shall start only from such places."

By the amendment the words " if starting places and termini have not been fixed in accordance with the provisions of any statute " were deleted, and the words " and after notice to the parties affected, fix or alter from time to time for good and proper reasons," were added. As amended, the rule runs thus :—

> " 268. In the case of public service vehicles (other than motor cabs) the Transport Authority may after consultation with such other authority as it may consider desirable, and after notice to the parties affected, fix or alter from time to time for good and proper reasons, the starting places and termini between which such vehicles shall be permitted to be used within its jurisdiction. A list of such places shall be supplied by such authority to every holder of a permit for such vehicles at the time of grant of or renewal of permits.
>
> When such places have been fixed, every such vehicle shall start only from such places."

The respondent then issued a notice to the appellant on 25th October, 1950, to show cause why the bus-stand should not be shifted, the grounds given being that

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1. (1950) 2 M.L.J. 592 : A.I.R. 1951 Mad. 419.

it was not satisfactorily maintained and was situated in a limited space which was inadequate to accommodate all the buses using the stand and that it did not permit of any improvements being carried out. The appellant filed a long written statement objecting to the notice and challenging the grounds, whereupon the respondent issued a fresh notice on 2nd November, 1950, in which the original grounds were dropped and were substituted by the ground 'from the point of convenience of the travelling public.' After hearing the appellant and the Municipality, the Board passed a resolution on 10th November, 1950, that for good and proper reasons, namely, the convenience of the travelling public, the Transport Authority had resolved to alter the starting places and termini of all public service vehicles (other than motor cabs) arriving at and proceeding from Tanjore from the existing bus-stand owned by the appellant to the Municipal bus-stand in another area of the town. This order led to another petition being filed in the High Court at Madras, praying for a writ of *certiorari* under Article 226. The appellant questioned the jurisdiction of the Transport Authority to pass the order in question. It was contended before the High Court that rule 268 as amended was itself *ultra vires*, firstly, because it was beyond the rule-making power conferred by section 68, sub-rule (*r*) of the Motor Vehicles Act, and secondly because it was repugnant to Article 19 (1) (*g*) of the Constitution. Both these contentions were rejected by the High Court and the petition was dismissed.

The contentions raised before the High Court have been repeated before us. We are satisfied that there is no good ground for differing from the view taken by the High Court. The Motor Vehicles Act contains 10 Chapters. Chapter IV of the Act deals with control of transport vehicles. Section 47 (1) lays down that the Regional Transport Authority shall, in deciding whether to grant or refuse a stage carriage permit, have regard to the following matters, namely :

(*a*) the interest of the public generally ;

(*b*) to (*f*)..............................

Section 48 says that the Regional Transport Authority after consideration of the matters set forth in section 47, may attach to a stage carriage permit any prescribed condition or any one or more of the following conditions. Various conditions are set out one of which (v) is material for our purposes. It is to the effect "that within Municipal limits and in such other areas and places as may be prescribed, passengers shall not be taken up or set down at or except at specified points." The material portion of section 68 may be set out here :—

"(1) A Provincial Government may make rules for the purpose of carrying into effect the provisions of this Chapter.

(2) Without prejudice to the generality of the foregoing power, rules under this section may be made with respect to all or any of the following matters, namely :—

* * *

(*r*) Prohibiting the picking up or setting down of passengers by stage or contract carriages at specified places or in specified areas or at places other than duly notified stands or halting places****;"

It is obvious from a plain reading of sub-section (1) that the Government has got full power to make rules, for the purpose of carrying into effect the provisions contained in Chapter IV relating to the control of transport vehicles and according to sub-section 2 without prejudice to this power, the Government has the power to frame rules with respect to matters set out in 2 (*a*) to (*za*). It is significant to note that the Act does not follow the ordinary mode of providing at the end of the Act that the Government is empowered to make rules for the purpose of carrying into effect the provisions of the Act but at the end of each of the Chapters, including Chapter IV, the power has been reserved to the Provincial Government to make rules for the purpose of carrying into effect the provisions of the Chapter. The purpose of Chapter IV is described by the compendious expression 'control of transport vehicles' and the Provincial Government is invested with plenary powers to make rules for carrying out that purpose. Keeping in view the purpose underlying the Chapter we are not prepared to hold that the fixing or alteration of bus-stands is foreign to that purpose.

It was contended that section 68, sub-section 2 (*r*) does not confer the power upon the transport authority to direct the fixing or the alteration of a bus-stand and that rule 268 of the rules framed under that section was, therefore, *ultra vires.* We are not prepared to accede to this contention. Sub-section 2 (*r*) clearly contemplates three definite situations. It prohibits the picking up or setting down of passengers

(i) at specified places,

(ii) in specified areas, and

(iii) at places other than duly notified stands or halting places.

If the power to make rules in regard to these matters is given to the Government, then it follows that a specified place may be prohibited from being used for picking up or setting down passengers. This will inevitably result in the closing of that specified place for the purpose of picking up or setting down of passengers. Similarly a specified area may be excluded for the same purpose. The expression 'duly notified stands' is not defined in the Act, but it is reasonable to presume that a duly notified stand must be one which is notified by the Transport Authority and by none other. There is no warrant for the presumption that it must be notified by the Municipality. Reference was made to sections 270 (*b*), 270 (*c*) and 270 (*e*), 1, 2 and 3 of the Madras District Municipalities Act V of 1920, and it was argued that the authority which is clothed with a power to fix a stand, is the Municipality. Section 270 (*b*) empowers the Municipal Council to construct or provide halting places and cart-stands, and the latter according to the Explanation appended to the section includes a stand for motor vehicles as well. Section 270 (*c*) merely says that where a Municipal Council has provided a public landing place, halting place or cart-stand, the executive authority may prohibit the use for the same purpose by any person within such distance thereof, as may be determined by the Municipal Council, of any public place or the sides of any public street. Section 270 (*e*) lays down that no person can open a new private cart-stand or continue to keep open a private stand unless he obtains from the Council a licence to do so. These provisions do not affect the power of the Transport Authority to regulate traffic control or impose restrictions upon the licence of any such cart-stand. If rule 268 is therefore within the power of the rule-making authority, it follows that it cannot be challenged as being void because it is not consistent with some general law.

Reliance was placed on a passage at page 299 of Craies on Statute Law as laying down that a by-law must not be repugnant to the statute or the general law. But by-laws and rules made under a rule-making power conferred by a statute do not stand on the same footing, as such rules are part and parcel of the statute itself.

Section 68, sub-section 2 (*r*) involves both a general prohibition that the stand will cease to exist as well as a particular prohibition, namely, that passengers shall not be picked up or set down at a specified point. The order passed by the Transport Authority properly construed falls within the ambit of section 68, sub-section 2 (*r*). Rule 268 under which the order impeached was passed is a rule framed under the plenary rule-making power referred to in section 68, sub-section 1. Sub-section 2 (*za*) says that a rule may be made with respect to any other matter which is to be or may be prescribed. This shows the existence of residuary power vested in the rule-making authority. It follows therefore that rule 268 is within the scope of the powers conferred under section 68 of the Act.

The next contention was that the order is repugnant to Article 19 (1) (*g*) of the Constitution, according to which all citizens must have the right to practise any profession or to carry on any occupation, trade or business. It cannot be denied that the appellant has not been prohibited from carrying on the business of running a bus-stand. What has been prohibited is that the bus-stand existing on the particular site being unsuitable from the point of view of public convenience, it cannot be used for picking up or setting down passengers from that stand for out-stations journeys. But there is certainly no prohibition for the bus-stand

being used otherwise for carrying passengers from the stand into the town, and *vice-versa*. The restriction placed upon the use of the bus-stand for the purpose of picking up or setting down passengers to outward journeys cannot be considered to be an unreasonable restriction. It may be that the appellant by reason of the shifting of the bus-stand has been deprived of the income he used to enjoy when the bus-stand was used for outward journeys from Tanjore, but that can be no ground for the contention that there has been an infringement of any fundamental right within the meaning of Article 19 (1) (*g*) of the Constitution. There is no fundamental right in a citizen to carry on business wherever he chooses and his right must be subject to any reasonable restriction imposed by the executive authority in the interest of public convenience. The restriction may have the effect of eliminating the use to which the stand has been put hitherto but the restriction cannot be regarded as being unreasonable if the authority imposing such restriction had the power to do so. Whether the abolition of the stand was conducive to public convenience or not is a matter entirely for the transport authority to judge, and it is not open to the Court to substitute its own opinion for the opinion of the authority, which is in the best position, having regard to its knowledge of local conditions to appraise the situation.

It was next contended that rule 268, if it is held to be *intra vires*, was not complied with as the Transport Authority could pass such an order only after consultation with such other authority as it may deem desirable. It is admitted that the Transport Authority consulted the Municipality before passing the order in question. Rule 268 therefore was fully complied with. But then it is urged that the Municipality was not the proper authority in the circumstances as it was a partisan to the dispute and had been endeavouring to oust the appellant from the bus-stand in order to set up its own bus-stand. The Municipality is a public body interested in public welfare and if it sought the assistance of the Government or the Transport Authority to shift the bus-stand, it was actuated only by the demands of public interest. It was possible for the Transport Authority to consult the District Board or the Panchayat as suggested for the appellant, but it was not bound to do so. We do not think that in consulting the Municipality the Transport Authority acted otherwise than within the scope of its powers. Further according to the language employed the consultation is not obligatory but only discretionary.

It was suggested that the act of the Municipality was *mala fide* and reference was made to paragraphs 18 and 19 of the appellant's affidavit dated 20th November, 1950. They refer merely to the vagueness of the ground of public convenience and to the amendment of the rule not being *bona fide*. There is, however, no material, to support this suggestion. The mere fact that in the first notice certain grounds were mentioned which were not adhered to in the second notice and convenience of the travelling public was alone mentioned as the ground cannot lead to the inference that the order was *mala fide*. The rule was amended in pursuance of the suggestion of the High Court in order to overcome the difficulty which arose in the absence of requisite power to alter the bus-stands. It is significant that no allegation about *mala fides* was made before the High Court and the question was never discussed there. In the petition for special leave to appeal though there is reference to the ground of inconvenience being vague, yet there is no suggestion of *mala fides*. The question about *mala fides* appears to have been raised for the first time in paragraph 4 (*f*) and (*g*) of the statement of the case. We hold that the plea of *mala fides* has not been substantiated by any evidence.

It was also urged that the resolution is invalid as the District Collector who presided over the meeting of the Transport Authority which passed this resolution had opened the new Municipal Bus-stand on 1st April, 1950. The suggestion is that he did not bring to bear upon the question an impartial and unbiased mind. The District Collector was not acting in the exercise of judicial or quasi-judicial functions so that his action can be subjected to the scrutiny which is permissible in the case of a judicial officer. He was acting purely in his executive capacity and his

conduct in presiding over the meeting of the Transport Authority in the exercise of his normal functions and also opening the Municipal stand which he was entitled to do as the head of the District, does not affect the validity or fairness of the order complained against. We do not think there is any merit in this contention.

Accordingly we dismiss the appeal with costs.

Agent for Appellant: *M. S. K. Sastri.*

Agent for Respondent: *G. H. Rajadhyaksha.*

Appeal dismissed.

[THE SUPREME COURT OF INDIA.]

[Original Jurisdiction.]

PRESENT:—MEHRCHAND MAHAJAN, B. K. MUKHERJEA, S. R. DAS, N. CHANDRASEKHARA AYYAR AND N. H. BHAGWATI, JJ.

Aswini Kumar Ghose and another .. *Petitioners**

v.

Arabinda Bose and another .. *Respondents.*

Contempt of Court—Article in newspaper criticising a recent decision of the Supreme Court and attributing improper motives to the Judges—Contempt.

When an article in a newspaper criticising a recent decision of the Supreme Court proceeded to attribute improper motives to the judges, it not only transgressed the limits of fair and *bona fide* criticism but had a clear tendency to affect the dignity and prestige of the Court. Such an article constitutes a gross contempt of Court.

Andre Paul v. *Attorney-General of Trinidad,* (1936) 71 M.L.J. 665 : A.I.R. 1936 P.C. 141 (P.C.), followed.

(The unconditional apology of the Editor, Printer and the Publisher of the paper was accepted and proceedings dropped.)

In the matter of Contempt of Court proceedings against the Editor, Printer and Publisher, " *Times of India* " (Daily), Bombay and Delhi for publishing a leading article in their paper of the 30th October, 1952, entitled " A Disturbing Decision ".

M. C. Setalvad, Attorney-General for India (*P. A. Mehta,* Advocate, with him), *amicus curiae.*

N. C. Chatterjee, Senior Advocate (*Nur-ud-Din Ahmad* and *A. K. Dutt,* Advocates, with him), for the Contemners.

The Order of the Court was pronounced by

Mahajan, J.—In its issue of the 30th October, 1952, the " *Times of India* ", a daily newspaper published in Bombay and New Delhi, a leading article was published under the heading " A Disturbing Decision ". The burden of it was that in a singularly oblique and infelicitous manner the Supreme Court had by a majority decision tolled the knell of the much maligned dual system prevailing in the Calcutta and Bombay High Courts by holding that the right to practise in any High Court conferred on advocates of the Supreme Court, made the rules in force in those High Courts requiring advocates appearing on the Original Side to be instructed by attorneys inapplicable to them. The article concluded with the following passage:—

" The fact of the matter appears to be that in the higher legal latitudes at New Delhi and elsewhere, the dual system is regarded as obsolete and anomalous. There is a tell tale note at the top of the rules framed by the Supreme Court for enrolment of advocates and agents to the effect that the rules were subject to revision and the judges had under consideration a proposal for abolishing the dual system. Abolish it by all means if the system has outgrown its usefulness and is found incongruous in the new setting of a democratic constitution. But to achieve a dubious or even a laudable purpose by straining the law is hardly edifying. Politics and policies have no place in the pure region of the law; and Courts of law would serve the country and the Constitution better by discarding all extraneous considerations and uncompromisingly observing divine detachment which is the glory of law and the guarantee of justice."

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* Petition No. 160 of 1952, *In re.* 12th December, 1952.

No objection could have been taken to the article had it merely preached to the courts of law the sermon of divine detachment. But when it proceeded to attribute improper motives to the judges, it not only transgressed the limits of fair and *bona fide* criticism but had a clear tendency to affect the dignity and prestige of this Court. The article in question was thus a gross contempt of Court. It is obvious that if an impression is created in the minds of the public that the judges in the highest Court in the land act on extraneous considerations in deciding cases, the confidence of the whole community in the administration of justice is bound to be undermined and no greater mischief than that can possibly be imagined. It was for this reason that the rule was issued against the respondents.

We are happy to find that the Editor, Printer and the Publisher of the paper in their respective affidavits filed in these proceedings have frankly stated that they now realize that in the offending article they had exceeded the limits of legitimate criticism in that words or expressions which can be construed as casting reflection upon the Court and constituting contempt had crept into it. They have expressed sincere regret and have tendered unreserved and unqualified apology for this first lapse of theirs. We would like to observe that it is not the practice of this Court to issue such rules except in very grave and serious cases and it is never over-sensitive to public criticism; but when there is danger of grave mischief being done in the matter of administration of justice, the animadversion cannot be ignored and viewed with placid equanimity. In this matter we are of the same opinion as was expressed by their Lordships of the Privy Council in *Andre Paul* v. *Attorney-General of Trinidad*[1], where they observed as follows :—

"The path of criticism is a public way; the wrong-headed are permitted to err therein; provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken comments of ordinary men."

In view of the unconditional apology tendered by the respondents and the undertaking given by them to give wide publicity to their regret, we have decided to drop further proceedings and we accept the apology and discharge the rule without any order as to costs.

Agent for Contemners : *Rajinder Narain.*

Rule discharged.

[THE SUPREME COURT OF INDIA.]

[Appellate Jurisdiction.]

PRESENT :—M. PATANJALI SASTRI, *Chief Justice*, B. K. MUKHERJEA, N. CHANDRASEKHARA AYYAR, VIVIAN BOSE AND GHULAM HASAN, JJ.

The State of Madras .. *Appellant**

v.

C. P. Sarathy and The South Indian Cinema Employees' Association .. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 10—Scope—Power of Government to refer disputes—Essentials for exercise of—Reference without specifying the disputes—Validity—Award by tribunal—Prosecution for non-implementation after expiry of award—Legality.

Non-implementation of an award is an offence made punishable under section 29 of the Industrial Disputes Act which is a permanent statute and when a party committed the alleged breach of some of the terms of the award which was in force at the time, that party incurred the liability to be prosecuted under the Act. The fact that the award subsequently expired cannot affect that liability.

The disputes referred to a Tribunal under section 10 (1) (*c*) of the Act, in order that the resulting award may be binding on any particular industrial establishment and its employees, need not have actually arisen between them.

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1. (1936) 71 M.L.J. 665 : A.I.R. 1936 P.C. 141 (P.C.).

* Case No. 86 of 1951. 5th December, 1952.

Section 10 of the Act does not require that the particular dispute should be mentioned in the order of reference of the Government, it is sufficient if the existence of a dispute and the fact that the dispute is referred to the Tribunal are clear from the order. This is, however, not to say that the Government will be justified in making a reference under section 10 (1) without satisfying itself on the facts and circumstances brought to its notice that an industrial dispute exists or is apprehended in relation to an establishment or a definite group of establishment engaged in a particular industry. It is also desirable that the Government should wherever possible indicate the nature of the dispute in the order of reference. But it must be remembered that in making a reference under section 10 (1) the Government is doing an administrative act and the fact that it has to form an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its function does not make it any the less administrative in character. The Court cannot therefore canvas the order of reference closely to see if there was a judicial or quasi-judicial determination. No doubt, it will be open to a party seeking to impugn the resulting award to show that what was referred by the Government was not an industrial dispute within the meaning of the Act, and that, therefore, the Tribunal had no jurisdiction to make the award. But, if the dispute was an industrial dispute as defined by the Act, its factual existence and the expediency of making a reference in the circumstances of a particular case are matters entirely for the Government to decide upon, and it will not be competent for the Court to hold the reference bad and quash the proceedings for want of jurisdiction merely because there was, in its opinion, no material before the Government on which it could have come to an affirmative conclusion on those matters.

No obligation can be held to lie on the Government to ascertain particulars of the disputes before making a reference under section 10 (1) or to specify them in the order.

In view of the increasing complexity of modern life and the interdependence of the various sectors of a planned national economy, it is obviously in the interest of the public that labour disputes should be peacefully and quickly settled within the framework of the Act rather than by resort to methods of direct action which are only too well calculated to disturb the public peace and order and diminish production in the country, and Courts should not be astute to discover formal defects and technical flaws to overthrow such settlements.

(1951) 1 M.L.J. 527, reversed.

Appeal under Article 132 (1) of the Constitution of India from the Judgment[1] and Order, dated the 15th November, 1950, of the High Court of Judicature at Madras (Menon and Sayeed, JJ.) in Criminal Miscellaneous Petition No. 1278 of 1950.

V. K. T. Chari, Advocate-General of Madras (*Ganapathy Iyer*, Advocate, with him), for Appellant.

K. S. Krishnaswamy Iyengar, Senior Advocate (*K. Venkataramani*, Advocate, with him), for Respondent No. 1.

The Court delivered the following

JUDGMENTS : *Patanjali Sastri, C.J.* (*Mukherjea, Chandrasekhara Aiyar and Ghulam Hasan, JJ., concurring*).—This is an appeal from an order of the High Court of Judicature at Madras quashing certain criminal proceedings instituted in the Court of the Third Presidency Magistrate, Madras, against the first respondent who is the managing director of a cinema company carrying on business in Madras under the name of "Prabhat Talkies."

The proceeding arose out of a charge-sheet filed by the police against the first respondent for an offence under section 29 of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act). The charge was that the first respondent failed to implement certain terms of an award, dated 15th December, 1947, made by the Industrial Tribunal, Madras, appointed under the Act and thereby committed a breach of those terms which were binding on him.

The first respondent raised a preliminary objection before the Magistrate that the latter had no jurisdiction to proceed with the enquiry because the award on which the prosecution was based was void and *ultra vires* and void on the ground that the reference to the Industrial Tribunal which resulted in the award was not made by the Government in accordance with the requirements of section 10 of the Act. As the Magistrate refused to deal with the objection as a preliminary point, the first respondent applied to the High Court under Article 226 of Constitution for a writ of *certiorari* to quash the proceeding pending before the

1. (1951) 1 M.L.J. 527.

Magistrate. The application was heard in the first instance by a single Judge who referred the matter to a Division Bench in view of the important questions involved, and it was accordingly heard and decided by Govinda Menon and Basheer Ahmed Sayeed, JJ., who upheld the objection and quashed the proceeding by their order[1] dated 15th November, 1950. From that order the State of Madras has preferred this appeal.

The second respondent, the South Indian Cinema Employees' Association (hereinafter referred to as the Association) is a registered trade union whose members are employees of various cinema companies carrying on business in the State of Madras. Among these are the 24 cinema houses operating in the City of Madras, including the "Prabhat Talkies". On 8th November, 1946, the Association submitted to the Labour Commissioner of Madras, who had also been appointed as the Conciliation Officer under the Act, a memorandum setting forth certain demands against the employers for increased wages and dearness allowance, annual bonus of three months' wages, increased leave facilities, provident fund, and adoption of proper procedure in imposing punishment and requesting the Officer to settle the disputes as the employers were unwilling to concede the demands. After meeting the representatives of the employees and the employers, the Labour Commissioner suggested on 28th April, 1947, certain "minimum terms" which he invited the employers and the union officials to accept. The managers of six cinema companies in the City including "Prabhat Talkies" agreed to accept the terms but the managements of other companies did not intimate acceptance or non-acceptance. It would appear that, in the meantime, a meeting was convened on 22nd February, 1947, of the employees of four cinema companies including "Prabhat Talkies". Ninety-four out of 139 workers attended the meeting and resolutions were passed to the effect that no action need be taken about the demands of the Association as the managements of those companies agreed to some improvement in the matter of wages and leave facilities and promised to look into the workers' grievances if they were real. But as the terms suggested by the Labour Commissioner were not accepted by all the employers, the representatives of the Association met that Officer on 13th May, 1947 and reported that the Association had decided to go on strike on any day after 20th May, 1947, if their demands were not conceded. As the conciliation proceedings of the Labour Commissioner thus failed to bring about a settlement of the dispute, he made a report on 13th May, 1947, to the State Government as required by section 12 (4) of the Act stating the steps taken by him to effect a settlement and why they proved unsuccessful. In that report, after mentioning the minimum terms suggested by him and enumerating the ten demands put forward by the employees, the Labour Commissioner stated as follows :

"As the employers have not accepted even the minimum terms suggested by me and as the employees are restive, I apprehend that they may strike work at any time. I therefore suggest that the above demands made by the workers may be referred to an Industrial Tribunal for adjudication. I have advised the workers to defer further action on their notice pending the orders of Government,"

and he concluded by suggesting the appointment of a retired District and Sessions Judge as the sole member of the Special Industrial Tribunal "to adjudicate on this dispute".

Thereupon the Government issued the G.O. Ms. No. 2227, dated 20th May, 1947, in the following terms :

"Whereas an industrial dispute has arisen between the workers and managements of the cinema talkies in the Madras City in respect of certain matters ;

And Whereas in the opinion of His Excellency the Governor of Madras, it is necessary to refer the said industrial dispute for adjudication ;

Now, therefore, in exercise of the powers conferred by section 7 (1) and (2) read with section 10 (1) (c) of the Industrial Disputes Act, 1947, H.E. the Governor of Madras hereby constitutes an Industrial Tribunal consisting of one person, namely, Sri Diwan Bahadur K. S. Ramaswami Sastri,

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1. (1951) 1 M.L.J. 527.

Retired District and Sessions Judge, and directs that the said industrial dispute be referred to that Tribunal for adjudication.

The Industrial Tribunal may, in its discretion, settle the issues in the light of a preliminary enquiry which it may hold for the purpose and thereafter adjudicate on the said industrial dispute.

The Commissioner of Labour is requested to send copies of the order to the managements of cinema talkies concerned."

The Tribunal sent notices to all the 24 cinema companies in the City and to the Association calling upon them to file statements of their respective cases and to appear before it on 7th July, 1947. Pleadings were accordingly filed on both sides and the Tribunal framed as many as 22 Issues of which Issue (3) is material here and runs thus :

"Is there a dispute between the managements of the City theatres and their respective employees justifying the reference by the Government to the Industrial Tribunal for adjudication? Whether such an objection is tenable in law ? "

It appears to have been claimed on behalf of some of these companies including " Prabhat Talkies " that so far as they were concerned there was no dispute between the management and their employees and therefore they should not be included in the reference or the award. The Tribunal repelled this argument observing :

"That even if some of the theatres have got a staff contented with their lot there is a substantial dispute in the industry taken as a whole. After I arrive at my decision about the basic wages, increments, dearness allowance, etc., the same will bind the industry as a whole in the City of Madras if the Government accepts and implements my award."

The Tribunal accordingly held that none of the cinema companies should be " removed from the ambit of this industrial dispute and adjudication ". It also found as a matter of fact that " the idyllic picture of industrial peace and contentment " put forward by the first respondent's company was not justified by the evidence. Issue No. 3 was thus found for the Association. The Tribunal finally passed its award on 15th December, 1947, which was confirmed by the Government on 13th February, 1948 and was declared binding on the workers and the managements with effect from 25th February, 1948, the date of its publication in the *Fort St. George Gazette*, for a period of one year from that date. It is alleged that the first respondent failed to implement certain provisions of the award when their implementation was due and thereby committed an offence punishable under section 29 of the Act.

No prosecution, however, was instituted till 24th April, 1950, as in the meanwhile, certain decisions of the Madras High Court tended to throw doubt on the validity of references made in general terms without specifying the particular disputes or the groups of workers and managements between whom such disputes existed, and legislation was considered necessary to validate awards passed on such references. Accordingly, the Industrial Disputes (Madras Amendment) Act, 1949, was passed on 10th April, 1949, purporting to provide, *inter alia*, that all awards made by any Industrial Tribunal constituted before the commencement of that Act shall be deemed to be valid and shall not be called in question in any Court of law on the ground that the dispute to which the award relates was not referred to the Tribunal in accordance with the provisions of the Industrial Disputes Act, 1947 (section 5). It also purported to validate certain specified awards including " the award in the disputes between the managements of cinema theatres and workers " (section 6), which obviously refers to the award under consideration in these proceedings.

In support of his application to the High Court the first respondent herein, raised three contentions. First, the Government had no jurisdiction to make the reference in question as there was no dispute between the management and workers of " Prabhat Talkies " and, therefore, the reference and the award in so far as they related to the first respondent were *ultra vires* and void ; secondly, in any case the notification by the Government purporting to refer an industrial dispute to the Tribunal was not competent under the Act, inasmuch as it did not refer to

any specific disputes as arising for adjudication and did not mention the companies or firms in which the disputes are said to have existed or were apprehended; and thirdly, the Madras Amendment Act was unconstitutional and void under section 107 of the Government of India Act, 1935, being repugnant to the provisions of the Central Industrial Disputes Act, 1947, and also void under Article 13 (1) read with Article 14 of the Constitution as being discriminatory in character. The learned Judges, by separate but concurring judgments, upheld these contentions and issued a certificate under Article 132 (1) of the Constitution as the case raised substantial questions of law regarding the interpretation of the Constitution. As we considered that the contentions of the appellant on the first two points must prevail, we did not hear arguments on the constitutional issue.

Before dealing with the main contentions of the parties, we may dispose of a minor point raised by Mr. Krishnaswami Aiyangar, for the first time before us, namely, that the prosecution of the first respondent for the alleged breach of some of the terms of the Tribunal's award is unsustainable inasmuch as it was instituted after the expiry of the award. In support of this argument learned counsel invoked the analogy of the cases where it has been held that a prosecution for an offence under a temporary statute could not be commenced, or having been commenced when the statute was in force, could not be continued after its expiry. Those decisions have no application here. The first respondent is prosecuted for an offence made punishable under section 29 of the Act which is a permanent statute and when he committed the alleged breach of some of the terms of the award, which was in force at the time, he incurred the liability to be prosecuted under the Act. The fact that the award subsequently expired cannot affect that liability.

On behalf of the appellant, the Advocate-General of Madras urged that the question whether there existed an industrial dispute when the Government made the reference now under consideration was an issue of fact which the High Court ought not to have found in the negative at this preliminary stage before evidence was recorded by the trial Court. He submitted, however, that, on the facts already appearing on the record, there could be no reasonable doubt that an industrial dispute did exist at the relevant time. We are inclined to agree. The ten demands set forth in the Labour Commissioner's letter of the 13th May, 1947, which were not agreed to by the managements of the 24 cinema theatres in Madras clearly constituted industrial disputes within the meaning of the Act. Basheer Ahmed Sayeed, J., with whom the other learned Judge concurred, says :

> "There is nothing in the letter of the Commissioner which would indicate that these demands made by the South Indian Cinema Employees' Association were referred to the respective owners of the cinema houses in the City of Madras as a body or to any of them individually."

This, we think, is based on a misapprehension of the true facts. The demands were identical with those mentioned in the Association's memorandum originally submitted on the 8th November, 1946, and they formed the subject of discussion with the respresentatives of the cinema companies in the City in the course of the conciliation proceedings. That memorandum, which was not made part of the record in the Court below, was produced here, and Mr. Krishnaswami Aiyangar was satisfied that the demands referred to in that memorandum were the same as those mentioned in the Labour Commissioner's letter of 13th May, 1947, of which all the employers were thus fully aware. Nor is it correct to say :

> "that the disputes, if any, which might have existed between the workmen of the petitioner's cinema and the petitioner himself had been settled by the petitioner's ready and willing acceptance of the terms suggested by the Commissioner."

The terms accepted by the first respondent were what the Commissioner called "the minimum terms" and were by no means the same as the demands put forward by the Association, which were never accepted by the Association. The Commissioner's letter of the 13th May, 1947, made this clear.

But, in truth, it was not material to consider whether there was any dispute outstanding between the first respondent and his employees when the Government

made the reference on 20th May, 1947. The learned Judges appear to have assumed that the disputes referred to a Tribunal under section 10 (1) (*c*) of the Act must, in order that the resulting award may be binding on any particular industrial establishment and its employees, have actually arisen between them.

"Analysing the order of reference of the Madras Government now under consideration", the learned Judges observe:

"it is obvious that there is no mention of the existence of any dispute between the petitioner (the first respondent herein) and his workmen . . . . . . In fact there was no dispute to be referred to a Tribunal so far as this petitioner is concerned. If, therefore, there was no jurisdiction to make any reference, it follows that the whole reference and the award are both invalid and not binding on the petitioner."

This view gives no effect to the words "or is apprehended" in section 10 (1). In the present case, the Government referred "an industrial dispute between the workers and managements of cinema talkies in Madras City in respect of certain matters." As pointed out in the Labour Commissioner's letter to the Government, there were 24 cinema companies in Madras, and the Association, which, as a duly registered trade union, represented their employees, put forward the demands on behalf of the employees of all the cinema houses in the City. Fifteen out of 43 workers of the "Prabhat Talkies" were admittedly members of the Association which thus figured as one of the parties to the dispute. In that situation, the Government may have thought, without a close examination of the conditions in each individual establishment, that disputes which affected the workmen collectively existed in the cinema industry in the City and that, even if such disputes had not actually arisen in any particular establishment, they could, having regard to their collective nature, well be apprehended as imminent in respect of that establishment also. It is not denied that notices were sent by the Tribunal to all the 24 companies and they all filed written statements of their case in answer to the demands made by the Association on behalf of the employees. In these circumstances, it is idle to claim that the Government had no jurisdiction to make the reference and that the award was not binding on the respondent's organisation. The latter was clearly bound by the award under section 18 of the Act.

It was next contended that the reference was not competent as it was too vague and general in its terms containing no specification of the disputes or of the parties between whom the disputes arose. Stress was laid on the definite article in clause (*c*) and it was said that the Government should crystallise the disputes before referring them to a Tribunal under section 10 (1) of the Act. Failure to do so vitiated the proceedings and the resulting award. In upholding this objection Govinda Menon, J., who dealt with it in greater detail in his judgment, said,

"secondly, it is contended that the reference does not specify the dispute at all. What is stated in the reference is that an industrial dispute has arisen between the workers and the managements of the cinema talkies in the City of Madras in respect of certain matters. Awards based on similar references have been the subject of consideration in this Court recently. In *Ramayya Pantulu* v. *Kutty and Rao (Engineers), Ltd.*[1], Horwill and Rajagopalan, JJ., had to consider an award based on similar references without specifying what the dispute was."

After referring to the decision of the Federal Court in *India Paper Pulp Co., Ltd.* v. *India Paper Pulp Workers' Union*[2], and pointing out that though the judgment of the Federal Court was delivered on 30th March, 1949, it was not referred to by the High Court in *Kandan Textile, Ltd.* v. *Industrial Tribunal, Madras*[3], which was decided on 26th August, 1949, the learned Judge expressed the view that

"the trend of decisions of this Court exemplified in the cases referred to by me above has not been overruled by their Lordships of the Federal Court".

Basheer Ahmed Sayeed, J., however, sought to distinguish the decision of the Federal Court on the facts of that case, remarking

"that a reading of the order of reference that was the subject-matter of the Federal Court decision conveys a clear idea as to a definite dispute its nature and existence and the parties between whom the dispute existed".

1. (1949) 1 M.L.J. 231.
2. (1950) 1 M.L.J. 270: (1949-50) F.C.R. 348: (1949) F.L.J. 367 (F.C.).
3. (1949) 2 M.L.J. 789.

It is, however, clear from the order of reference which is fully extracted in the judgment that it did not mention what the particular dispute was, and it was in repelling the objection based on that omission that Kania, C.J., said :

"The section does not require that the particular dispute should be mentioned in the order ; it is sufficient if the existence of a dispute and the fact that the dispute is referred to the Tribunal are clear from the order. To that extent the order does not appear to be defective. Section 10 of the Act, however, requires a reference of the dispute to the Tribunal. The Court has to read the order as a whole and determine whether in effect the order makes such a reference ".

This is, however, not to say that the Government will be justified in making a reference under section 10 (1) without satisfying itself on the facts and circumstances brought to its notice that an industrial dispute exists or is apprehended in relation to an establishment or a definite group of establishments engaged in a particular industry. It is also desirable that the Government should, wherever possible, indicate the nature of the dispute in the order of reference. But, it must be remembered that in making a reference under section 10 (1) the Government is doing an administrative act and the fact that it has to form an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its function does not make it any the less administrative in character. The Court cannot, therefore, canvass the order of reference closely to see if there was any material before the Government to support its conclusion, as if it was a judicial or quasi-judicial determination. No doubt it will be open to a party seeking to impugn the resulting award to show that what was referred by the Government was not an industrial dispute within the meaning of the Act, and that, therefore, the Tribunal had no jurisdiction to make the award. But, if the dispute was an industrial dispute as defined in the Act, its factual existence and the expediency of making a reference in the circumstances of a particular case are matters entirely for the Government to decide upon, and it will not be competent for the Court to hold the reference bad and quash the proceedings for want of jurisdiction merely because there was, in its opinion, no material before the Government on which it could have come to an affirmative conclusion on those matters. The observations in some of the decisions in Madras do not appear to have kept this distinction in view.

Moreover, it may not always be possible for the Government, on the material placed before it, to particularise the dispute in its order of reference, for situations might conceivably arise where public interest requires that a strike or a lock-out either existing or imminent, should be ended or averted without delay, which, under the scheme of the Act, could be done only after the dispute giving rise to it has been referred to a Board or a Tribunal (*vide* sections 10 (3) and 23). In such cases the Government must have the power, in order to maintain industrial peace and production, to set in motion the machinery of settlement with its sanctions and prohibitions without stopping to enquire what specific points the contending parties are quarrelling about, and it would seriously detract from the usefulness of the statutory machinery to construe section 10 (1) as denying such power to the Government. We find nothing in the language of that provision to compel such construction. The Government must, of course, have sufficient knowledge of the nature of the dispute to be satisfied that it is an industrial dispute within the meaning of the Act, as, for instance, that it relates to retrenchment or reinstatement. But, beyond this no obligation can be held to lie on the Government to ascertain particulars of the disputes before making a reference under section 10 (1) or to specify them in the order.

This conclusion derives further support from clause (*a*) of section 10 (1) which provides in the same language for a reference of the dispute to a Board for promoting a settlement. A Board is part of the conciliation machinery provided by the Act, and it cannot be said that it is necessary to specify the dispute in referring it to such a body which only mediates between the parties who must, of course, know what they are disputing about. If a reference without particularising the disputes is beyond cavil under clause (*a*) why should it be incompetent under clause (*c*) ? No doubt, the Tribunal adjudicates, whereas the Board only mediates.

But the adjudication by the Tribunal is only an alternative form of settlement of the disputes on a fair and just basis having regard to the prevailing conditions in the industry and is by no means analogous to what an arbitrator has to do in determining ordinary civil disputes according to the legal rights of the parties. Indeed, this notion that a reference to a Tribunal under the Act must specify the particular disputes appears to have been derived from the analogy of an ordinary arbitration. For instance, in *Ramayya Pantulu* v. *Kutty and Rao (Engineers), Ltd.*[1], it is observed :

"that if a dispute is to be referred to a Tribunal the nature of the dispute must be set out just as it would if a reference were made to an arbitrator in a civil dispute. The Tribunal like any other arbitrator can give an award on a reference only if the points of reference are clearly placed before it."

The analogy is somewhat misleading. The scope of adjudication by a Tribunal under the Act is much wider as pointed out in the *Western India Automobile Association's case*[2], and it would involve no hardship if the reference also is made in wider terms provided, of course, the dispute is one of the kind described in section 2 (*k*) and the parties between whom such dispute has actually arisen or is apprehended in the view of the Government are indicated either individually or collectively with reasonable clearness. The rules framed under the Act provide for the Tribunal calling for statements of their respective cases from the parties and the disputes would thus get crystallised before the Tribunal proceeds to make its award. On the other hand, it is significant that there is no procedure provided in the Act or in the rules for the Government ascertaining the particulars of the disputes from the parties before referring them to a Tribunal under section 10 (1).

In view of the increasing complexity of modern life and the interdependence of the various sectors of a planned national economy, it is obviously in the interest of the public that labour disputes should be peacefully and quickly settled within the frame-work of the Act rather than by resort to methods of direct action which are only too well calculated to disturb the public peace and order and diminish production in the country, and Courts should not be astute to discover formal defects and technical flaws to overthrow such settlements.

In the result we set aside the order of the High Court and dismiss the first respondent's petition.

Bose, J.—I agree but would have preferred to rest my decision on the grounds that in this case there was sufficient compliance with the terms of section 10 (1) (*c*) of the Act even on the first respondent's interpretation of it, namely, that the words, "the dispute" require Government to indicate the nature of the dispute which the Tribunal is required to settle. I say this because, in my judgment, we must read the order of the 20th May, 1947, along with the documents which accompanied it. I also agree that one must not be overtechnical, but had it not been for the fact that the point is now settled by the decision in the *India Paper Pulp Company's case*[3], I would have been inclined to consider that an indication of the nature of the dispute, either in the order itself or in the papers accompanying it, was necessary. However, that is now settled and I have no desire to go behind the decision but I would like to say that even if it is not legally necessary to indicate the nature of the dispute, it is, in my opinion, desirable that that should be done.

Agent for Appellant : *G. H. Rajadhyaksha.*

Agent for Respondent No. 1 : *S. Subramanian.*

G.R./K.S. *Appeal allowed.*

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1. (1949) 1 M.L.J. 231.
2. (1949-50) F.C.R. 321 : (1949) F.L.J. 154 (F.C.).
3. (1949-50) F.C.R. 348 : (1949) F.L.J. 367 : (1950) 1 M.L.J. 270 (F.C.).

[THE SUPREME COURT OF INDIA.]

[Criminal Appellate Jurisdiction.]

PRESENT :—M. PATANJALI SASTRI, C.J., B. K. MUKHERJEA, N. CHANDRASEKHARA AIYAR, VIVIAN BOSE AND GHULAM HASAN, JJ.

Darshan Singh, son of Balwant Singh .. *Appellant**
Attar Singh, son of Jawand Singh .. „

v.

The State of Punjab .. *Respondents.*
The Union of India .. *Interveners.*

East Punjab Cotton Cloth and Yarn (Regulation of Movement) Order (1947)—*Constitutional validity—Essential Supplies (Temporary Powers) Act (XXIV of* 1946), *section* 4—*Delegation of power under to Governor—Scope.*

Constitution of India (1950), *Article* 132 (1)—*Appeal on certificate under—Other questions—When can be challenged—Proper procedure.*

The provisions of the East Punjab Cotton Cloth and Yarn (Regulation of Movement) Order (1947) which prohibit *inter alia* the export of certain commodities to any country outside India without a permit and make the violation of such provisions an offence, were validly made by the Governor in exercise of the powers delegated to him under section 4 of the Essential Supplies (Temporary Powers) Act, 1946.

As the main object of the legislation Essential Supplies (Temporary Powers) Act was the continuance of control over the production, supply and distribution of commodities considered essential to the community and as these are, provincial subjects, the Central Legislature in legislating on them invoked the powers conferred upon it by Statutes IX and X, George VI, Chapter 39. But from this it cannot be argued that the Central Legislature was legislating only in exercise of the powers which it derived from the British Parliament and that it did not exercise the powers which it itself had under the Government of India Act (1935). The Central Government was fully competent to legislate on exports and imports which are Central subjects and in making any provision relating thereto it cannot be said that it acted in excess of its authority.

Even taking the legislation to be purely on the Provincial subjects of production, distribution and supply of goods, restriction of exports as ancillary to production and supply of essential commodities would be quite within the scope and ambit of such legislation and in pith and substance it would be an enactment dealing exclusively with these Provincial matters.

The scope and purpose of this Act was totally different from that of the Imports and Exports Control Act (XVIII of 1947) and there was nothing wrong if they existed side by side and were in operation at one and the same time. As the Legislature was competent to enact both sets of provisions any occasional overlapping, even if it is assumed to exist would not be material.

In appeals brought before the Supreme Court on the strength of a certificate granted under Article 132 (1) of the Constitution the appellants are not entitled to challenge the propriety of the decision appealed against on a ground other than that on which the certificate was given except with the leave of Court as provided for by clause (3) of Article 132 of the Constitution. Where it is found that the High Court relied on a supposed admission (which was not in fact made) the Court will interfere if it has resulted in grave miscarriage of justice and order a retrial. The function of the Supreme Court which is not an ordinary court of criminal appeal, is not so much to weigh and appraise the evidence again, to find out the guilt or innocence of the accused as to see that the accused gets a fair trial on proper evidence.

Appeals under Article 132 (1) of the Constitution of India from the Judgment and Order dated the 5th April, 1950, of the High Court of Judicature for the State of Punjab at Simla (Khosla, J.) in Criminal Revision Nos. 1144 and 1147 of 1949.

Achhru Ram, Senior Advocate (*Gopal Singh*, Advocate, with him), for Appellant in Case No. 11 of 1950 and *S. M. Sikri*, Advocate-General of Punjab and *Umrigar* (*H. S. Gujral*, Advocate, with them), for Appellant in Case No. 12 of 1950.

M. C. Setalvad, Attorney-General for India (*B. Sen*, Advocate, with him), for the Intervener.

The Judgment of the Court was delivered by

Mukherjea, J.—The facts giving rise to these two connected appeals may be briefly narrated as follows :—Darshan Singh, the appellant in Case No. 11 and

*Case Nos. 11 and 12 of 1950. 5th December, 1952.

Attar Singh, who is the appellant in Case No. 12 along with three other persons were tried by the Special Magistrate, Ambala, East Punjab, on charges under section 120-B of the Indian Penal Code, read with section 3/10 of the East Punjab Cotton Cloth and Yarn (Regulation of Movement) Order, 1947, and section 7 of the Essential Supplies Act, 1946. There was a further charge under section 8 of the Essential Supplies Act against three of these accused, Darshan Singh, being one of them.

The allegation against all the accused, in substance, was that they conspired to export 76 bags of mill-made cloth to Pakistan without a permit, by smuggling them through the customs barrier near Wagha, on the morning of the 26th May, 1948. Wagha is about 18 miles from Amritsar ; and at a distance of nearly half a mile from this place lies the actual Indo-Pakistan border. Between the customs barrier and the border there is a small Police Post and almost opposite the Police Post is the Customs Office which is located in a tent. The prosecution case is that at about 7 A.M., on the 26th of May, 1948, a truck, loaded with a large quantity of mill-made cloth owned by the accused Ram Singh, arrived at the customs barrier near Wagha. Rajendra Singh, another accused, who was on duty at that time as the Customs Supervisor, allowed the truck to pass through and the truck stopped near the Customs Office on the side of the Police Post. As soon as the truck stopped, Darshan Singh, who was the Deputy Superintendent in charge of the customs barrier, and Attar Singh, who was a Customs Preventive Officer at Amritsar and was then under order of transfer to some other place, went to the Police Station and asked Kulraj, the Sub-Inspector in charge of the same, to allow the lorry to pass through upto the border. Kulraj did not accede to this request and thereupon both Darshan Singh and Attar Singh went back to the Customs tent. The truck was then unloaded and the goods were handed over to a large number of coolies who began carrying them towards the border, being followed by both Attar Singh and Ram Singh. A little later, Kailash Chandra, a Police Sub-Inspector of Amritsar, who was at that time, on special duty in connection with checking and detection of smuggling cases, arrived at the place on a motor-bicycle and being informed by Kulraj of what had happened before, both he and Kulraj proceeded in his motor-cycle towards the border and overtook the coolies who were carrying the goods. The coolies were rounded up and brought back to the border along with Attar Singh, though Ram Singh managed to slip away. Kailash Chandra made a report of the occurrence to Inder Singh, who was the head of the Special Police Establishment at Delhi dealing with smuggling cases, and after a detailed investigation, the five accused were sent up to take their trial. The trying Magistrate convicted all of them under section 120-B of the Indian Penal Code, read with section 3/10 of the East Punjab Cotton Cloth and Yarn Order, 1947, and sentenced them to rigorous imprisonment for a period of one year each. Attar Singh was further convicted under section 7 of the Essential Supplies Act and Darshan Singh under section 8 of the said Act, and there was a sentence of one year's rigorous imprisonment and a fine of Rs. 1,000 upon each one of them under these sections, the sentence of rigorous imprisonment to run concurrently with that on the previous charges.

Against this judgment there was an appeal taken by all the accused to the Court of the Sessions Judge at Amritsar. The Additional Sessions Judge, who heard the appeal, acquitted two of the accused but maintained the conviction of the other three, namely, Attar Singh, Ram Singh and Darshan Singh, though their sentences were reduced. Thereupon these three persons presented three separate revision petitions to the High Court of East Punjab at Simla which were heard and disposed of by Mr. Justice Khosla sitting singly. The learned Judge dismissed the revision petitions but granted a certificate under Article 132 of the Constitution on the ground that the cases involved a substantial question of law as to the interpretation of the Constitution. It is on the strength of this certificate that these two appeals have come before us, one being filed by Darshan Singh and the other by Attar Singh. No appeal has been preferred by the accused Ram Singh.

The constitutional point involved in these appeals has been presented before us very lucidly by Mr. Achhru Ram who appeared on behalf of Darshan Singh, the appellant in Case No. 11, and his contention, in substance, is that the East Punjab Cotton Cloth and Yarn Order, 1947, which was promulgated by the Governor of East Punjab by notification dated 15th November, 1947, and under the provisions of which the prosecution was launched against the accused, was *ultra vires* the authority of the Governor, in so far as it purported to legislate on matters of export and import across the customs frontier; and consequently the accused could not be held guilty of any offence for having violated such provisions.

For a proper appreciation of the contention raised by the learned counsel, it would be necessary to refer to certain provisions of the Government of India Act, 1935, as well as to those of a number of later enactments. Under entries 27 and 29 of List II of the Government of India Act, 1935, " trade and commerce within the province " and " production........supply and distribution of goods" were provincial subjects, while " import and export across the customs frontier " was a central subject being covered by item 19 in List I. Section 102 of the Government of India Act, 1935, gave the Central Legislature the power to legislate on provincial subjects if and when a proclamation was issued by the Governor-General that a state of emergency existed in the country, and such legislation would, under sub-section (4) of the section, cease to have effect on the expiration of a period of six months after the proclamation had ceased to operate. It appears that these extraordinary powers were assumed by the Central Legislature during the period of the last war when there was a Proclamation of Emergency by the Governor-General, and the Defence of India Rules promulgated during this period dealt with various provincial matters. The Proclamation of Emergency was revoked by the Governor-General under section 102, clause (3) of the Constitution Act on 1st April, 1946, and the result of the revocation was that all orders passed on the basis of the Defence of India Act or the Defence of India Rules ceased to be operative after the 30th of September, 1946. The state of the country, however, was at that time far from normal and it was considered necessary that the control of the Central Legislature over the production, supply and distribution of goods should not be discontinued. To meet this situation, the British Parliament passed a temporary Act (IX and X, Geo. VI chapter 39) which gave the Indian Legislature, during the period specified in the Act, the power to make laws with regard to certain provincial subjects. The provision of section 2 of the Act, so far as is necessary for our present purpose, stood as follows :

" (1) Notwithstanding anything in the Government of India Act, 1935, the Indian Legislature shall, during the period mentioned in section 4 of this Act, have power to make laws with respect to the following matters :

(*a*) trade and commerce (whether or not within a Province) in and the production, supply and distribution of, cotton and woollen textiles, paper, petroleum, products, spare parts of mechanically propelled vehicles, coal, iron, steel and mica ;"

Armed with this authority, the Indian Legislature passed the Essential Supplies (Temporary Powers) Act of 1946, sections 3 and 4 of which are in these terms :—

" 3. The Central Government so far as it appears to it necessary or expedient for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices may, by notified order provide for regulating and prohibiting the production, supply and distribution thereof and trade and commerce therein.

* * * * * *

" 4. The Central Government may by notified order direct that the power to make orders under section 3 shall in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercisable also by

(*a*) * * * * * *

(*b*) such Provincial Government or such officer or authority subordinate to a Provincial Government as may be specified in the direction."

By a notification dated 20th of December, 1946, issued under section 4 mentioned above, the Central Government delegated to the Governor of Punjab the powers under section 3 of the Act. On the 15th of November, 1947, the Governor

of East Punjab, in exercise of the powers delegated by the said notification, passed the East Punjab Cotton Cloth and Yarn (Regulation of Movement) Order, 1947, and sections 2, 3 and 10 of the Order are material for our present purpose. Section 2 is in these terms :—

"In this Order unless there is anything repugnant in the subject or context, (*a*) "export" means to take out of the Province of the East Punjab or the said land by rail, road or river to any Province or State of the Dominion of India and Pakistan and includes taking out of the Province of East Punjab to any place, situated in the said lands as well as out of the said lands to any place situated in the East Punjab."

Section 3 runs as follows :—

"No person shall export or attempt to export cotton cloth or yarn except under the authority and in accordance with the conditions of a permit issued by a permit issuing authority . . . . The permit shall be in form IV, specified in Schedule 'A' annexed to this Order."

Section 10 provides :—

"If any person contravenes any provision of this Order, he shall be punishable with imprisonment which may extend to 3 years, with fine or both and without prejudice to any other general punishment which may be imposed by any court trying such contravention may direct that any cotton cloth and/or yarn in respect of which the court is satisfied that this order has been contravened together with the covering and packing of such cloth shall be forfeited to His Majesty."

The point for our consideration is, whether the above provisions which prohibit *inter alia* the export of certain essential commodities to any country outside India without a permit and make the violation of such provisions an offence, were validly made by the Governor in exercise of the powers delegated to him under section 4 of the Essential Supplies (Temporary Powers) Act, 1946?

It is not suggested by the learned counsel that there was anything improper in the Central Government's delegating its powers to the Governor of East Punjab under section 4 of the Essential Supplies (Temporary Powers) Act. His contention is that the Governor, in making the order, acted in excess of his delegated authority by prohibiting the export of cotton cloth and yarn to any place outside India. Matters of export and import, it is said, were not within the scope of section 3 of the Essential Supplies Act, and the notification under section 4 could only delegate to the Governor such powers as the Central Government could itself exercise under section 3. Section 3 of the Essential Supplies Act, it is true, authorised the Central Government to make provisions for regulating and prohibiting the production, supply and distribution of the essential commodities specified in the Act and also trade and commerce therein ; but it is argued by the learned counsel that the expression "trade and commerce," as used in the section, must be taken to mean trade and commerce within a province or at the most between provinces *inter se*, but it cannot include any transaction by way of exporting goods outside India. This interpretation, somewhat restricted as it appears to us, is sought to be supported by a two-fold argument. In the first place, it is said, that the Essential Supplies Act, as its preamble shows, was passed by the Central Legislature in exercise of the authority conferred upon it by the Statute IX and X, George VI Chapter 39 and that statute conferred, only for a short period of time, a power in the Central Indian Legislature to legislate on certain provincial matters, which it could not do after the revocation of the Proclamation of Emergency on the termination of the war. It is said, therefore, that the Essential Supplies Act purported to deal exclusively with provincial matters, and import and export of goods outside the Indian territory, being a central subject, could not reasonably be brought within the purview of the Act. The other line of reasoning that is put forward in support of the argument is, that the intention of the Central Legislature not to include export and import within the provisions of the Essential Supplies Act is evidenced by the fact that the Central Legislature dealt with export and import of goods separately and by an altogether different set of enactments which existed side by side with the Essential Supplies Act and other legislation of the same type preceding it. It is pointed out that there was an order made under the Defence of India Rules on 3rd November, 1945 (being Order No. 91 c.w. (1) 45) imposing prohibitions on export of various descriptions of goods specified therein.

The Defence of India Rules were due to expire on the 30th September, 1946. On the 25th September, 1946, the Essential Supplies Ordinance was passed and this was later replaced by the Essential Supplies Act. On the very day that this Ordinance was passed, another Ordinance, being Ordinance No. XX of 1946, was promulgated, which *inter alia* continued the provisions of the Defence of India Rules relating to prohibition and restriction of import and export of goods. Subsequently on the 25th of March, 1947, the Imports and Exports (Control) Act was passed, which dealt comprehensively with the subject of control over exports and imports. As it would be unnatural to suppose that the Legislature was legislating on the same subject simultaneously by two parallel sets of legislation existing side by side, it is argued that export and import of goods were not within the scope and intendment of the Essential Supplies Act.

These arguments though somewhat plausible at first sight, do not appear to us to be sound or convincing. It is a cardinal rule of interpretation that the language used by the legislature is the true depository of the legislative intent, and that words and phrases occurring in a statute are to be taken not in an isolated or detached manner dissociated from the context, but are to be read together and construed in the light of the purpose and object of the Act itself.

The object of the Essential Supplies Act, as set out in the preamble, was to provide for the continuance, during a limited period of time, of the power to control the production, supply and distribution of, and trade and commerce in, foodstuffs, cotton and woollen textiles, petroleum, iron and other essential commodities, a list of which appeared in the Act itself. Section 3, which is the most material part of the Act, authorised the Central Government, whenever it considered expedient or necessary, for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, to provide by notified order, for regulating or prohibiting, the production, supply and distribution thereof or trade and commerce therein. Keeping this object in view and reading the words "trade and commerce" in the light of the context, there appears to be no reason why these words should not be taken in their ordinary or natural sense, and why restriction on the export of goods to any place, outside a province, including a neighbouring foreign state should be deemed to be outside their scope and ambit. For maintenance or increase of supply of essential commodities within a province and to secure their equitable distribution and availability at fair prices, it might certainly be necessary to restrict export of the goods outside the Province, and Pakistan being a foreign State abutting on the very borders of East Punjab, it was quite natural for the East Punjab Governor to mention Pakistan as one of the places to which export of goods from his province should not be allowed without a proper permit. As the main object of the legislation was the continuance of control over the production, supply and distribution of commodities considered essential to the community and as these are provincial subjects, the Central Legislature in legislating on them must have to invoke the powers conferred upon it by the Statute IX and X George VI Chapter 39 spoken of above; and that is plainly the reason why a reference to that statute was made in the second paragraph of the preamble. But from this it cannot be argued that the Central Legislature was legislating only in exercise of the powers which it derived from the British Parliament and that it did not exercise the powers which it itself had under the Government of India Act. It is not disputed that the Central Legislature was fully competent to legislate on exports and imports which are central subjects and in making any provision relating thereto, it cannot be said that it acted in excess of its authority.

Even taking the legislation to be purely on the provincial subjects of production, distribution and supply of goods, restriction of export as ancillary to production and supply of essential commodities would, in our opinion, be quite within the scope and ambit of such legislation and in pith and substance it would be an enactment dealing exclusively with these provincial matters.

Looked at from this standpoint, the other argument advanced by Mr. Achhru Ram would also be found to be without any substance. The Imports and Exports Act or the earlier Order and Ordinance, referred to by the learned counsel, were legislation essentially on the subject of exports and imports. Their object was to regulate or control imports and exports generally and they dealt with a large variety of articles far outnumbering those enumerated in the Essential Supplies Act. The object of the Imports and Exports Act was not to regulate production and distribution of commodities considered essential to the community and it was not as a means to secure that object that it purported to prohibit or restrict exporting of goods. Thus the scope and purpose of the two sets of legislation were totally different and there was nothing wrong if they existed side by side and were in operation at one and the same time. We are not told that there was any overlapping of the provisions of these two statutes; and as the competency of the Legislature to enact both these sets of provisions is not disputed, we do not think that any occasional overlapping, even if it is assumed to exist, would be at all material. In our opinion, therefore, the contentions raised in regard to the constitutional point involved in these appeals are unsupportable and could not be accepted.

As the appeals have come up before us on the strength of a certificate granted under Article 132 (1) of the Constitution, the appellants are not entitled to challenge the propriety of the decision appealed against on a ground other than that on which the certificate was given except with the leave of this Court as provided for by clause (3) of Article 132 of the Constitution. At the close of the arguments of the parties in regard to the constitutional point referred to above, we made it clear to the learned counsel appearing for both the appellants that we would not allow any question relating to the merits of the cases to be raised before us which turned merely on appreciation of evidence by the courts below. Mr. Umrigar, who appeared for Attar Singh the appellant in Case No. 12, however stated to us that he would crave leave to bring to our notice one important matter which, according to him, resulted in grave miscarriage of justice at least so far as his client was concerned. He pointed out that both the Additional Sessions Judge and the learned Judge of the High Court in deciding the case against his client relied upon an admission alleged to have been made by the latter that he was present at the Customs barrier at Wagha on the morning of the day of occurrence and had gone there to say good-bye to the Customs staff, he being under an Order of transfer from Amritsar to Gurdaspur. It is said by the learned counsel that his client never admitted his presence at the Customs barrier on the morning of 26th May, 1948, and that he neither did nor had any occasion to put forward any explanation regarding his presence there at that time. The whole thing, it is said, is based upon sheer misapprehension and is not warranted by anything appearing on the record.

There is no doubt that the Additional Sessions Judge as well as the High Court did refer in their respective judgments to the alleged admission of Attar Singh and rely upon the same to arrive at their decision in the case. The Additional Sessions Judge said in his judgment:

> "The next important man is Attar Singh accused. He admits his presence at the barrier on that morning, when he says that he had gone to bid good-bye to the Customs staff on his transfer to Gurdaspur. According to the leave obtained by him he had yet to remain at Amritsar till 28th and in view of illness of his wife he need not have been in hurry to go to the barrier for this purpose so soon. I am not convinced with his explanation."

The High Court in referring to the said admission observed as follows:

> "Attar Singh admitted that he was present at the barrier on that morning but the explanation he gave was this. His office is at Amritsar but he had received orders of transfer to Gurdaspur. His wife was ill and, therefore, he could not move immediately. So he applied for a few days leave, and on the morning of the 26th of May he went to the barrier to say good-bye to his colleagues in the Customs Department and while he was there this incident took place without his knowledge. . . . Attar Singh's explanation of his presence at the spot does not convince me at all."

It appears that in course of the examination of the accused Attar Singh under section 342 of the Criminal Procedure Code before the trial Magistrate a specific

question was put to him as to whether he could explain his presence on the scene of occurrence on the 26th May, 1948, although it was alleged that he was on leave. To this question he replied categorically that he was not present as alleged. In this state of the records, we asked the learned Advocate-General, who appeared for the State of East Punjab, as to when and how was the admission referred to above made by Attar Singh? The Advocate-General answered that the admission might be in the written statement which Attar Singh said he would file, when he was interrogated under section 342 of the Criminal Procedure Code. In order to clear up the matter we had the further hearing of the case adjourned to enable the Advocate-General to produce before us the written statement, if any, that was filed by Attar Singh in the trial Court. The case was again taken up for hearing on the 26th of November last and the Advocate-General frankly stated to us that no written statement by Attar Singh was on the records at all. It is clear, therefore, that both the courts below in coming to their decision regarding the guilt of the accused did rely to a considerable extent on the so-called admission of Attar Singh which, it must be held, had no existence in fact. The Advocate-General contends that even if there was an error committed by the courts below in this respect, we should nevertheless dismiss the appeal inasmuch as there is sufficient evidence to support the conviction of the accused independently of the so-called admission of Attar Singh; and he invited us to examine the evidence ourselves and come to our own decision on the point. Without in any way disputing our right to adopt this course in cases where it may be considered necessary, we think that in the circumstances of the present case the proper order to make will be to direct a rehearing of the appeal by the Sessions Court on the evidence as it actually stands after excluding from consideration the alleged admission of Attar Singh. There can be no doubt that the supposed admission was of a very damaging character and was highly prejudicial to the accused. It is quite problematic to value its effect upon the minds of the Judges in the courts below and it is difficult for us to say that had it been excluded from consideration the courts would have come to the same decision of guilt or that conversely a verdict of acquittal would have been a perverse one. In such cases, the function of this Court, which is not an ordinary court of criminal appeal, is not so much to weigh and appraise the evidence again, to find out the guilt or innocence of the accused as to see that the accused gets a fair trial on proper evidence.

It has been argued by Mr. Achhru Ram and in our opinion quite rightly, that if the case of Attar Singh is to be heard afresh, the same order should be made in the case of Darshan Singh as well. Not only are the two cases closely interconnected, but so far as Darshan Singh is concerned the prosecution sought to establish his complicity in the affair primarily by adducing evidence to show that he was in the company of Attar Singh when both of them approached Kulraj, the officer-in-charge of the police station, and requested him to allow the truck to pass through. The Additional Sessions Judge observed in his judgment that the only motive of Darshan Singh was to help his colleague, namely Attar Singh, who was about to leave the district. It is necessary, therefore, that the case of Darshan Singh should also be reheard and the whole evidence against him reconsidered with a view to find out whether he is guilty or innocent.

The result, therefore, is that both the appeals are allowed. The judgment of the High Court as well as that of the Additional Sessions Judge are set aside and the cases remitted to the Sessions Court in order that they may be heard afresh on the evidence on record in the light of the observations made above after excluding from consideration the supposed admission of Attar Singh. Pending the decision of the Sessions Court, the accused would remain on bail on the same terms as before.

Agents for Appellants : *Naunit Lal and G. H. Rajadhyaksha.*

Agent for Intervener : *G. H. Rajadhyaksha.*

G.R./K.S. ——— *Appeals allowed and retrial ordered.*

[THE SUPREME COURT OF INDIA.]

(Criminal Appellate Jurisdiction.)

PRESENT :—M. PATANJALI SASTRI, C.J., B. K. MUKHERJEA, N. CHANDRASEKHARA AIYAR, VIVIAN BOSE AND GHULAM HASAN, JJ.

Sisir Kumar Dutta .. *Appellant**

v.

The State of West Bengal .. *Respondent.*

The Union of India .. *Intervener.*

Essential Supplies (Temporary Powers) Act (XXIV of 1946)*—Extension by Resolution of* 20*th December,* 1949, *by Constituent Assembly till* 31*st March,* 1951*—Validity—Contravention of Act on* 24*th October,* 1950 *—Offence—Constitution of India* (1950), *Articles* 379 (1) *and* 372 (1), *Explanation III—Scope.*

The Constituent Assembly had authority on 25th February, 1948 and again on 23rd March, 1949, to make two successive extensions of the Essential Supplies Act of a year each.

Joylal Agarwala v. *The State,* (1952) S.C.R. 127 : 1951 S.C.J. 743 (S.C.), relied on.

The Constituent Assembly derived its authority to make the extensions from section 4-A of the India (Central Government and Legislature) Act, 1946. This was an Act of the British Parliament which originally conferred on the British Houses of Parliament the power of approving by resolution the extension of the period fixed by section 4. Later, the Indian Independence Act, 1947, was passed by the British Parliament and in exercise of the powers conferred by sections 9 and 19 of that Act the Governor-General by an Adaptation Order substituted the words " Dominion Legislature," for the words " Houses of Parliament " and thus enabled the Dominion Legislature to exercise the powers of Parliament in that behalf. At the same time, the Governor-General introduced section 4-A into the British Act of 1946, the India (Central Government and Legislature) Act, 1946, by way of adaptation and conferred on the Constituent Assembly the powers of the Dominion Legislature. Thus the Constituent Assembly became empowered to extend the period fixed in section 4 by the passing of a resolution and that in its turn had the effect of extending the life of the Essential Supplies Act of 1946, because section 1 (3) of the Act says that it shall cease to have effect on the expiration of the period mentioned in section 4 of the India (Central Government and Legislature) Act, 1946.

Section 4-A provides that the Constituent Assembly shall have the powers of the Dominion Legislature under the British Act " until other provision is made by or in accordance with a law made by the Constituent Assembly under sub-section (1) of section 8 of the Indian Independence Act, 1947." Section 8 (1) of the Independence Act invested the Constituent Assembly with all the powers of the Dominion Legislature for the purpose of making provision as to the constitution of the Dominion. That power it exercised and drew up the Indian Constitution, but in doing so it decided to bring the Constitution into being in two instalments and it did that by enacting Article 394 and enacting in it that that Article and certain others including Article 379, should come into force " at once "—at once, being the 26th of November, 1949—while the remaining Articles were to come into force on the 26th of January, 1950. Under Article 379, the body functioning as the Constituent Assembly of the Dominion of India *immediately before the commencement of the Constitution* shall be the Provisional Parliament and exercise all the powers and perform all the duties conferred by the provisions of the Constitution on Parliament. The Constituent Assembly was to continue in existence till 26th January, 1950 and its power could be validly exercised on 20th December, 1949, to extend the life of the Essential Supplies (Temporary Powers) Act, 1946. The Essential Supplies Act as a law in force immediately before the commencement of the Constitution continued in force because of Article 372 (1), Explanation III until it was due to expire.

The Act was a living Act (extended by a competent body) and a contravention of the provisions of that Act on 24th October, 1951, constituted an offence.

Appeal under Article 132 (1) of the Constitution of India from the Judgment and Order, dated the 11th April, 1951, of the High Court of Judicature at Calcutta (Das Gupta and Mookerjee, JJ.) in Criminal Revision Case No. 1028 of 1950, arising out of the Order, dated the 23rd November, 1950, of the Presidency Magistrate, 8th Court, Calcutta, in P.R. Case No. 2107 of 1950.

N. C. Chakravarti, Advocate, for Appellant.

B. Sen, Advocate, for Respondent.

M. C. Setalvad, Attorney-General for India (*P. A. Mehta,* Advocate, with him), for Intervener.

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*Case No. 275 of 1951. 5th December, 1952.

The Judgment of the Court was delivered by

Bose, J.—This is an appeal under Article 132 (1) of the Constitution. Leave to appeal was granted by the High Court at Calcutta.

The appellant was convicted under section 7 (1) of the Essential Supplies (Temporary Powers) Act of 1946 for an offence said to have been committed on the 24th of October, 1950. The conviction was on two counts : (1) for selling cloth above the controlled rate and (2) for not issuing a cash memo. The sentence was rigorous imprisonment for three months and a fine of Rs. 200 with another three months in default. The trial was before the 8th Presidency Magistrate at Calcutta who adopted a summary procedure.

There was an application for revision before the High Court but it was dismissed. An application for leave to appeal to this Court was then filed. It was granted on a ground which was not taken either in the original Court or in the revision before the High Court, namely, that the Essential Supplies Act of 1946, under which the appellant was convicted was not in force on the 24th of October, 1950, and so there could be no conviction under it.

The validity of this Act was challenged in *Joylal Agarwala* v. *The State*[1], but this Court held that the Act was valid up to the 31st of March, 1950, that being the life of the Act at the date relevant to that case. It is necessary to explain that the Act is a temporary Act and that its life has been extended from time to time after the date of its first expiry for a year at a time. The latest extension at the date of the previous case was up to the 31st of March, 1950. We therefore start with the position that the Act was a good Act up till that date.

The Act was further extended up till the 31st of March, 1951, by a Resolution dated the 20th of December, 1949. This is the extension with which we are concerned and which is now challenged, the argument being that there was no legislative body in existence on that date competent to extend the life of the Act for another year.

The Gazette Notification setting out the Resolution is in the following terms :

"*New Delhi, the 22nd December*, 1949.

No. F.—7 WL (1) 47.—The following resolution which was passed by the Constituent Assembly (Legislative) at its meeting held on the 20th of December, 1949, is hereby published for general information :

In pursuance of the proviso to section 4 of the India (Central Government and Legislature) Act, 1946, as adapted by the India (Provisional Constitution) Order, 1947, this Assembly hereby approves the extension of the period mentioned in sections 2 and 3 of the said Act for a further period of twelve months commencing on the first day of April, 1950."

It has to be seen whether the body which passed that Resolution had the power to extend the Act.

It can be accepted, because of the decision in *Joylal Agarwala* v. *The State*[1] that the Constituent Assembly had authority on 25th February, 1948 and again on 23rd March, 1949, to make two successive extensions of the Essential Supplies Act of a year each. The only question, therefore, is whether any body continued to have that power on the dates material here.

The extensions just referred were brought about as follows. The Constituent Assembly derived its authority to pass the above Resolution from section 4-A of the India (Central Government and Legislature) Act of 1946. This was an Act of the British Parliament which originally conferred on the British Houses of Parliament the power of approving by resolution the extension of the period fixed by section 4. Later, the Indian Independence Act of 1947 was passed by the British Parliament and in exercise of the powers conferred by sections 9 and 19 of that Act the Governor-General by an Adaptation Order substituted the words "Dominion Legislature" for the words "Houses of Parliament" and thus enabled the Dominion Legislature to exercise the powers of Parliament in this behalf. At the same time, the Governor-

1. (1952) S.C.R. 127 at 131 : (1951) S.C.J. 743 (S.C.).

General introduced section 4-A into the British Act of 1946, the India (Central Government and Legislature) Act, 1946, by way of adaptation and conferred on the Constituent Assembly the powers of the Dominion Legislature. Thus the Constituent Assembly became empowered to extend the period fixed in section 4 by the passing of a resolution and that in its turn had the effect of extending the life of the Essential Supplies Act of 1946, because section 1 (3) of that Act says that it shall cease to have effect on the expiration of the period mentioned in section 4 of the India (Central Government and Legislature) Act of 1946.

Now section 4-A provides that the Constituent Assembly shall have the powers of the Dominion Legislature under the British Act

"until other provision is made by or in accordance with a law made by the Constituent Assembly under sub-section (1) of section 8 of the Indian Independence Act, 1947."

Turning to sub-section (1) of section 8 we find that the British Parliament invested the Constituent Assembly with all the powers of the Dominion Legislature

"for the purpose of making provision as to the constitution of the Dominion."

That power it exercised and drew up the Indian Constitution, but in doing so it decided to bring the Constitution into being in two instalments and it did that by enacting Article 394 and enacting in it that that Article and certain others, including Article 379, should come into force "at once"—at once being the 26th of November, 1949—while the remaining Articles were to come into force on the 26th of January, 1950.

Now Article 379 (1) provides that—

"Until both Houses of Parliament have been duly constituted and summoned to meet for the first session under the provisions of this Constitution, the body functioning as the Constituent Assembly of the Dominion of India *immediately before the commencement of this Constitution* shall be the Provisional Parliament and shall exercise all the powers and perform all the duties conferred by the provisions of this Constitution on Parliament."

It was argued on behalf of the appellant that because of this Article the Constituent Assembly disappeared *as a law making body* on and after the 26th of November, 1949 and that its place was taken by the Provisional Parliament referred to by that Article, and as the Resolution of the 20th December, 1949, purports to be a resolution of the Constituent Assembly (Legislative) and not of the Provisional Parliament, it is a resolution of a body which no longer had authority to enact laws or pass a resolution of this kind affecting the laws of the land.

The learned Attorney-General argues, on the other hand, that the Constituent Assembly continued to function as such and to retain its right to exercise its dual functions of constitution making and law making right up to the last stroke of midnight on the 25th of January, 1950. The very next second, when a new day ushered in a new era for this country, it ceased to exist as a Constituent Assembly and its place was taken by the Provisional Parliament of India.

We need not decide this point, for even if the Provisional Parliament was intended to function on the 26th of November, 1949 and not from the 26th of January, 1950, it is clear that the Constituent Assembly was to continue in existence till "the commencement of the Constitution" which, by Article 394, is the 26th of January, 1950. Consequently, the power conferred on it as a designated body, by the English statute, as adapted by the Governor-General, could be validly exercised on the 20th of December, 1949 and was so exercised when it passed the resolution of that date. The Provisional Parliament was not a body authorised to exercise the special power of approving the extension of the period mentioned in section 4 of the English statute as that was not one of "the powers conferred by this Constitution on Parliament", nor can bringing the Provisional Parliament into existence on the 26th of November, 1949 (assuming that to be the case) be regarded as "other provision" made by the Constituent Assembly within the meaning of section 4-A of the English Act. It follows the Constituent Assembly was not deprived of these specially designated powers on the date of the Resolution.

The next question is whether the Constituent Assembly had this power to extend the life of this particular piece of legislation beyond the 26th of January, 1950. The question was posed in this way. It was conceded that the Essential Supplies Act was validly extended up to the 31st of March, 1950. The Resolution which extended its life for another year beyond this was passed on the 20th of December, 1949, but it was argued that it could not take effect till after the expiry of the previous extension, that is, not until the 1st of April, 1950. But by that time the Constitution had come into being and so neither the Constituent Assembly nor the Provisional Parliament could have extended the life of the temporary Act after its expiration on the 31st of March, 1950, because of Explanation III to Article 372. It follows that the Constituent Assembly which purported to effect the extension ahead of time could not do, in anticipation, what the Constitution says cannot be done after its commencement.

There is nothing in this contention. The Resolution of the 20th December, 1949, took immediate effect and its effect was to alter the date fixed for the expiration of the period mentioned in section 4 of the English statute from the 31st of March, 1950, to the 31st of March, 1951. The Essential Supplies Act fixed the date for its own expiration as the date fixed for the expiration of the period mentioned in section 4 above. Accordingly, it was an Act which was alive immediately before the 26th of January, 1950 and which was due, at that time, to expire *of its own force*, not on the 31st of March, 1950, but on the 31st of March, 1951, and as this was a law in force immediately before the commencement of the Constitution it continued in force, because of Article 372 (1) and Explanation III, until it was due to expire.

That exhausts the constitutional points. We hold that there was a body in existence at all material times competent to extend the life of the Act up till the 31st of March, 1951 and that it did so extend its life on the 20th of December, 1949. The Act continued in force until after the Constitution and therefore was a living Act at the date of the offences, namely, the 24th of October, 1950.

Counsel then sought to attack the conviction on other grounds but as the leave to appeal was confined to the constitutional points he cannot, so far as that is concerned, be permitted to travel further. Of course, it would have been competent for him to file a separate petition for special leave to appeal on the other points but had he done so it would have followed the usual course and he would have been obliged to obtain special leave in the usual way. We therefore treated this part of the argument as one asking for special leave to appeal. We heard him fully and are of opinion that these remaining points are not ones on which special leave to appeal should be granted. We therefore reject this irregular petition for special leave to appeal on its merits.

The appeal filed under Article 132 (1) is also dismissed.

Agent for Appellant : *S. C. Banerjee.*

Agent for Respondent : *P. K. Bose.*

Agent for Intervener : *G. H. Rajadhyaksha.*

G.R./K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

T. S. Venkatanarayana Aiyar .. *Petitioner**

v.

The State of Madras through the District Collector at Madhurai .. *Respondent.*

Court-Fees Act (VII of 1870), *section* 17—*Scope of—Distinct subjects—Test—Different inam villages comprised in different title deeds in favour of different individuals—Suit for declaration—If single "subject-matter"*.

A number of plaintiffs joined together and instituted a single suit for declaring that an order of resumption passed by the Revenue Divisional Officer and Collector on appeal in respect of nine distinct inams in favour of distinct individuals and under nine inam title deeds was illegal and a nullity. Before the Revenue Divisional Officer nine separate applications were filed. The Revenue Divisional Officer and the Collector passed a single order in respect of the nine applications.

On a question whether the suit comprised nine distinct subjects within the meaning of section 17 of the Court-Fees Act (VII of 1870),

Held, the words "distinct subjects" used in section 17, though not defined, should be interpreted to mean distinct subject-matters only. If the words "distinct subjects" are to be construed as including distinct categories of subjects taking the word "subject" in a very comprehensive sense then the meaning of section 17 would become absurd. Obviously, the intention underlying the section seems to be to provide for suits which involve multifariousness and which do not offend against the other provisions of the Code of Civil Procedure such as misjoinder of causes of actions and so forth.

In the present case it was not contended that each one of the plaintiffs is interested in each one of the different inams nor that all the inams belonged to all the plaintiffs jointly or in common. If one of the plaintiffs or a few of them alone had filed the suit a decree passed in favour of such plaintiffs would not enure to the benefit of the rest of the plaintiffs who were not parties to the suit. It is a suit of this type that can be called as a multifarious suit and it is suits of such type that are sought to be provided for by section 17 of the Court-Fees Act. Because it is possible to avoid multiplicity of suits by combining causes of action and parties without offending against the provisions of Civil Procedure Code, it cannot be contended that such suits ceased to be multifarious or that they became suits on a single cause of action or they embrace a single subject or subject-matter. The only commonalty which can be postulated in the present case is that the Revenue Divisional Officer and the Collector passed a single order of resumption as a matter of convenience. This cannot be said to have taken away the distinctness of the subjects comprised in the suit.

Haru Bepari v. *Kshiteeshbhooshan Ray*, (1935) I.L.R. 63 Cal. 163 and *Munshi Lachminarayan Lal* v. *Bhupendra Prasad Shukul*, (1943) I.L.R. 22 Pat. 275, followed.

Raja of Vizianagaram v. *The Government*, (1932) 63 M.L.J. 73 and *Thangasami Pillai* v. *Dhanabhagyammal*, (1949) 2 M.L.J. 565, distinguished.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Madhurai (Additional), dated 28th October, 1950 and passed in O.S. No. 3 of 1949 on its file.

J. Sitamahalakshmi and *N. Rammohan Rao* for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*) for Respondent.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition is against the order of the learned Subordinate Judge of Madhurai directing the plaintiffs to pay enhanced court-fee consequent upon his finding on the preliminary issue, namely, whether the court-fee paid and the valuation of the suit were proper ? The first plaintiff is the petitioner.

Fifteen plaintiffs sued for a decree setting aside the order of the Collector of Madhurai, dated 17th October, 1947, directing resumption of the plaint schedule lands and for declaring the order to be illegal and a nullity. According to the plaint, the cause of action in the suit arose on 17th October, 1947, when the Collector of Madhurai confirmed the order of the Revenue Divisional Officer of Usilampatti, dated 4th April, 1947, directing the resumption of the suit lands. In the schedule attached to the plaint, the description of the properties in respect of which the resumption order was passed sets out nine different inams with the respective extents of the lands covered by nine title deeds. The entire extent of the land is stated to be 35.67 acres and for the purpose of jurisdiction the value of the suit lands is given as Rs. 5,000.

*C.R.P. No. 1857 of 1950. 10th August, 1951.

It transpires that before the Revenue Divisional Officer nine separate applications were filed for resumption, each application relating to the properties covered by each one of the nine title deeds. But the Revenue Divisional Officer heard all the applications together and passed a single order directing the resumption of the lands appertaining to the said nine inam title deeds. The Collector who heard the appeals against this order also confirmed the order of the Revenue Divisional Officer by a single order of his which is now sought to be set aside.

In a prior suit (O. S. No. 104 of 1948) on the file of the Sub-Court of Madhurai filed by the very same plaintiffs against the Province of Madras and also two other parties who had applied for resumption of the suit lands on the ground that the alienations by the service holders were void, the contention of the plaintiffs was that the inam title deeds disclosed the inam grant to comprise only the melwaram and not the kudiwaram, and that in so far as the service was being properly rendered, the lands having been endowed by Hindu Rajahs as manibhams for the purpose of certain service in Sri Mulanatha Swami temple at Thenkarai village of Nilakottah Taluk of Madhurai district, the resumption was not legal. In that suit however the learned Subordinate Judge had held that the total valuation of the suit properties could not be said to be Rs. 10,000 or more. But in the present suit the learned Subordinate Judge relying upon the finding in the previous suit by his predecessor accepted the valuation given in the plaint at Rs. 5,000, especially in view of the fact that it would make no difference if the value of the property was Rs. 5,000 or above but did not amount to Rs. 10,000 or more.

After the filing of the plaint, the Court-fee Examiner pointed out by means of a checkslip that the court-fee of Rs. 15 paid by the plaintiffs under Article 17-A (1) of Schedule II of the Court-Fees Act (hereinafter referred to as the Act) would be Rs. 100 and not Rs. 15. From the judgment of the learned Subordinate Judge, it appears that the plaintiffs conceded that that was the correct position, namely, that instead of Rs. 15 the legitimate court-fee payable on the plaint would be Rs. 100. In the checkslip put up by the Court-fee Examiner it appears that he further pointed out that the valuation of the suit lands totalling about 35.67 acres in extent at Rs. 5,000 was grossly inadequate and that each acre would be worth Rs. 1,000 and that under Article 17-A (1) of Schedule II of the Court-Fees Act, Rs. 500 should have been paid as the court-fee as the total value would have exceeded Rs. 10,000 and more. In the written statement the defendant-respondent had pleaded that a single suit in respect of distinct subjects which comprised nine different inams covered by nine inam title deeds was not competent and that different suits should have been filed in respect of each one of the inams, that in any event the court-fee paid was grossly inadequate, that each inam should have been separately valued at the market value of lands, and that the court-fee should have been paid with reference to each inam, and that a single court-fee of Rs. 15 paid by the plaintiffs was wholly insufficient in view of the provisions of the Act.

The learned Subordinate Judge who tried the preliminary issue and heard arguments in respect thereof also took into consideration the checkslip prepared by the Court-fee Examiner in which the question of valuation and court-fee had been raised. No evidence, however, was adduced by either of the parties with reference to the valuation, and, as already observed, the learned Subordinate Judge proceeded on the basis of the finding of his predecessor in regard to the valuation of the properties and on a consideration of the material available before him, came to the conclusion that since the valuation was under Rs. 10,000 the proper court-fee to be paid would be Rs. 100 for the suit. But on the question as to whether the suit comprised nine distinct subjects within the meaning of section 17 of the Act or whether it was a single subject that was comprised in the plaint, the learned Subordinate Judge held, agreeing with the contention of the respondent that each one of the inams covered by the title deeds was a distinct subject within the meaning of section 17 of the Act and that the mere fact that the Collector for the sake of convenience passed a single order and the further fact that the suit was similarly instituted as one suit instead of nine suits, would not exempt the plaintiffs from

their obligation to pay court-fee on nine declarations as they were bound to pray for a declaration in respect of each of the nine inams comprised in the nine title deeds and the lands appertaining to them. Having come to the conclusion, the learned Subordinate Judge directed amendment of the plaint to incorporate separate declarations of the same kind in respect of each of the nine inams and also directed the payment of court-fee of Rs. 100 in respect of each of the nine declarations and that Rs. 15 having already been paid, a further sum of Rs. 885 was made payable, within the date stipulated by the order of the learned Subordinate Judge. It is against this order that the first plaintiff-petitioner has now preferred this revision petition.

There can be no question in this case that section 17 of the Act would govern the case and the only question then is as to what is the correct interpretation of section 17 of the Act with reference to the facts of the present case. Section 17 of the Act is to the following effect:

> "Where a suit embraces two or more distinct subjects, the plaint or memorandum of appeal shall be chargeable with the aggregate fees to which the plaints or momoranda of appeal in suits embracing separately each of such subjects would be liable under this Act."

This section relates to court-fee payable in respect of multifarious suits. But unfortunately in the whole of the Act the word "subject" has not been defined. Whereas in sections 7 and 13 of the same Act which relate to computation of fees payable in certain suits and fees paid on memorandum of appeal, the words used are "subject-matter of the suit," in section 17 of the Act, the words used are "suit embraces two or more distinct subjects." It is not therefore clear from the language of the section as such as to whether the word "subject" here means and includes subject-matter, or whether it means something else. On a reading of the entire provisions of the Act as a whole I am inclined to the view that the terminology, namely, "distinct subject" used in section 17 of the Act should be interpreted to mean distinct subject-matters only, and it should also be understood to mean such subject-matters as are distinct but which can be clubbed together in a single suit. Otherwise, if the words "distinct subjects" are to be construed as including distinct categories of subjects taking the word "subject" in a very comprehensive sense, then the meaning of section 17 would become absurd; for distinct categories of subjects could not be embraced in a single suit. Obviously, the intention underlying this section 17 seems to be to provide for suits which involve multifariousness and which do not offend against the other provisions of the Civil Procedure Code, such as misjoinder of causes of action and so forth.

The question then that arises for consideration is whether the present suit embraces different subject-matters or whether it involves a single subject-matter. The facts of this case disclose that there are nine inams granted to the original service holders for performing the service to the temple and each one of these nine inams has been comprised in "separate inam title deed". The extent of each inam varies with the rest and the parties to whom these inams have been granted appear also to have been distinct individuals. Even so, at the time when the inam commissioner issued titles in favour of the respective service holders for the respective lands, he did so in favour of each one of the service holders for the respective lands, notwithstanding the recognition by the Collector of Madhurai of the title of Kunjana Iyer who had purchased from the respective manibhamdars at some time prior to 1861. This Kunjana Ayyar appears to be the ancestor of plaintiffs 2 to 4 and the predecessor-in-title of the other plaintiffs. At the time of the resumption proceedings before the Revenue Divisional Officer it also transpires that nine separate applications were filed. Only the Revenue Divisional Officer and the Collector contented themselves with passing a single order of resumption in respect of the nine separate service inams and separate title deeds. The reason why all the fifteen plaintiffs have combined in this suit is also obvious, for they want relief in respect of each of the inams comprised by a separate and distinct title deed. It is not however the case that each one of the plaintiffs is interested in each one of

the nine inams. Nor is it the case that all the nine inams belong to all the fifteen plaintiffs jointly or in common. So that it is fairly clear that the cause of action for each one of the aggrieved parties among the plaintiffs would be only in respect of the inam or the land covered by the inam title deed in which he is interested and he could not have a cause of action in respect of the rest of the items of inams comprised in the present suit. Therefore, the construction sought to be put upon the terms " distinct subjects " occurring in section 17 of the Act by the learned counsel for the petitioner does not seem to be sound. Whether the items involved in the suit are distinct subjects or one and the same subject may also be tested by the fact as to whether, if one of the plaintiffs alone had filed a suit or if a few of the plaintiffs alone had filed the suit and a decree passed therein in favour of such plaintiffs, it would enure to the benefit of the rest of the plaintiffs who have not been parties to the suit. Unless and until the scope of the suit is made comprehensive enough to include all the nine items and unless all the parties interested in each of the subject-matters of the suit are before the Court, any decree or order passed by the Court would not be of any avail to set the matters in dispute at rest, as regards the other claimants. The effect of such a procedure adopted actually is that instead of each one filing a separate suit for a declaration in respect of the inam in which he is interested, all the interested parties have combined to file a suit in respect of the nine items involved, so that in effect it means that there are nine suits in respect of nine inams by the parties who are respectively entitled to the same and who want to assert their claim in respect of it and seek a relief from the Court by way of a declaratory decree that the resumption ordered by the Revenue authorities ought not to stand. In other words, each one of the parties who is interested in the inam is claiming a relief in respect of that particular subject-matter in which he is interested, and seeks a decree from the Court to nullify the effect of the resumption so far as it operates against that particular subject-matter to which he has a claim. It may be convenient for all such people who claim a similar relief on a similar cause of action to combine and file a suit and such a suit would not amount to a single suit comprising a single subject-matter. On the other hand, it is a suit of this type that can be called a multifarious suit and it is suits of such a type that are sought to be provided for by section 17 of the Act. Because it is possible to avoid multiplicity of suits by combining causes of action and parties without offending against the provisions of the Civil Procedure Code, it cannot be contended that such suits ceased to be multifarious, or that they became suits for a single cause of action or they embrace a single subject or subject-matter. In this view, I think, each one of the subject-matters, namely, the inam comprised by a separate title deed in respect of which there has been an order of resumption should be considered to be a distinct subject and the provision contained in section 17 of the Act would attract itself, to such a suit.

The learned counsel for the petitioner, however, invited my attention to the decision reported in *The Raja of Vizianagaram* v. *The Government*[1], where it has been held that a suit filed by a landholder against the ryots of a village under section 193 of the Madras Estates Land Act does not comprise "distinct subjects" within the meaning of section 17 of the Court-Fees Act, and that where such a suit is dismissed and the landholder appeals, the court-fee payable is on the total of the annual rents of the immoveable property to which the suit relates and not on the aggregate of the court-fees separately payable in respect of the rent of the holding of each particular ryot calculated in accordance with section 7 (xi) (*b*) of the Act. In this decision Anantakrishna Ayyar, J., has considered the question as to whether a suit under section 193 of the Madras Estates Land Act embraced distinct subjects and has come to the conclusion that since the word subject has not been defined, it would not be unreasonable to hold that a suit under section 193 did not comprise distinct subjects, and that the suit of the landholder to enhance the rent upon the particular conditions mentioned in that section which should all exist before a suit under that section can be instituted did not embrace distinct subjects within the

1. (1932) 63 M.L.J. 73.

meaning of section 17 of the Act. Though two other Full Bench decisions of this Court and one other Full Bench decision of the Calcutta High Court have been referred to by the learned Judge in the course of his judgment, I do not think these decisions throw much light on the question at issue in this petition. But one thing is clear, namely, the judgment of Anantakrishna Ayyar, J., is authority only for the proposition that a suit filed under section 193 of the Madras Estates Land Act by a single landholder cannot be said to comprise distinct subjects, and cannot come under the purview of section 17 of the Act. The learned counsel for the petitioner has also invited my attention to another decision reported in *Thangasami Pillai* v. *Dhanabhagyammal*[1]. In that suit the plaintiff had sued for possession of several properties and the prayer in the plaint was that the plaintiff should be put in possession of the " undermentioned " properties through the process of Court and free from obstruction of the defendants who came into possession under different titles from the first defendant who in violation of a trust had alienated them. On the question as to what the proper court-fee payable was, Krishnaswami Nayudu, J., held that on the allegations in the plaint and taking the substance of the plaint also into consideration the suit did not embrace distinct subjects but only one subject as claimed in the prayer in the plaint and as such section 17 of the Act was not applicable to it. I do not think that the decision in this case applies to the facts of the case under revision. A single plaintiff suing for possession of different items of land in the hands of various defendants has been rightly held to be not coming within the scope of section 17 of the Act. But in the present case, as already stated, there are fifteen plaintiffs who are not all of them interested in every one of the items of the property but are interested in distinct items comprised in distinct inam title deeds. The only commonalty which can be postulated in respect of these distinct subjects is that the Revenue Divisional Officer and the Collector passed a single order of resumption as a matter of convenience. This act of passing a single order for purposes of administrative convenience cannot be said to take away the distinctness of each one of the subjects comprised in the suit filed by the plaintiffs for a declaration that that order should not be held to be operative against each one of the items of the inam. I do not think that the decision has any bearing on the facts of the present petition.

The learned counsel for the respondent however invited my attention to a decision in *Haru Bepari* v. *Kshiteeshbhooshan Ray*[2]. The ruling in that decision in my view applies in all its bearings to the facts of the present case. There, several plaintiffs joined in a suit and prayed for declarations affecting the title to their respective jotes and for the removal of cloud upon their titles occasioned by one compromise decree. It was held that proceedings of such a kind embrace as many distinct subjects as the titles affected within the meaning of section 17 of the Act and separate court-fee must be paid for each of them. I think that the reasoning contained in this judgment of a Division Bench of the Calcutta High Court is in full accord with the facts that obtained in the present petition. This decision reviewed the decisions referred to by Anantakrishna Ayyar, J., in *The Raja of Vizianagaram* v. *The Government*[3]. The learned Judges have observed :

> " The expression causes of action may be capable of definition. Indeed, definitions have been formulated in the past although the terms of one definition have not always been identical with those of another, the elements varying to suit particular exigency which evoked the attempt. Be that as it may, we are of opinion that the word ' subject ' in section 17 of the Court-Fees Act covers a multitude of matters which cannot be confined within the precise formula. We find it difficult to see how distinct causes of action can ever be one subject within the meaning of section 17. But the converse does not necessarily hold good : for it may well be that a suit based on one cause of action alone may nevertheless embrace more than one subject within the meaning of section 17 of the Court-Fees Act."

In *Munshi Lachmi Narayan Lal* v. *Bhupendra Prasad Shukul*[4], a co-sharer landlord instituted a suit for rent and paid court-fee on his share of rent. He impleaded the remaining co-sharer as *pro forma* defendant, but alleged that his share of rent only was due. The *pro forma* defendant disclosed that his share of rent had also not been paid and that he be added as a plaintiff and a decree for his share of rent

1. (1949) 2 M.L.J. 565.
2. (1935) I.L.R. 63 Cal. 163.
3. (1932) 63 M.L.J. 73.
4. (1943) I.L.R. 22 Pat. 275.

also be granted. This was allowed on his paying court-fee on his claim. The suit was decreed in favour of both. The tenants preferred an appeal. In the appeal it was held by Roland, J., that the claim of the added plaintiff was not on the same cause of action and was not within the same subject as the claim preferred by the original plaintiff and that his claim was a separate and distinct subject within the meaning of section 17 of the Act. The learned Judge held further that the court-fee payable on the Memorandum of Appeal, therefore, was equal to the total of the court-fee paid by the plaintiff and the added plaintiff in the Court below. Though this decision does not refer to the earlier decision in *Haru Bepari* v. *Kshiteeshbhooshan Ray*[1], still it throws considerable light on the question as to what the word ' subject ' in section 17 of the Act means and what is meant by ' cause of action.' Agreeing with the views expressed in the aforesaid two decisions reported in *Haru Bepari* v. *Kshiteeshbhooshan Ray*[1], and *Munshi Lachmi Narayan Lal* v. *Bhupendra Prasad Shukul*[2], I am inclined to hold that in the present form in which the suit stands, the decision of the learned Subordinate Judge that the plaintiffs should be deemed to have asked for nine separate declarations of the same kind in respect of each of the nine inams, that the suit as framed embraces distinct subjects and that the court-fee payable is governed by the provisions of section 17 of the Act is justified. His further direction that the plaintiffs should pay court-fee of Rs. 100 in respect of each one of the nine declarations is also correct, so long as the frame of the suit remains what it is.

This petition is therefore dismissed with costs.

R.M. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

C. S. Subramaniam .. *Petitioner.**

Penal Code (XLV of 1860), section 497—Validity—If repugnant to Article 13 (1) read with Article 15 (1) of the Constitution of India (1950) as perpetuating discrimination on the ground of sex only—Burden of proof as to connivance of husband.

Where an alleged offence of adultery had been committed before the coming into operation of the Constitution of India (1950) no question of fundamental rights arises and the question whether section 497 of the Penal Code is repugnant to Articles 13 (1) and 15 (1) of the Constitution as perpetuating discrimination on the ground of sex only, need not be decided.

The burden of proving that the accused had sexual intercourse with the complainant's wife without the complainant's consent or connivance is on the prosecution. (As to what constitutes connivance discussed.)

Per *Basheer Ahmed Sayeed, J.*:—It is essential that the complainant should show against the particular person who is made the accused that his sexual intercourse with the complainant's wife was without the complainant's consent or connivance, notwithstanding the fact that the complainant might or might not have consented or connived at the sexual intercourse which other persons might have had with the complainant's wife earlier or later than the complaint.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of Session of the Coimbatore Division in Crl. Appeal No. 148 of 1950, dated 8th March, 1951, preferred against the order of the Additional First Class Magistrate of Erode, dated 9th October, 1950, and made in C. C. No. 405 of 1949.

M. K. Nambiar for *V. Rajagopalachari* and *N. C. Srinivasan* for Petitioner.

The Assistant Public Prosecutor (*A. C. Muthanna*) on behalf of the State.

The Court delivered the following

JUDGMENTS : *Govinda Menon, J.*—The charge against the petitioner before the Court of the Additional First Class Magistrate of Erode was that he, between October, 1948 and 16th May, 1949, at Gobichettipalayam committed adultery with one Dr. Suguna Bai, knowing that she is the wife of one Dr. P. V. Ramachandra

1. (1935) I.L.R. 63 Cal. 163. 2. (1943) I.L.R. 22 Pat. 275.

*Cr.R.C. No. 217 of 1951. 28th October, 1952.
(Cr.R.P. No. 216 of 1951.)

Reddi, the complainant, and without the consent of the said Ramachandra Reddi, and thereby committed an offence punishable under section 497, Indian Penal Code. He was found guilty of the offence and sentenced to rigorous imprisonment for six months. On appeal, the learned Additional Sessions Judge of Coimbatore confirmed the conviction and sentence. Hence this revision.

Mr. Panchapakesa Ayyar, J., before whom the revision came on for hearing on 13th March, 1951, directed the case to be posted before a Bench of two Judges as according to the learned Judge, section 497, Indian Penal Code, perpetuates a discrimination solely on ground of sex and as such is repugnant to the provisions of the Indian Constitution, *viz.*, Article 13 (1) read with Article 15 (1). It was for the purpose of deciding the validity of section 497, Indian Penal Code, and its repugnancy in relation to the articles of the Constitution that the references was made. The learned Judge overlooked the fact that the offence complained of had been committed before the coming into operation of the Indian Constitution. Both the learned counsel for the petitioner and the learned Public Prosecutor conceded that no question of fundamental rights arises in this case, as the alleged offence took place before the 26th January, 1950.

Under section 497, Indian Penal Code, whoever has sexual intercourse with a person who is, and whom he knows, or has reason to believe, to be, the wife of another man, without the consent or connivance of that man, commits the offence of adultery, if such sexual intercourse does not amount to rape.

The complainant had been married to one Dr. Suguna Bai on the 26th January, 1940, under the Special Marriage Act (III of 1872) at Madras. From the evidence of P.W. 1 the complainant, it appears that the wedded life of the parties had not been a happy one. It is in evidence that both the husband and wife were members of the Communist party and that they are interested in the activities of that party. The petitioner who was a friend of both the spouses, was also a member of the Communist party and knew them very intimately. The relations between the married couple became very much estranged from 1942 onwards and the inference that can be drawn from the prosecution case is that the husband allowed the wife to lead her own life without much interference on his part. From 1946 the wife was in different places on private as well as on Government service. It is further alleged that in the second week of October, 1946, the wife went away from the house of the complainant at Madras without the knowledge and in spite of diligent enquiries made by the complainant he could not know her whereabouts till the end of December, 1946. In May, 1948, it is alleged that the differences between both of them were patched up in the presence of a respectable mediator ; but even after that, the estrangement continued. Ex. P-2 is a copy of the petition in O.M.S. No. 22 of 1948, filed by the complainant on the Original Side of this Court under section 17 of the Special Marriage Act and section 10 of the Indian Divorce Act for a dissolution of the marriage on the ground of the wife's adultery with one Mr. G. P. That petition was withdrawn sometime in July, 1949. P.W. 1 says that though he had sufficient evidence that his wife committed adultery with Mr. G. P., he withdrew the suit at the advice of his lawyer. The complaint in the present case was filed on 16th May, 1949, before the withdrawal of that application. Both the lower Courts have found that the accused and Dr. Suguna Bai were living together in house No. 13, Cutchery Street, Gobichettipalayam, that no other person lived in that house, that both of them had one and the same mess and that both of them used to sleep in one and the same room. On this evidence it was found that the only inference is that the accused committed an offence under section 497, Indian Penal Code.

We have been taken through the evidence of the various witnesses examined on behalf of the complainant as well as the testimony of the defence witnesses and it seems to us that the finding of the lower Court on the question of fact that the complainant's wife and the accused were living together in the same house and under the conditions described in the judgment of the lower Court cannot be disputed. But the argument that is put forward by the learned counsel for the petitioner

is that assuming, without conceding, that the accused had sexual intercourse with Dr. Suguna Bai, knowing that she was the lawfully wedded wife of the complainant, still the necessary pre-requisite for a conviction under section 497, Indian Penal Code, *viz.*, that such sexual intercourse was without the consent or connivance of the husband, should be proved. It is urged that the evidence in this case does not show that there was no connivance. It is argued that from the conduct of the husband the Court has to presume that though he did not positively consent to his wife living apart and living with others, he must have tacitly connived at such a life. The learned counsel for the appellant invited our attention to the observations of Edge, C. J. and Aikman, J., of the Allahabad High Court in *Brij Basi* v. *The Queen-Empress*[1]. That was a case where the accused person was found guilty by the lower Courts of an offence under section 451, Indian Penal Code, for having committed house trespass with intent to commit an offence, the prospective offence being adultery. During the course of the discussion the learned Judges observe as follows :

> " It is the first principle of criminal law that where a statute creates a criminal offence the ingredients of that criminal offence must be strictly proved, and that where the doing of an act without consent or without authority is made a criminal offence, and the statute does not expressly put upon the accused the proof of such consent or authority, it is a necessary part of the case for the prosecution to negative by evidence such consent or authority. In this case, if Brij Basi had actually been caught in the act of sexual intercourse with the wife of Ram Gopal, assuming that he knew to be Ram Gopal's wife, the offence of criminal adultery would not have been made out without proof that such sexual intercourse was without the consent and without the connivance of Ram Gopal."

Granting that the prosecution has proved that the accused has committed adultery with the complainant's wife, still is there anything in the evidence to show that it was without his consent or connivance ? It is not sufficient for the complainant to prove the act of adultery. He must also prove that he did not connive at it. Paragraph 20 of Ex. P-2 is clear that the complainant knew that his wife was committing adultery with persons other than the accused on the 13th April, 1948, and on other occasions during April and December, 1947 and between 10th April, and 12th April, 1948, and also between 14th April, 1948 and 16th April, 1948. There is not a word in the deposition of P.W. 1 that subsequent to his having known about his wife's adultery with other persons, he had done anything to prevent her committing adultery with anyone else. In fact the inference is irresistible that after he was convinced that his wife had adulterous intercourse with the co-respondent in O.M.S. No. 22 of 1948, he tacitly acquiesced in the conduct of his wife. His filing an application for divorce and later on withdrawing it is proof that he did not take any steps to wean away his wife from the alleged evil conduct into which she had fallen. We are therefore satisfied that the necessary pre-requisite for a finding that an offence under section 497, Indian Penal Code, has been committed is absent in this case. It is absolutely essential as stated in *Brij Basi* v. *The Queen-Empress*[1], that being a criminal offence, one of the two ingredients to be proved is that the husband did not connive at the adultery.

What " connivance " means in cases under the English Matrimonial Causes Act has been the subject of discussion in *Lloyd* v. *Lloyd*[2]. Langton, J., after discussing all the earlier cases on the subject holds that when the husband having been fully apprised of what was going on, *viz.*, that his wife was committing adultery with other persons, took no active steps to prevent it, and therefore acquiesced in it, it should be presumed that there has been connivance on the part of the husband and therefore a petition for divorce should be dismissed. The learned Judge discussed the earlier cases on the point such as *Rogers* v. *Rogers*[3], and other cases.

But it is argued by the learned Public Prosecutor that this decision has not been approved in England in the subsequent cases. He invites our attention to *Churchman* v. *Churchman*[4]. In that case the Court of Appeal dissented from certain observations of Langton, J., in *Lloyd* v. *Lloyd and Leggan*[2], but lays down that it is the essence of connivance that it preceded the event and, generally, the material event was the

1. (1896) I.L.R. 19 All. 74.
2. (1938) 2 All E.R. 480.
3. (1830) 3 Hag. Ecc. 57 : 27 Digest 327.
4. (1945) 2 All E.R. 190.

inception of the adultery, and not its repetition, although the facts might be such that petitioner must be taken to have connived at it from the first. The same view has been taken in *Manning* v. *Manning*[1], again a judgment of the Court of Appeal. It may therefore be taken that unless there has been connivance at the inception, the English Law would not accept subsequent condonation of adultery as connivance.

We are satisfied from the evidence that after the filing of O.M.S. No. 22 of 1948, the complainant was no longer interested in his wife leading a chaste life. In fact, he was anxious to get a divorce and for some reason, which is not clearly explained, he withdrew the suit on the advice of his counsel. It is alleged by the accused in this case that the complainant abducted his wife from Gobichettipalayam with the intention that she should not give evidence in the divorce suit. Whatever that might be, on a careful reading of P.W. 1's evidence, we are driven to the conclusion that it mattered to him nothing as to what his wife did after he had filed the divorce suit. He allowed her to have her own mode of living without any kind of let or hindrance on his part. That was the reason why there was no evidence let in on behalf of the prosecution that there was no connivance on the part of the husband. As the necessary ingredients of the offence have not been proved we find that the petitioner is not guilty of the offence with which he is charged and we acquit him and set him at liberty.

Basheer Ahmed Sayeed, J.—I agree with my learned brother in the conclusions he has arrived at and the reasoning which he has put forth for allowing the revision petition filed by the petitioner. I would like to add a few words of mine. Section 497, Indian Penal Code, requires that the complainant should prove that the accused had sexual intercourse with the complainant's wife without the complainant's consent or connivance. That means the burden is cast upon the prosecution to prove that the sexual intercourse had been without his consent or connivance of the complainant himself. My learned brother has rightly held that this onus which is cast upon the complainant has not been discharged by the complainant. All that has been proved by the complainant in the case is that the accused must have had or actually had sexual intercourse with the wife of the complainant. This cannot be full compliance with the requirements of the section. On the other hand, it was incumbent upon the complainant to prove that the said sexual intercourse which the accused had with the wife of the complainant was without his consent or connivance. As has been pointed out, there has been no evidence whatsoever that such want of consent or connivance has been proved by the complainant though averments have been made by the complainant to that effect in his complaint. A reference to paragraph 5 of the complaint will make this clear. So also his sworn statement at the time he filed the complaint makes reference to the fact that he did not consent to the sexual intercourse of the accused with his wife. But it does not really meet the requirements of the section. The complainant who gave the evidence as P.W. 1 has not shown that he did not give his consent or that he did not connive at the accused having sexual intercourse with his wife. In order to show this he should have spoken to the steps which he took to prevent the accused or his wife from having intercourse with each other from the moment he came to know of the intimacy between the wife and the accused and from the time he began to suspect that the accused was having sexual intercourse with his wife. Far from speaking to any such facts or steps taken by him, it appears from the evidence that he actually took no steps whatever, though he was fully aware from August 1946 up till 16th May, 1949, when he actually filed the complaint that the accused and his wife were on intimate terms with each other. Paragraph 7 of Ex. P-4 and also Ex. P-3 counter-affidavit filed by the wife makes this position very clear. In spite of this knowledge if the complainant had failed to take steps to prevent sexual intercourse between the accused and his wife, such conduct on the part of the complainant would give rise it is claimed, to the presumption that he had connived at the accused having sexual intercourse with his wife, though in

1. (1950) 1 All E.R. 602.

my opinion, such presumption does not seem to be necessary at all in a criminal case where the onus is laid on the complainant to prove the ingredients of the offence against the accused.

Mr. Nambiar has referred to a number of events which have preceded the filing of the complaint by the complainant to show that the complainant had connived at the sexual intercourse of his wife with other persons like Mr. G. P. during a long period of time and to the various proceedings which were instituted by and against the complainant in connection with the conduct of his wife and that of the complainant himself respectively. These facts might be quite relevant and necessary in a case where the complainant sought to have a divorce between himself and his wife. But in a criminal case I do not think that the connivance by the complainant at acts of sexual intercourse which the wife of the complainant might have had with persons other than the accused would be material or relevant to the particular complaint with which the complainant goes to the criminal Court for vindicating his so-called rights. In my opinion, it is essential that the complainant should show against the particular person who is made the accused that his sexual intercourse with the complainant's wife was without the complainant's consent or connivance, notwithstanding the fact that the complainant might or might not have consented or connived at the sexual intercourse which other persons might have had with the complainant's wife earlier or later than the complainant. In order to make the accused liable to punishment, the complainant must show that that particular accused had sexual intercourse with his wife without his consent or connivance. All the English cases cited by the learned counsel on both sides have relevance only to the civil proceedings in matrimonial cases and they do not have much bearing on the requirements laid down by the express language of section 497, Indian Penal Code. In the present case as has been observed by my learned brother while the complainant has failed to discharge the onus laid down on him to prove the absence of consent or connivance at the sexual intercourse of the accused with the complainant's wife, the petitioner-accused has shown by evidence on record that the complainant had connived at the sexual intercourse of the accused with the complainant's wife though it was absolutely unnecessary on his part to prove such consent or connivance. In this view the petition must be allowed and the conviction will have to be set aside, as has been rightly held by my learned brother.

K.S. —————— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAGHAVA RAO.

Parupudi China Venkata Reddi and others .. *Petitioners**

v.

Ventrapragada Ramabrahmam and another .. *Respondents.*

Madras Agriculturists Relief Act (IV of 1938), section 19—Petition presented under returned for presentation to proper Court—Appeal lies and High Court will not interfere in revision.

An appeal lies under section 25 (*a*) of Madras Act (IV of 1938) against an order returning a petition under section 19 of the Madras Agriculturists Relief Act, for re-presentation to the proper Court and therefore the High Court will not interfere with that order on a revision petition.

If under Order 7, rule 10, Civil Procedure Code, an order for return of a plaint has been made that will certainly be appealable under Order 43, rule 1 (*a*). The right of appeal under that provision cannot stand attracted to orders made in connection with matters other than suits or plaints merely because of section 141, Civil Procedure Code, which can only imply and involve that the mode of trial laid down by the Code in regard to suits will be available in the case of all original petitions as well.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Vijayawada, dated 4th August, 1949, in C.M.P. No. 373 of 1949, in O. S. No. 547 of 1935.

* C.R.P. No. 149 of 1950. 1st October, 1952.

M. S. Ramachandra Rao and *M. Krishna Rao* for Petitioners.

M. V. Nagaramiah for Respondents.

The Court delivered the following

JUDGMENT.—The petition presented under section 19 of the Madras Agriculturists Relief Act to the Court of First Instance where its decree had gone up on appeal and on second appeal also to this Court was returned by that Court for presentation to the proper Court on the ground that the proper Court was the Court of second appeal and not itself. To this view of the learned District Munsiff, Mr. Krishna Rao, urges his objection on the basis of a ruling in a Divisional Bench of this Court consisting of the present Chief Justice and Somasundaram, J., in C. M. P. No. 918 of 1950. Mr. Nagaramayya for the respondents has however invited me to dismiss this petition on the ground that there is an appeal rightly preferred against the order of the learned District Munsiff to the Sub-Court, Vijayawada which is pending. The learned counsel for the respondents says that if the order under revision is an appealable order, I ought not to interfere in revision with the order in question. Mr. Krishna Rao seeks to get over the point made by Mr. Nagaramayya by saying that against the order of the learned District Munsiff now under consideration no appeal can properly lie because all that section 141, Civil Procedure Code, renders possible of application to the original petition for scaling down with which we are concerned in the present case is the procedure provided by the Code of Civil Procedure which may well include a provision for the return of the petition to the proper Court under Order 7, rule 10, Civil Procedure Code, but not necessarily a provision for right of appeal under Order 43, rule 1 (*a*), Civil Procedure Code. The learned counsel has in my opinion rightly maintained that the right of appeal is not a matter of procedure but a substantive right which unless expressly given by the statute cannot be held to be available to a litigant. The interpretation to be placed upon the language in Order 43, rule 1 (*a*) is, in my opinion, this, namely, that if under Order 7, rule 10, an order for the return of a plaint has been made, that will certainly be appealable. I am inclined to think that the right of appeal under that provision cannot stand attracted to orders made in connection with matters other than suits or plaints merely because of section 141, Civil Procedure Code, which can only imply and involve that the mode of trial laid down by the Code in regard to suits will be available in the case of all original petitions as well. It is stated by Mr. Krishna Rao that there is unreported ruling of this Court (Wadsworth, J.) in support of his present submission. I am satisfied that even apart from any such authority the submission of the learned counsel is sound and that the preliminary point of objection of Mr. Nagaramayya based upon section 141, Civil Procedure Code, has no force and must be repelled. It is next contended that the appeal now pending in the Sub-Court at Vijayawada is valid under section 25 (*a*) of the Madras Agriculturists Relief Act. That section provides for an appeal against orders amending or refusing to amend decrees—language which according to the submission of the learned counsel Mr. Nagaramayya is wide enough to include an order for the return of the petition under section 19 on the ground of want of jurisdiction in the Court to which it is presented. Mr. Krishna Rao urges in answer to this further point of Mr. Nagaramayya that refusing to amend can only mean refusing to amend on a consideration of the merits and not a refusal to amend on the ground of want of jurisdiction in the Court to which the petition for amendment is presented. Mr. Krishna Rao urges that the right of appeal conferred by section 25-A ought to be understood in this restricted sense which is the only natural sense that one can *prima facie* impute to the words amending or refusing to amend in the context in which they occur. I am of the opinion that if the language of the rule authorising an appeal is sufficiently wide to take in a case of the kind before me by a Court of first instance, such a right of appeal ought not to be restricted by the considerations of the kind relied on by Mr. Krishna Rao. No consideration except that derived from the language of the rule authorising the appeal ought to enter into the mind of the Court when deciding the question of appealability and if any consideration other than the literal meaning of the language is permissible I rather think that an interpretation in favour of appealability should

prevail rather than the interpretation against appealability. The only one consideration that is permissible is whether the language in its literal tenor leaves one in doubt whether a particular case is within the scope of the language or outside it. In the present case as I have already indicated, the language of section 25-A is sufficiently wide to authorise an appeal preferred by the petitioners to the Sub-Court, Vijayawada.

In view of my upholding the objection of Mr. Nagaramayya based upon section 25-A of the Madras Agriculturists Relief Act it follows that this revision petition must be dismissed but in the circumstances without costs.

Mr. Krishna Rao wants me to make it clear that in view of this objection taken by the respondents to this revision petition the competency of the appeal preferred by his clients to the Sub-Court would no longer be a matter for controversy between the parties there. I can only say that it would not be a matter of controversy hereafter. Mr. Nagaramayya it must be stated in fairness to him has in answer to a question put my me, conceded that it will not be open to him or his clients to question the validity of the appeal in the Sub-Court at Vijayawada.

K.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK AND MR. JUSTICE KRISHNASWAMI NAYUDU.

Polavarapu Venkataswami .. *Appellant**

v.

Nalluri Venkayya .. *Respondent.*

Transfer of Property Act (*IV of* 1882), *section* 55 *and Indian Contract Act* (*IX of* 1872), *section* 73—*Breach of covenant of title and quiet possession—Damages—Mode of assessing—Limitation—Limitation Act* (*IX of* 1908); *Article* 116—*Applicability.*

The suit property was leased out to the plaintiff's father in 1921 and after the death of the lessor his widow sold the property to the defendant in 1932 who in his turn sold it to the plaintiff in 1933. A portion of the purchase money was received by the defendant to discharge a decree debt with respect to which attachment of the said property was pending, but as the defendant did not satisfy the decree the property was brought to sale. The defendant instead of paying and settling the decree started a litigation which failed against the auction-purchaser, in which the plaintiff was not impleaded. The auction-purchaser who obtained symbolical possession filed a suit in 1943 against the plaintiff which was decreed in 1943 and on appeal by the plaintiff was dismissed in 1945. Plaintiff filed the present suit in 1947 for damages for breach of covenant of title and quiet possession.

Held, (i) There was a breach of covenant of title and quiet possession as under section 55 of the Transfer of Property Act there is always an implied covenant as to title and quiet possession and enjoyment in all sales of immoveable properties. Unless there is an express contract to the contrary by the terms of the document, such covenant for title would subsist and would enure to the benefit of the purchaser if there should be a breach of that covenant at any subsequent stage.

(ii) Article 116 of the Limitation Act is applicable to a case of this kind and it provides for six years from the date of the breach of the covenant the covenant being not only the covenant for title but the covenant for possession also and the suit is within time whether the date of the decree of the trial Court in the auction-purchaser's suit in 1943 or an appeal in 1945 is taken as the relevant date.

(iii) The principle of section 73 of the Contract Act is made applicable to breach of covenant of title even as regards immoveable properties and the difference between the contract price and the market price on the date of the breach would be the ordinary mode of assessing damages. But in applying this principle to breaches of covenant of title relating to immoveable properties it is necessary to consider whether courts are prevented from holding that the relevant date would be the date on which the plaintiff makes the claim for damages, *i.e.*, the date of the suit. It is always open in cases of breaches of covenant of title or quiet possession for the plaintiff to have two causes of action to recover the consideration paid together with interest on the basis of failure of consideration or to recover damages on the breach of covenant by reason of the indemnity implied in the covenant of title. When the plaintiff has recourse to the latter, *i.e.*, claiming damages for the loss of property he must be given the property or its value on the date when he makes the demand by instituting a suit, *i.e.*, in this case the market value in 1947.

Appeal against the decree of the Court of the Subordinate Judge of Bapatla, dated 31st July, 1948 and passed in O.S. No. 30 of 1947.

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*Appeal No. 688 of 1948. 22nd October, 1952.

K. Umamaheswaram for Appellant.

C. A. Vaidyalingam and *P. Rajeswaran* for Respondent.

Judgment of the Court was delivered by

Krishnaswami Nayudu, J.—The defendant is the appellant and the appeal is against the decree of the learned Subordinate Judge of Bapatla in O.S. No. 30 of 1947, the decree being for damages for breach of covenant of title and quiet possession. Two acres eighty-four cents of dry lands originally belonged to one Jalambotlu, who leased it to the plaintiff's father for a period of 25 years under Exhibit A-1, dated 4th October, 1921, on an annual rental of Rs. 76, subject to a payment of quit rent out of the maktha amounting to Rs. 2-5-6. The property owned by Jalambotlu was of the extent of 3 acres and odd. After the death of Jalambotlu, his widow Sitaramamma, who acquired absolute rights to the property under a will left by her husband, conveyed 2 acres and 84 cents out of the 3 acres and odd owned by Jalambotlu to the defendant under a sale deed Exhibit B-2, dated 24th June, 1932 for a consideration of Rs. 1,250. The property was already subject to an attachment before the judgment in O.S. No. 170 of 1932, a suit instituted by one Subbamma against Sitaramamma, for recovery of a sum of Rs. 500. Subsequently a decree was also passed in the suit. On 15th September, 1933, the defendant conveyed 2 acres and 84 cents of lands to the plaintiff under the original of Exhibit B-3 for Rs. 1,200. Out of the consideration, a sum of Rs. 500 was received by the defendant for the purpose of discharging the decree debt in O.S. No. 170 of 1932, in which there was already an attachment pending against the property. But after the sale deed, obviously, the defendant having received the amount of Rs. 500 did not pay and satisfy the decree in O.S. No. 170 of 1932 and further proceedings in execution of the decree appears to have been taken and 2 acres and 84 cents of lands were sold on 9th November, 1936 and symbolical possession was taken in favour of the auction-purchaser. The defendant instead of paying and settling the decree in O.S. No. 170 of 1932 appears to have launched himself in litigation by filing a claim petition and after dismissal of the claim petition by instituting a claim suit O.S. No. 508 of 1933 in the District Munsif's Court, Ongole, which was dismissed on the 28th November, 1935. He filed an appeal against that decision A.S. No. 4 of 1936, which likewise was dismissed on the 16th August, 1937. Not content with this, he appears to have filed S.A. No. 142 of 1938 in this Court, which received a similar fate of dismissal on the 11th February, 1941. It may be mentioned that in not one of these proceedings started by the defendant the plaintiff was a party.

The auction-purchser by the strength of his purchase of the property in court auction instituted O.S. No. 112 of 1943 in the District Munsif's Court, Ongole against the plaintiff for recovery of the makthas or the lease amount due up to 1943, *i.e.*, a total sum of Rs. 612-12-0. The plaintiff resisted the suit on the strength of his title and possession by the purchase under the original of Exhibit B-3, but the suit was decreed in favour of the auction-purchaser on the 30th September, 1943. The plaintiff appealed in A.S. No. 31 of 1944 on the file of the Subordinate Judge's court of Bapatla and the appeal was dismissed on 16th January, 1945. The period of 25 years' lease also expired on 4th October, 1946 and the auction-purchaser took actual possession on 22nd March, 1947. The present suit for breach of covenant of title and quiet possession was instituted on 11th April, 1947. The plaintiff claimed a sum of Rs. 9,500 as damages for the breach. The suit was resisted by the defendant in his written statement. He denied that there was any covenant of title and on the other hand pleaded that there was an agreement not to claim compensation or damages in regards to warranties of title, possession and enjoyment except in regard to any alienations made by himself of the suit property and also raised a plea of limitation besides questioning the quantum of damages claimed by the plaintiff. The lower court held in favour of the plaintiff and decreed the suit for Rs. 9,500 and hence this appeal.

Three contentions were urged on behalf of the appellant. All the three contentions that were raised in the lower court were urged before us and as regards the

first of the contentions that there was no covenant of title and quiet possession and enjoyment, there was not much argument by the counsel on behalf of the appellant, as undoubtedly there could not be any doubt that, in this case even apart from any specific covenant as to title in the document, by virtue of section 55, clause (2) of the Transfer of Property Act, the defendant must be deemed to have contracted with the plaintiff, that the interest, which he professed to transfer under the sale deed Exhibit B-3 to the plaintiff subsisted and that he had power to transfer the same. There is always an implied covenant as to title and quiet possession and enjoyment in all sales of immoveable properties, unless it is shown that there is an express contract to the contrary by the terms of the document, such covenant for title would subsist and would ensure to the benefit of the purchaser, if there should be a breach of that covenant at any subsequent stage. Very properly the learned counsel did not press his argument on this issue and we have no doubt in holding that there was such a covenant. An attempt was made in the lower Court to cull out from the terms of Exhibit B-3 a contract to the contrary, which very properly has been rejected by the lower court as there could not be by any means any contract to the contrary which could be ascertained from the terms of Exhibit B-3.

The only two other questions that are required to be determined in this appeal are whether the suit is barred by limitation and whether the damages awarded are excessive. On the first of these questions as to limitation, it is contended that the starting point of limitation must be taken to be 9th November, 1936, the date of sale held in execution of the decree in O.S. No. 170 of 1932, and in any event 11th March, 1937, the date when the auction-purchaser purports to have obtained symbolical delivery of the property. In our view, none of these dates should be relied on to fix the cause of action. As whatever might have been the declarations made by the Court as to title relating to this property, such a declaration was made in the absence of the plaintiff and in the proceedings to which the plaintiff was not a party and it could not be expected that in so far as he was concerned the title has been decided as against him. Equally so, as regards possession, since what was delivered was only symbolical possession as nothing more could be given to the auction-purchaser. And it is not in evidence that the plaintiff was aware of this delivery of possession symbolically and in the absence of such evidence, it is not safe to hold that the cause of action had arisen on the date of the order or on the date of the effecting of this symbolical delivery to the auction-purchaser, which was on 11th March, 1937.

It is therefore for consideration as to what will be the relevant date on which the plaintiff's cause of action could be said to have arisen. For the first time in 1943 by the institution of O.S. No. 112 of 1943, by the auction-purchaser for the recovery of the rent on the strength of his purchase at the Court auction, the plaintiff's title to the property was in issue and he contested the suit on the strength of his own title and a decision was given against him by the first court on 30th September, 1943. The matter was taken up in appeal and finally concluded on 16th January, 1945, when it could reasonably be said that the matter has been conclusively decided against the plaintiff in so far as the title to the property was concerned. Article 116 of the Limitation Act which is applicable to a case of this kind provides for a period of six years from the date of the breach of the covenant, the covenant here being not only the covenant for title but the covenant for possession also. If the cause of action is within six years from any of these two dates, the plaintiff would perfectly be in time. We are inclined to hold that until the determination of the appeal on 16th January, 1945, it could not reasonably be held that the title of the plaintiff has been conclusively determined against him and found in favour of the auction-purchaser in view of the plaintiff having filed an appeal questioning the decision of the first Court. In these proceedings it must be stated that the plaintiff was in fact fighting out the case of the defendant and trying his best to see if he could have his title established against the auction-purchaser in O. S. No. 170 of 1932, though the defendant had failed initially in the claim petition and subsequently in the proceedings which he instituted and conducted. Our attention is however

invited to a decision in *Juscurn Boid* v. *Pirthichand Lal Choudhury*[1], where the following observations of the Privy Council are relied upon in support of the contention that the cause of action must be deemed to have arisen on the date of the disposal of the suit in the first Court. Sir Lawrence Jenkins, delivering the judgment observes at page 678, as follows :

> "Their Lordships feel no doubt that as between these two decrees (a decree of the first Court and a decree of the appellate Court), this is the correct view, for whatever may be the theory under other systems of law, under the Indian Law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal."

Sir Lawrence Jenkins proceeding observed :

> "There may be circumstances in which a failure to get or retain possession may justly be regarded as the time from which the limitation period should run, but that is not the case here."

So either the date of the first decree or the date when the plaintiff failed to retain possession would be relevant for the purpose of ascertainment as to the relevant dates of cause of action under section 116 of the Limitation Act. In either case, the present suit is in time the suit having been instituted on 11th April, 1947, within six years from 30th September 1943, or from 22nd March, 1947, which was the date when the auction-purchaser actually took vacant possession. The suit is well within the time provided by law.

The question as to whether the damages are excessive would to a great extent depend upon the determination of the question as to what should be the relevant date on which the damages have to be ascertained, that is, as to the date on which the value of the lands has to be fixed. Mr. Umamaheswaram, the learned counsel for the appellant contends that the date of delivery of possession to the auction-purchaser on 11th March, 1937, that is when symbolical delivery was made, should be the date on which the market value of the lands has to be fixed. In the view which we have already taken, that would not be the proper date to be relied upon for the purpose of limitation. We are unable to agree that that date should be taken for fixing the market value of the property. The only other alternative which the counsel for the appellant suggests as the relevant date is 30th September 1943, when the decree for the maktha was passed in the suit instituted by the auction-purchaser. As regards this question, the date for the purpose of limitation, which ordinarily will be the date of breach of the covenant of title, could not be treated as the date also for assessing the damages, that is, for fixing the market value of the lands in respect of which the breach has occurred. The principle of section 73 of the Indian Contract Act is made applicable to breaches of covenant of title even as regards immoveable properties, and it is sought to be contended placing reliance on section 73 of the Indian Contract Act that the quantum of damages must be ascertained on the date of the breach as in a contract for sale of goods, where there is a breach of contract, the difference between the contract price and the market price on the date of the breach would be the ordinary mode of assessing the damages. But in applying the principle to breach of covenant of title relating to immoveable properties, it is necessary to consider whether Courts are prevented from holding that the relevant date would be the date on which he makes the claim for damages, that is the date of the suit. All that section 73 provides is that when a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach. Applying that principle one has to see what is it that the plaintiff has lost by the failure on the part of the defendant to implement the covenant for title regarding the sale of the property to the plaintiff. What the plaintiff has lost is the property which he is entitled to get back, but which he could not secure for the reason that the defendant is not in a position to deliver back possession of the property or to show good title to it. It is therefore the property that the plaintiff has lost and which he must get back and when asked for it he must get it or its value in terms of money, and when therefore a suit is instituted for recovery of damages, the

1. (1918) I.L.R. 46 Cal. 670 at page 678 (P.C.).

damages must be ascertained on the date of the suit and not on any other date prior to it. It is always open in cases of breaches of covenant of title or quiet possession, for the plaintiff to have two causes of action, to recover the consideration paid together with interest on the basis of failure of consideration or to recover damages on the breach of covenant by reason of the indemnity implied in the covenant of title. When the plaintiff has recourse to the latter, *i.e.*, claiming damages for the loss of property, he must be given the property or its value on the date when he makes the demand by instituting a suit. We consider that to be the reasonable and suitable view to be taken in cases of this kind relating to damages arising out of the breach of covenant of title and our view finds support in the decisions reported in *Muhammad Siddiq* v. *Muhammad Nuh*[1], and in *Dadha Sahib* v. *Muhammad Sultan Sahib*[2]. The learned counsel however relied on the decisions reported in *Alagirappa Reddiar* v. *Alagirisami Naick*[3] and in *Muthu Goundan* v. *Muttayan alias Kolanda Goundan*[4], but the question there did not arise in the manner in which it has been raised in the present case. In those cases the contention was as to whether the damages were to be ascertained on the date of the sale or on the date of the breach and not on the date of the dispossession or on the date of the suit as is the case before us. We have therefore to find out what the market value of this property would be on 11th April, 1947, the date of the suit.

The evidence as regards the value is discussed by the learned Subordinate Judge and he has arrived at the figure of Rs. 9,500 mainly basing his conclusion on two documents of sale, Exs. A. 10 and A. 11, both dated 12th October, 1946, of lands of the same quality and which are situated adjacent to the suit lands. Ex. A. 10 is a sale deed of about 1 1/2 acres of land to one P. Rangiah for Rs. 7,000, Rs. 4,000 having been paid by way of cash and Rs. 3,000 by way of promissory note executed in favour of the vendor. Ex. A. 11 is in favour of P.W. 2 of an extent of 97 cents for a price of Rs. 4,000. On the basis of these two sale deeds, there can be no doubt that the sum of Rs. 9,500 is the reasonable figure that could be fixed as the value of the property and as claimed by the plaintiff. It is pointed out by Mr. Umamaheswaram, that in or about 1940 or 1941 from the evidence of the witnesses P.Ws. 3 and 4 it is evident that an acre was sold for Rs.400 and for Rs. 1000. No sale deeds are produced in respect of these transactions; but accepting the evidence of these witnesses that in 1940 or 1941 the prices of these properties ranged from Rs. 400 to Rs. 1,000 per acre, that would not be sufficient to hold that the prices continued at the same rate in 1947, when the suit was instituted. The evidentiary value of Exs. A.10 and A. 11 cannot be under-estimated. It is suggested however that in Ex. A. 10, part of the consideration was paid by way of promissory note, which is not of any consequence, since it is ordinarily common in land, transactions that part of the price is paid in cash and the balance of the price by way of promissory note. It is also pointed out that P.Ws. 1 and 2 are near relations of the plaintiff and it is likely that these two documents might have been brought into existence to support the claim of the plaintiff in this suit. But the fact remains that a sum of Rs. 4,000 in cash has been paid by the vendee in Ex. A. 11 before the Sub-Registrar of Assurances, which it is very difficult for the appellant to get over. That these dry lands have arisen phenomenally in value is evident from the fact that they have been used for raising tobacco, which is a paying commercial crop, in this part of the State and this is also evident from the fact that though the same lands were leased to the plaintiff's father for a sum of Rs. 76 per annum, after the auction-purchaser secured possession he appeared to have leased it for an amount of Rs. 300. Mr. Umamaheswaram relied on this prior evidence on the side of the plaintiff and contended that the proper mode of ascertainment of the market value in this case should be by capitalising the annual rental which the property was fetching. Capitalising the annual rental value of Rs. 300 at 20 times, he submitted, that a sum of Rs. 6,000 would be the reasonable market value. We would have been inclined to take the annual rental value as the basis and fix the

1. (1930) I.L.R. 52 All. 604.
2. (1950) 39 M.L.J. 706 : I.L.R. 44 Mad. 167.
3. (1935) 68 M.L.J. 588.
4. (1942) 2 M.L.J. 617.

market value, but for the fact that there is the other evidence in this case which gives us a clear indication of the market value of the lands in the locality on the relevant date in about 1946 or 1947. Further it must be stated that there is no evidence on the side of the defendant to disprove that the value of the lands has not increased as has been shown in this case by the evidence on behalf of the plaintiff and the documents relied on by him in support of his contentions. We do not therefore feel justified in disagreeing with the valuation fixed by the lower Court at Rs. 9,500 which appears to be the reasonable market value on the date of the suit.

In the result the appeal is dismissed with costs.

V.P.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Bojja Venkataraju .. *Petitioner**

v.

The State of Madras, represented by the Secretary to Government Local Administration Dept., Fort St. George, Madras .. *Respondent.*

Madras Village Panchayats Act (X of 1950), section 47 (1)—Whether irregularities committed before the commencement of the Act can be taken into account—Allegations of mala fide *against Government should not lightly be made.*

On 1st April, 1951, the Madras Village Panchayats Act came into force and on 30th July, 1951, the Inspector of Local Boards issued a notice to the President of a Panchayat (the petitioner) to show cause why he should not be removed from office alleging four irregularities all of which were committed before 1st April, 1951. The petitioner submitted an explanation which was not accepted and he was ordered to be removed from office.

Held: that (i) under section 47 (1) of the Act the omission or refusal to carry out, or disobedience of the provisions of the Act or rules framed thereunder relates to acts committed or omissions made after the commencement of the Act, and the Inspector of Local Boards cannot take into consideration acts done or omissions made prior to the commencement of the Act and the order passed is therefore contrary to the provisions of the Act.

(ii) While it is necessary in the interests of the country that Government and its Officials should act *bona fide* in the discharge of their duties it is equally important that members of the public should not make grave and unfounded allegations against the Government unless they are in a position to substantiate them.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in R. O. C. No. 65013-50 H-4 dated 28th August, 1951, on the file of the Inspector of Local Boards, as confirmed by G.O. No. Bt. 56, Local Administration Dept., dated 23rd January, 1952 and connected records and quash the same.

Neti Subramaniam and *J. V. Krishna Sarma* for Petitioner.

V. V. Raghavan for the Government Pleader (*P. Satyanarayana Raju*) for State.

The Court made the following

ORDER.—This is an application under Art. 226 of the Constitution of India for issuing a writ of *certiorari* to quash the order of the Government of Madras, dated 28th August, 1951, in R. O. C. No. 65013-50 H-4.

The petitioner was elected President of the Panchayat Board, Bhogapuram, Pithapuram taluk in the year 1940. The Madras Village Panchayats Act (Act No. X of 1950) came into force on 1st April, 1951. After the Act came into force, on 31st July, 1951, the Inspector of Local Boards issued a notice to the petitioner to show cause why he should not be removed from his office. In that notice, four irregularities alleged to have been committed by the petitioners were detailed :

(1) The President failed to convene meetings of the Panchayat Board in May and November, 1948, January, February, April, June, July, August and November, 1949 and in the months of June, July, August, October and November, 1950.

*Writ Petition No. 200 of 1952. 12th September, 1952.

(2) When three members of the Panchayat Board ceased to be members for not attending three consecutive meetings, he failed to report the same to the authorities concerned.

(3) He was favouring Prathipadu hamlet of Bhogapuram in preference to Bhagapuram, as he was residing in that place.

(4) He did not afford access to Harijan members to attend the meetings and that they were denied access to enter the Panchayat Board Office at the time of meetings.

The petitioner submitted explanation denying the allegations. The Inspector of Local Boards made an order dated 28th August, 1951, removing the said Bojja Venkataraju from the office of the President of the Bhogapuram Panchayat Board with effect from 4th September, 1951. The petitioner filed an appeal to the Government and the Government declined to interfere with the order of the Inspector of Local Boards. Mr. N. Subramaniam, the learned counsel for the petitioner raised before me three points:

(1) The Government and the Inspector of Local Boards were actuated by *mala fides* in removing him from the office.

(2) That the petitioner's removal is contrary to the express provisions of section 47 (1) of Madras Village Panchayats Act of 1950 as all or most of the acts complained of were done long before that Act came into force.

(3) Neither did the notice state that the irregularities alleged to have been committed by the petitioner were wilful nor was there a finding that the irregularities were wilful within the meaning of that section.

The question of *mala fides* was based upon the following allegations: In the village, there were two groups of congressmen, one the ministerial group and the other anti-ministerial group. The petitioner belonged to the anti-ministerial group. An attempt was therefore made through the Secretary of the All-India Congress Committee to influence the Minister in charge to amalgamate Bhogapuram Panchayat with the neighbouring Panchayat Board and when that attempt failed, to get the petitioner removed from the office. To substantiate this grave allegation, the learned counsel for the petitioner stated that petitions were sent through the Secretary, All-India Congress Committee, who forwarded the same with his recommendation to the Minister-in-charge, and the Minister-in-charge took personal interest in the file and expeditiously passed orders within a month. A perusal of the records does not support the allegations made against the Government. The records submitted to the court disclose that a petition for amalgamation was sent through the secretary, All India Congress Committee who forwarded it to the Minister in charge with a note "Please look into the matter and do the needful." But the same records disclose that notwithstanding the recommendation of the Secretary the Government directed the Inspector of Local Boards to make an enquiry and he reported that amalgamation was not in the interests of the Panchayat Boards. Accepting the recommendation, the Government dropped the proposal. Far from showing that the Government was influenced by the recommendation of the Secretary, it shows that notwithstanding the recommendations, they disposed of the matter on the merits in favour of the petitioner. Then it is said that the petition mentioned in the affidavit was not the petition forwarded to the Minister prior to the dropping of the amalgamation proceedings, but a petition sent subsequently. No doubt, an allegation to that effect was made in the affidavit and it was not specifically denied in the counter, but the records submitted to the Court do not show that any such petition was forwarded to the Government. If it was sent, just like the other petition, it would have found a place in the records. I cannot therefore accept the allegation that some other petition was sent with the recommendations of the Secretary of the All India Congress Committee to the Minister-in-charge. From the mere fact that the petitioner belonged to the opposite group working against the official congress, and from the other laudable circumstance that the Secretariat disposed of the matter expeditiously, I find it impossible

to hold that either the Government or the Inspector of Local Boards were influenced by the ministerial group or through some other influential quarter. I hold on the record placed before me that the petitioner failed to substantiate the allegations made in the petition. I must once again state what I have been stating in many similar other applications before me, that while it is necessary in the interests of our country that the Government and their officials should act *bona fide* in discharge of their duties, it is equallly important, that members of the public should not make grave and unfounded allegations against the Government unless they are in a position to substantiate the allegations made.

There is some force in the next argument advanced by the learned counsel for the petitioner. The learned counsel argued that the Inspector of Local Boards acted illegally in removing the President under section 47 (1) of the Madras Village Panchayat Act of 1950 in respect of acts alleged to have been committed by the petitioner prior to the date when the Madras Village Panchayat Act came into force. Section 47 (1) reads :

> " The Inspector may, by notification and with effect from a date to be specified therein, remove any president or vice-president who, in his opinion, wilfully omits or refuses to carry out or disobeys the provisions of this Act or any rule, by-laws, regulations or, lawful orders issued thereunder, or abuses the powers vested in him."

This Act came into force on 1st April, 1951. *Prima facie*, therefore, the omission or refusal to carry out, or disobedience to the provisions of the Act or the rules framed thereunder must necessarily relate to the acts committed, or omissions made, after the Act came into force. But the learned Government Pleader contended that by reason of the transitory provision, the Inspector of Local Boards has a power to take into consideration acts done by the President at a time prior to the date when the Act came into force. He relied upon section 131 in support of his contention. S. 131 says :

> " With regard to the first reconstitution in accordance with the provisions of this Act of Panchayats in existence at the commencement thereof, and otherwise in first giving effect to the said provisions, they shall be read subject to the rules in Schedule III."

Schedule III deals with transitional provisions. There is no rule in schedule III enabling the Inspector of Local Boards to take into consideration the acts done by the President in contravention of some provisions of a different Act. Rule 13 only saves any action taken by any authority before the commencement of the Act unless that is inconsistent with that Act. I, therefore, agree with and accept the contention of the learned counsel for the petitioner that the Inspector of Local Boards cannot take into consideration acts done or omissions made by the petitioner in his capacity as a President functioning under a different Act. Even so, the learned Government Pleader contended that the Acts taken into consideration by the Inspector of Local Boards related only to a period after 1st April, 1951. Even a perusal of the counter-affidavit filed on behalf of the Government shows that all the acts were committed long prior to the Act came into force. The meetings alleged not to have been convened relate to the years 1948, 1949 and 1950. The three members were disqualified in the year 1944. The expenditure incurred by the petitioner in respect of the hamlet in which he was living related to a period ending with 31st March, 1951. The Harijans were prevented from attending the office long prior to the Act came into force. The order passed upon the said facts is, in my view, contrary to the provisions of section 47 (1) of the Act. The Inspector of Local Boards therefore acted illegally in removing the President of the Panchayat Board under section 47 (1) of the Act. For the aforesaid reasons, I quash the orders of the Inspector of Local Boards and the Government of Madras. As regards costs, I do not think this is a fit case for awarding costs to the petitioner. As I have already stated, he made grave allegations against the Government and failed to establish the same. Further, the point now raised has not been specifically stated in the affidavit filed in support of the petition. For the aforesaid reasons, I direct the parties to bear their own costs.

V.P.S. ——— *Orders quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Mylasu Gopalarao .. *Petitioner**

v.

Chitta Seetharamiah and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 24 (1) and (4)—Transfer of suit to Sub-Court by High Court's order—Sub-Court having no small cause jurisdiction—Revision—If lies.

A small cause suit filed in a District Munsiff's Court was transferred by order of the High Court to a Subordinate Judge's Court to be tried along with other suits in that Court, On a revision petition filed against the decision of the Sub-Court the preliminary point was raised, namely, that an appeal and not a revision would lie as the decision of the Sub-Court must be regarded as one made in the exercise of the original jurisdiction and not a decision in the exercise of small causes jurisdiction.

Held: that section 24 (4), Civil Procedure Code, should have been made by the Legislature in order to ensure that the decision of the transferee court be regarded, for the purpose of procedure, including a question of appealability as a small cause suit which originally it was undoubtedly.

Further where the High Court as in this case had made the transfer, the original disability on the Sub-Court could not survive it.

Sankaramma v. *Padmanabha,* (1912) 23 M.L.J. 373 : I.L.R. 38 Mad. 25 applied.

Murugesa Mudaliar v. *Venkatakesavalu Chetty* (1929) 56 M.L.J. 649, disapproved.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge, Eluru, dated 28th February, 1950, in O.S. No. 8 of 1950.

B. V. Subramanian for Petitioner.

Ch. Sankara Sastri for Respondents.

The Court delivered the following

JUDGMENT.—A small cause suit filed in the District Munsif's Court of Eluru was transferred by an order of this Court, to the Subordinate Judge's Court at Eluru for disposal along with two other suits. In the suit out of which this revision arises there was a decision rendered by the transferee court, the Sub-Court at Eluru, against which the defendant has filed this revision petition.

Mr. Ch. Sankara Sastri, the learned advocate appearing for the plaintiffs, has taken a preliminary objection to the maintainability of this revision petition on the ground that against the decision of the Subordinate Judge an appeal would lie to the District Court. So, says counsel, this revision is incompetent. In other words, learned counsel says that the decision pronounced by the Subordinate Judge must be regarded as a decision in the exercise of his original jurisdiction and not a decision in the exercise of small cause jurisdiction. It is pointed out by Mr. Sankara Sastri that in fact the Sub-Court at Eluru had no small cause jurisdiction at the time that the transfer took place. So, says counsel, the jurisdiction actually exercised by the Sub-Court at Eluru must be referred to its original jurisdiction and not to any small cause jurisdiction. As counsel drew my attention to section 24 of the Civil Procedure Code, in connection with their arguments, it has struck me that section 24 (4) of the Code creates a real difficulty in the way of this preliminary objection raised by Mr. Sankara Sastri. The language of that section is to this effect :

"The court trying any suit, transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes."

This, to my mind, puts an end to all enquiry after a transfer has taken place as to whether, after the transfer, it is the original jurisdiction of the transferee court that must be said to have been exercised, or the small cause jurisdiction of the court from which the transfer took place.

Mr. Sankara Sastri concedes that in this case he is not disputing the validity of the order of transfer made by the High Court. But he says that notwithstanding

* C.R.P. No. 2007 of 1950. 7th October, 1952.

the order of transfer, the jurisdiction actually exercised by the transferee Court is referable only to the original jurisdiction vested in the transferee Court from the inception and not to the small cause jurisdiction which can be reasonably supposed to have been transferred to it by the High Court on account of its order of transfer of the cause itself from the file of the Munsif's Court to the Sub-Court.

If a provision like the one embodied in section 24 (4) of the Civil Procedure Code did not exist, the contention of Mr. Sankara Sastry might have some force. In most cases it is difficult to say, after the kind of transfer under sub-section (1) has been made, whether the subsequent trial of the transferred suit must be referred, where the transfer has been to a Court possessed of original jurisdiction, to such original jurisdiction or to the small cause jurisdiction vested in the Court in which the suit was originally instituted as a small cause suit. It is precisely to avoid enquiries into matters of such difficulty, after the order of transfer has taken place, that the provision in section 24 (4), Civil Procedure Code, seems to my mind to have been made by the Legislature in order to ensure that the decision of the transferee Court shall be regarded, for the purpose of procedure including a question of appealability, as in a small cause suit which it originally was undoubtedly. The effect of sub-section (4) in my opinion is to make the decision by the Sub-Court at Eluru in the present case a small cause decision and not an original side decision.

The only point which has given some room for anxious consideration on my part in this matter is the fact that when the order of transfer was made, the Sub-Court at Eluru had no small cause jurisdiction. But for the reasons that I have given, I think that if one has to apply the language of section 24 (4), Civil Procedure Code, as it stands the decision of the Sub-Court at Eluru in the present case was a small cause decision which accordingly would be revisable under section 25 of the Provincial Small Cause Courts Act and not appealable under section 96 of the Civil Procedure Code.

The fact that the Sub-Court at Eluru had only original jurisdiction and no small cause jurisdiction at all may entail a disability for it to entertain a suit which is of a small cause nature. But where the transfer of the suit has been made by the High Court, the original disability in the Sub-Court does not in my opinion survive it, so as to make the kind of preliminary objection raised by Mr. Sankara Sastri tenable. In support of the view that I have taken there is a Bench decision of this Court reported in *Sankararama* v. *Padmanabha*[1]. So, if authority were needed for the conclusion that I have reached, that in this case the revision petition is competent, that decision *prima facie* furnishes authority in that direction. Mr. Sankara Sastri has attempted to distinguish that ruling, as one single learned Judge of this Court is said by him to have distinguished it in *Murugesa Mudaliar* v. *Venkatakesavalu Chetti*[2]. It is unnecessary for me to deal with this point of distinction between the case in *Sankararama* v. *Padmanabha*[1] and the present case on the facts, as I am satisfied that the statement of principle contained in that decision, which is really what governs me sitting here as a single Judge, is supported by the *prima facie* view that I have formed on the language of section 24 (4), Civil Procedure Code. It is to my mind therefore clear that the preliminary objection raised by Mr. Sankara Sastri must be overruled and this civil revision petition must be proceeded with on the merits.

Turning to the merits of the small cause revision Mr. B. V. Subramaniam, the learned advocate for the petitioner-defendant, has taken the point before me that no decree could have been passed for the rent part of the suit claim on the basis of the lease between the respondent and his client because, on a construction of Exhibit A-1, the lease between the respondents and the owner of the property, one Mulukutla Venkata Ramakrishnayya, the respondents ceased to have any title to the property on the date on which they granted the lease in their turn to the present petitioner. The point in question, as learned counsel has frankly admitted before me after a verification of the pleadings and the issues, is not one which was

1. (1912) 23 M.L.J. 373 : I.L.R. 38 Mad. 25. 2. (1929) 56 M.L.J. 649.

raised by him in the Court below. I do not think, sitting in revision as I do, I can allow this point to be raised, of which there is no hint, as I have said, in the pleadings in the case or in the issues as framed by the District Munsif before the transfer of the suit to the Sub-Court at Eluru.

Mr. Subramaniam draws my attention to the fact that in the judgment of the Court below it has been observed that it is not necessary to go into the question of the construction of Exhibit A-1 or of whether there were any rights in the respondents at the time of their alleged lease to the petitioner. In my opinion the Court below rightly observed to that effect because the point was not one which had been taken either in the pleadings or in the issues.

There is no other point which has been argued before me or attempted to be argued before me in this case very properly, because any other point would not be within the purview of my revisional jurisdiction under section 25 of the Provincial Small Cause Courts Act. This revision petition is therefore dismissed with costs.

K.C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRA REDDI.

Sri P. M. Ratna Sabhapathi Rao and others .. *Petitioners**

v.

The State of Madras, represented by Secretary, Local Administration Department and others .. *Respondents.*

Madras District Municipalities Act (*V of* 1920), *section* 43—*Scope of*—*Writ under Article* 226 *of the Constitution of India* (1950)—*Cannot issue at the instance of a person not aggrieved*—*Jurisdiction of Courts to interfere with electoral process.*

There is no provision of law in the District Municipalities Act to compel the Government to give effect to the recommendations made by a municipality. The Government is not bound to accept all the recommendations of a municipality in regard to the division of the municipality into wards. All that they have to do under section 43 of the Act is to consider the proposals made by a municipality before arriving at a decision. So, where a municipality sent proposals for division into wards and the Government after considering them passed orders, it cannot be said that the Government should accept any further recommendations of the municipality or even consider them.

Where the petitioners do not state how the division into wards resulted in a diminution of their chances of being elected to the Municipal Council, an application for the issue of a writ by them is not maintainable as they cannot be said to be aggrieved or affected by the failure of the Government to comply with the provisions of section 43 of the Act even assuming that there was such a non-compliance. It is only the municipality that can complain about it. Belated attempts at the close of the argument to file a petition on behalf of the municipality should not be entertained especially when the Chairman could not come on record without sanction from the municipality.

It is nowhere laid down in the Act that the wards in a municipality are to be so divided as to make it easy for the members of a particular community to be returned to the municipal council or that equality of voting strength in the wards should be ensured.

Even assuming that the disparity in the voting strength in the matter of redistribution of wards might amount to a volition of the principles of natural jusice, the matter is outside the jurisdiction of a court of law to interfere by way of a writ.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* or any other appropriate writ or direction, call for the records of the case and quash the Notification of the Government G.O. No. 1298, L.A., dated 1st July, 1952.

N. Subrahmanyam for Petitioners.

The Government Pleader (*P. Satyanarayana Raju*) for Respondents.

The Court made the following

ORDER.—This petition relates to the Municipal Council, Guntur and is taken out by twelve persons stated to be the members of that municipality for calling

* Writ Petition No. 640 of 1952. 15th October, 1952.

for the records and for quashing the notification issued by the Government in G.O. No. 1298, Local Administration, dated 1st July, 1952. In 1949 the strength of the Municipal Council, Guntur, was fixed at 32 and as the census of 1951 disclosed an increase in the population, the strength of the council had to be increased to 36 in view of the provisions of section 7 of the District Municipalities Act. This necessitated re-division of the wards into 32. Under section 43 of the District Municipalities Act, the Government have to consult the municipalities concerned before dividing the municipality into wards and doing other things mentioned in that section. Accordingly the Government called for proposals from the municipality with regard to the division of it into wards and also the wards in which seats if any should be reserved under sub-section 3 of section 7 of the Act. On receipt of this communication the Municipal Council passed a resolution on 1st November, 1951, appointing a sub-committee of eight of whom two of the present petitioners were members for formulating proposals to be submitted to the Government regarding division into wards. In order to consider the recommendations of the sub-committee, a meeting of the Council was called for on 7th March, 1952 and the agenda specifically included the consideration of the proposals of the sub-committee with regard to division of wards. But as there was no quorum, the meeting had to be adjourned, By a notice dated 13th March, 1952, the meeting was fixed for 27th March, 1952. On that day a point of order was raised that the meeting was not validly summoned as the notice for the meeting and the agenda were not signed by the Vice-Chairman, the basis of the objection being that the Vice-Chairman left the town on the 16th evening and so he could not have signed either the notice or the agenda. But this point of order was ruled out by the Vice-Chairman who was then presiding on the ground that, the notice and the agenda were signed on the 13th and there was absolutely no force in the point of order. Thereafter the proposals of the sub-committee were considered and were accepted with slight modification and they were communicated to the Government. On 30th May, 1952, some members of the Municipal Council sent a requisition for summoning a special meeting for the purpose of reconsidering the resolution of the 27th of March, 1952. Accordingly the special meeting was summoned and at that meeting it was resolved that the resolution of the 27th March, 1952, should be reconsidered. The meeting was adjourned to 20th June, 1952 and on account of some inconvenience to some of the members, the meeting could not be held on the 20th and it was postponed to 23rd June, 1952. On 23rd June, 1952, at about 11 o'clock when the council was in meeting, a notice was served on the Vice-Chairman by an advocate informing him that a suit was filed by one of the Municipal Councillors for an injunction restraining the Municipal Council from reconsidering the resolution passed on 27th March, 1952. Immediately the Vice-Chairman read out the notice received by him and adjourned the meeting entering in the minute book that the matter of reconsideration of the resolution was *sub judice* and left the meeting. It is alleged in the affidavit in support of the petition for the issue of writ of *certiorari* that 17 members of the Council stayed behind, elected one of them as the president of the meeting and passed a resolution making certain proposals to be forwarded to the Government for the division of the wards. This seems to have been communicated to the Government and it is stated that these proposals were before the Government before the notification now sought to be quashed was issued.

The main grounds of attack against the notification in question are that it is based on the proposals of the municipality made on the 27th March, 1952, which are inequitable, and unjust and is therefore *ultra vires* the powers of the Government, that it contravenes the provisions of section 43 and that the Government acted in a very high-handed and arbitrary manner and were actuated by *mala fides* in not issuing a notification in accordance with the proposals made on 23rd June, 1952.

The chief question therefore for consideration is whether the Government disregarded the provisions of section 43 of the District Municipalities Act. Section 43 of that Act runs thus :

"43. (1) For the purpose of election of councillors to a Municipal Council, the Provincial Government after consulting the Municipal Council may, by notification,

(*a*) divide the municipality into wards,

(*b*) determine the wards in which the seats, if any, reserved under sub-section (3) of section 7 shall be set apart, and

(*c*) declare for whom such seats are reserved.

(2) ......"

We are not concerned with the other provisions of the section. It is seen that under section 43 all that the Government are required to do before dividing the municipality into words is to consult the municipality concerned. Before issuing a notification regarding the division, the Government should have the advice of the Municipal Council, that is, the views of the concerned municipality with regard to that matter. They are not bound to adopt all the proposals submitted to them in that behalf. All that they have to do before arriving at a decision with regard to division into wards is to take the recommendations of the municipality into consideration they being the final authority and the responsibility being entirely their own. In this case the notification issued on 1st July, 1952, is mainly based on the proposals made by the municipality on 27th March, 1952.

It is argued by Mr. Subramaniam, vehemently that when fresh proposals were submitted to the Government in supersession or modification of the earlier proposals the Government were bound to act only on the subsequent proposals and could not take into consideration the earlier proposals. I am afraid I cannot give effect to this argument. There is no provision of law in the Act to compel the Government to give effect to the recommendations made by the municipality. They are not bound to accept all the recommendations of the municipality in regard to the division. All that they have to do is to consider the proposals before arriving at a decision. Whatever may be the position if the Government were to act in accordance with the wishes or the resolution of the council and the resolution binding on the Government it is different when the Government have only to consult the municipality before issuing the notification. Under section 43 the capacity of the council is only advisory and it cannot insist on the Government accepting the later advice tendered by it in preference to the one that was given earlier. It is for the Government to decide whether they will accept the advice given first or that given subsequently. If the contention put forward on behalf of the petitioners is to be accepted, the position comes to this. If after passing the resolution on 23rd June the municipality again had changed its mind and submitted fresh proposals, the Government would have to give effect to the latest proposals and not to the intermediate proposals. I do not think such a position was ever contemplated by the Legislature when it enacted section 43 of the District Municipalities Act. It is not out of place to note in this case that the municipality met again on 18th August, 1952 and passed a resolution submitting proposals which are said to be completely at variance with those submitted on 23rd June, 1952. If effect is given to the argument of Mr. Subramaniam, the Government can never act promptly and expeditiously.

In support of his contention that there was no consultation by the Government as required under section 43 of the Act, Mr. Subramaniam relied on a decision of Subba Rao, J., in W.P. No. 648 of 1952. (*Pushpam* v. *State of Madras*[1].) I do not think that the decision has any bearing on the question for consideration. There the State Government made proposals to the Municipal Council, Arupukottai, to reserve two seats for women in Ward Nos. 5 and 12. The Municipal Council expressed the opinion that the reservation for women might be made in Ward Nos. 5 and 7. The Government instead of making reservation as per the original proposal or accepting Municipal Council's recommendation made the reservation for women in Ward Nos. 2 and 12. While holding that there was consultation in regard to Ward No. 12 having regard to the fact that the original proposal of the Government included Ward No. 12 the learned Judge took the view that there was no consultation in respect of Ward No. 2. In the opinion of the learned Judge

1. Since reported in (1953) 1 M.L.J. 88.

it could not be said that there had been any consultation or collaboration between the Municipal Council and the Government as regards Ward No. 2.

As I have already pointed out, the principle underlying the case has no application to this case. I think that once the Government had called for proposals and the proposals were submitted it is open to the Government to accept those proposals in preference to those subsequently made. When this is done, it cannot be said that there is no sufficient compliance with the provisions of section 43 of the District Municipalities Act. In these circumstances there is absolutely no substance in the contention that the Government disregarded relevant provisions of the Act in issuing the notification on 1st July, 1952.

I must also observe that there is absolutely no foundation for the allegations of *mala fides* and high-handedness made against the Government. The Government acted on the advice tendered by the municipality and it cannot be said that the action of the Government was *mala fide*, high-handed or arbitrary. In this connection it cannot be overlooked that the sub-Committee whose recommendations formed mainly the basis of the notification included two of the petitioners. Further in the counter filed by the Secretary to the Government, Local Administration department it is stated that the Government considered that the wards as proposed by the Council on 23rd June were equitable and approved those proposals. I do not see any reason why I should not accept this statement. Merely because the voters' list of different wards are not exactly equal, it cannot be premised that there is want of *bona fides* on the part of the Government. It is regrettable that *mala fides* should be attributed to the Government without the slightest foundation.

It was argued by the Government Pleader that even assuming that there was non-observance of the provisions of section 43 of the District Municipalities Act, the petitioners have no *locus standi* to maintain this application. It is submitted that the petitioners cannot be said to be aggrieved or affected by the failure of the Government to comply with the provisions of section 43 of the District Municipalities Act even assuming that there was such non-compliance. There seems to be considerable force in this contention of the Government Pleader. It cannot be said that the rights of the petitioners are involved in the failure of the Government to comply sufficiently with the requirements of section 43 of the Act. They have no direct interest in the matter. It is only the Municipality that can complain of it. The petitioners do not have any personal interest in the matter.

In this connection, I may refer to a decision of a Bench of this Court consisting of the Chief Justice and Venkatarama Ayyar, J., in W.P. No. 244 of 1952. The principle laid down there is that the right which is the foundation of a petition under Article 226 of the Constitution or a corresponding provision is a personal and individual one and it is the person whose right has been affected by any particular order that can invoke the jurisdiction of this Court under Article 226 of the Constitution. The learned Judges in that case referred to a decision of the Supreme Court in *Chiranjitlal Chowdhury* v. *The Union of India*[1].

In the last mentioned case the validity of the Sholapur Spinning and Weaving Company (Emergency Provisions) Act passed by Parliament was impugned by a holder of a share in the company by moving for a writ of *mandamus* and certain other reliefs under Article 32 of the Constitution. The Supreme Court took the view that an individual shareholder was not entitled to challenge the validity of the enactment which affects the fundamental rights of the company except to the extent that it constitutes an infraction of his rights. The observations of Fazl Ali, J., at page 32 of the report are pertinent :

> "It has been held in a number of cases in the United States of America that no one except those whose rights are directly affected by a law can raise the question of the Constitutionality of that law."

I may also extract the observations of Das, J., in In re *Benwarilal Roy*[2] in this connection :

1. (1951) S.C.J. 29.
2. (1944) 48 C.W.N. 766.

"It is a very well-known form of process and an effective weapon in the judicial armoury for the protection of the rights and franchise alike of the Crown and the subjects."

In this connection the remarks of Wright, J., in the *Queen* v. *Lewisham Union*[1], are apposite :

"This Court would be far exceeding its proper functions if it were to assume jurisdiction to enforce the performance by public bodies of all their statutory duties without requiring clear evidence that the person who sought its interference had a legal right to insist upon such performance."

I therefore think that the petitioners unless they can allege that their personal rights are involved in the notification impugned cannot maintain this application. It is not alleged how the alleged unequal division has affected the petitioners personally. They do not state that this has in any way resulted in the diminution of the chances of the three petitioners who are said to be seeking election to be returned to the Municipal Council. All that is alleged in the affidavit in support of the petition is that the re-distribution of wards is not in the interest of the public.

Mr. Subramaniam cited some cases which have laid down that although a subject not having a personal right involved in the matter may not be entitled *ex debito justitiae* to the issue of a writ, still it is within the discretion of the Court to issue a writ if it is established that the orders impugned are contrary to the provisions of an enactment or principles of natural justice. I do not think these decisions carry the petitioners very far assuming the dictum laid down in those rulings is correct and also that it has a bearing on the writs to be issued under Article 226 of the Constitution.

What is alleged in the present petition is that the wards are not so divided as to ensure the return of members of minority communities to the Municipal Council and that the number of voters in some wards is larger than those of other wards. It is nowhere laid down that the wards in a municipality are to be so divided as to make it easy for the members of a particular community to be returned to the Municipal Council. Nor can it be premised that there is a violation of the principles of natural justice if the wards are not so manipulated as to ensure the success of the representatives of a particular community in the Municipal election. It is not out of place to mention here that it is complained in the affidavit that one of the wards was so redistributed as to make it easy for a Brahmin candidate to be returned to the Council. There is not much force in the other complaint also. Neither under the provisions of the District Municipalities Act nor under the rules framed for the holding of elections, is it incumbent on the authorities concerned to divide the wards in such a manner as would ensure the equality of voting strength of the wards.

Even assuming that there is any force in the contention based on the disparity of votes in the matter of redistribution of wards that matter cannot be brought up for writ of *certiorari*. There are some decisions of the United States Supreme Court which throw some light on this issue. In *Colegrove* v. *Green*[2], there was a suit in the District Court of Illinois to have a division of Illinois State into congressional districts declared invalid by reason of inequalities in the population of the respective districts. The suit was dismissed by the District Court. While dismissing the appeal preferred against the dismissal of the suit, Justice Frankfurter who delivered the judgment of the Court remarked thus :

"We are of opinion that the petitioners ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about 'jurisdiction'. It must be resolved by the considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination."

It is also stated in the judgment that in effect it was an appeal to the Federal Courts to reconstruct the electoral process of Illinois in order that it may adequately be represented in the councils of the nation. Another passage from the same judgment may also be quoted as it is relevant in this context :

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1. L.R. (1897) 1 Q.B. 498. 2. 328 U.S. 549 : 90 Law. Ed. 1434.

> "Nothing is clearer than that this controversy concerns matters that bring Courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law."

I adopt the reasoning of the learned Judges in this case.

The same view is embodied in *South* v. *Peters*[1]. The residents of the Northern Districts of Georgia filed a suit in the United States District Court for the Northern District attacking statute of Georgia which provided that county unit votes should determine the outcome of primary election, as offending against Fourteenth and Seventeenth Amendments. Under the impugned statute each county was given a number of unit votes ranging from six for the most populous counties, to two for most of the other counties and the candidates who received the highest popular vote in the county was to be awarded the appropriate number of unit votes. The ground of attack against the statute was that the votes of the residents of the most populous counties had on the average but one-tenth the weight of those in other counties and this amounted to an unconstitutional discrimination against the residents. The suit was dismissed by the Court below. On appeal this was affirmed by the Supreme Court by a majority of Judges holding that Federal Courts consistently refused to exercise their equity powers in cases posing political issues arising from a State's geographical distribution of electoral strength amongst its political sub-divisions.

In my view, these rulings embody the sound principles and I express my respectful accord with them. These decisions indicate that questions relating to delimitation of Constituencies are not justiciable, they being matters purely within the ambit of the executive power. It is for the Government to arrange the distribution of wards, taking into consideration various factors such as compactness of area, the population and the electoral strength, etc. There is bound to be disparity between one ward and another in the matter of voting strength as due regard has to be had to various other factors. The voting strength is not the sole criterion in these matters. As pointed out by Subba Rao, J., in W.P. No. 568 of 1952 in dividing the wards the Government have to take into consideration the administrative convenience, the factor of population, the housing accommodation, the size of the divisions, the geographical position of the streets and other similar factors. It follows on this discussion that the redistribution of wards is not a matter that can be brought up for a writ of *certiorari* before this Court. Any interference by Courts with electoral process is not warranted under Article 226 of the Constitution.

I have to state here that just at the time of the close of his reply Mr. Subramaniam wanted to file a petition purported to be one on behalf of the municipality to come on record. I declined to grant him his request for the reason that it was too late. Further the chairman cannot come on record without the sanction of the municipality. So the request of Mr. Subramaniam for permitting him to file an application on behalf of the municipality to come on record as a party cannot be granted.

For the foregoing reasons I hold that there are absolutely no grounds for the issue of writ of *certiorari* and for quashing the notification contained in G.O. No. 1298, Local Administration, dated 1st July, 1952. The petition is accordingly dismissed with costs which I fix at Rs. 200.

V.P.S. *Petition dismissed.*

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1. 339 U.S. 276 : 94 Law. Ed. 856.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Madras Handloom Weavers' Provincial Co-operative Society, Ltd., Madras .. *Petitioner**.

v.

The Dominion of India, represented by the General Manager, Madras and Southern Mahratta Railway and another .. *Respondents.*

Railways Act (IX of 1890)—Both risk-notes "Z" and "A" executed by consignor—Claim for damages—Onus.

Where a consignor by a Railway had executed both risk-note Z and risk-note A, risk-note Z being in the general form and risk-note A is the one used in special cases where the package is defectively and insufficiently packed so as to be liable for damage, it must be held that the special contract in note A supersedes the general contract in note Z. The Railway can take advantage of either of the notes. *Governor-General in Council* v. *Thakursi Dass*, A.I.R. 1948 Pat. 45, approved.

The burden in such a case is on the consignor claiming damages to prove misconduct on the part of the Railway and not on the Railway to show how the consignment was dealt with during the course of transit.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the order of the District Munsif's Court, Vijayawada, dated 9th September, 1949, in S.C.S. No. 73 of 1949.

Sriramamurthi for *Messrs. John aud Row* for Petitioner.

Sampathkumar for *Messrs. King and Partridge* for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff, whose suit for Rs. 113-6-3 being the value of the shortage of goods, due to him from the defendant, inclusive of proportionate freight charges has been dismissed, is the petitioner, in this civil revision petition, and the only question that arises, as the learned District Munsif has stated, is whether the defendant railway is liable for the alleged loss occasioned to the plaintiff during the transit. There was a consignment weighing 15 maunds 30 seers of textile material from Madura to Bezwada according to the railway receipt, which is marked in the case Exhibit B-5. The plaintiff as the consignee when he took delivery of the goods at Bezwada found that the quantity was short by 22 seers and he took open delivery of it. The present suit is for the recovery of the price of 22 seers of goods. The lower Court has dismissed the suit on the ground that in the absence of proof that the shortage occurred on account of the misconduct on the part of the railway, the plaintiff is not entitled to any relief.

In revision, it is argued for Messrs. John and Row by Mr. Sriramamurthi, that according to the clause in risk-note Z the railway administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession and control and if necessary to give evidence before the consignor is called upon to prove misconduct ; but if misconduct on the part of the railway administration or its servants cannot be fairly inferred from such evidence the burden of proving such misconduct will only be on the consignor. What is contended is that in this case the railway administration has not let in any evidence to show how the consignment was dealt with during the time it was in its possession, in transit from Madura to Bezwada. If the railway had let in evidence to show that proper care was taken of the package while it was being transported both over the South Indian Railway and the Madras and Southern Mahratta Railway, then the burden shifts to the plaintiff to show misconduct on the part of the railway servants. The argument, therefore, urged is that there is no obligation on the part of the plaintiff to prove any misconduct on the part of the railway administration and if it is shown that there has been shortage during the course of transit, then the plaintiff is entitled to damages for that shortage. On the other hand, on behalf of

* C.R.P. No. 462 of 1950. 31st October, 1952.

the railway administration Mr. Sampath Kumar of Messrs. King and Partridge has put forward the contention that if the risk-note Z had stood alone, probably the plea put forward on behalf of the plaintiff might be of some avail. But, in this case, it is admitted that the consignor had executed another risk-note in the form risk-note A, which very much reduces and clinches the liability of the railway administration. Risk-note A premises by saying that it will be used when articles are tendered for carriage which are either already in bad condition or so defectively packed as to be liable to damages, leakage, or wastage in transit. Therefore, when once risk-note A is taken in addition to the ordinary risk-note Z, the inference is possible that at the time the package was tendered for transit, it was either in a bad condition or so defectively packed as to be liable to damages. Since both risk-notes have been executed, the question is whether the provisions contained in risk-note A should prevail over risk-note Z. In my view, risk-note Z is the general form of risk-note for all kinds of goods handed over to the railway administration for transit and risk-note A is the particular kind of risk-note to be used only in special cases where the package is defectively or insufficiently packed so as to be liable for damages. In view of the principle that a special contract or provision supersedes a general principle or a general contract, we have to take it that the parties have to be governed by the terms of risk-note A.

On this aspect of the case, my attention has been invited to a decision of a single Judge of the Patna High Court in *Governor-General in Council* v. *Thakursi Dass*[1], in which the facts are somewhat similar. There also the consignor had executed two risk-notes, risk-note A and risk-note Z. When the railway administration was confronted with a claim for damages, they choose to take their stand on the terms and provisions of risk-note A and disclaimed liability. The learned Judge, in disposing of that contention in favour of the railway administration, observed as follows:

> "So much for risk-note Z. But in the present case the consignor also executed risk-note A, and thereby even further exempted the railway administration from liability. Obviously where two risk-notes have been executed limiting the railway's liability, it is open to the Railway administration to take advantage of either, and if under either it can be shown that the railway administration has escaped liability, then the suit must be dismissed, even if some other form of risk-note might also have been executed under which it might be held that liability had not been fully taken away. Risk-note A is a special form of risk-note, to be used when articles are tendered for carriage which are either already in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit."

I have been asked by the learned counsel for the petitioner to dissent from the view taken by Meredith, J., of the Patna High Court. But no arguments have been advanced as to why I should dissent from that view. How and under what circumstances the consignor came to execute risk-note A has not been made clear. The fact that risk-note A has been executed raises the presumption that the railway administration insisted on its execution, because the package was either insufficiently packed or liable to leakage and damage. In this view, it is incumbent upon the plaintiff in order to mulct the railway administration with liability, to prove misconduct. He cannot sit quiet and leave the burden on the railway administration for showing how the consignment was dealt with during the course of transit and thereafter try to let in evidence of misconduct. In this case, he has not attempted to prove any misconduct trusting himself to the burden on the railway administration as contained in the clause in risk-note Z.

In addition to this, there is a further circumstance in this case that under rule 15 of the Goods Tariff General Rules, the railway administration does not admit that the weight as shown in the railway receipt has been received or that the description of the goods as furnished by the consignor is correct. The learned District Munsiff came to the conclusion that at the time the goods were accepted for transit at Madura, there is no evidence to show that they were weighed or that the weight of 15 maunds and 30 seers was the correct weight. I am therefore of the opinion that no interference is called for in revision and this civil revision petition is dismissed but in the circumstances without costs.

K.S. *Petition dismissed.*

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1. A.I.R. 1948 Pat. 45.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AIYAR.

D. V. Sanjeevi Naidu .. *Appellant**

v.

M. N. Chittibabu Mudaliar .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), section 7 (1)—Person coming into possession as tenant setting up title in himself as owner—Decree in suit to evict on the ground of denial of landlord's title—Defendant if entitled to claim that he is " a tenant holding over " and cannot be evicted except in accordance with the Rent Control Act.

Where a person coming into possession under a lease sets up title in himself as owner and the landlord obtains a decree for ejectment on the ground of denial of his title, the person in possession cannot be evicted in execution of such decree. He will be a tenant holding over entitled to rely on the provisions of Madras Buildings (Lease and Rent Control) Act that he cannot be evicted except in accordance with the provisions of section 7 (1) of the Rent Control Act.

Even when the tenant has denied the title of the landlord and his denial has been found to be without foundation, he will be entitled to the benefits of section 7 (2) of the Act.

On appeal from the judgment and order of Krishnaswami Nayudu, J., dated 24th April, 1950, and passed in exercise of the ordinary original civil jurisdiction of the High Court in Application No. 1231 of 1950 in E. P. No. 34 of 1950 in C.S. No. 115 of 1947.

C. Srinivasachari, Raman and *Raghavan* for Appellant in O. S. A. No. 70 of 1950 and for Respondent in O.S.A. No. 133 of 1950.

C. Musalappa Reddy for Respondent in O.S.A. No 70 of 1950 and for Appellant in O. S. A. No. 133 of 1950.

The Judgment of the Court was delivered by

The Chief Justice.—These two appeals arise out of further proceedings in C.S. No. 115 of 1947, the main appeal (O.S.A. No. 102 of 1949) from which we have just disposed of. As already mentioned, in this suit Sanjeevi claimed not only possession but also mesne profits, and Rajagopalan, J., directed that mesne profits should be ascertained by the Official Referee in proceedings subsequent to the decree. The Official Referee accordingly ascertained the msene profits and his report came up for consideration before Rajagopalan, J., who accepted the figures arrived at by the Official Referee and granted a decree to Sanjeevi for mesne profits on that basis by his order dated 2nd November, 1950. O. S. A. No. 133 of 1950 is by Chittibabu against the order. The main ground of appeal is that he is not liable in mesne profits as he must be deemed to be a tenant.

Sanjeevi filed an execution petition, E. P. No. 34 of 1950 for delivery of possession. Chittibabu raised the objection that notwithstanding the decree he was not liable to be evicted because of the provisions of S. 7 (1) of the Madras Buildings (Lease and Rent Control) Act of 1949. The Master before whom the execution petition came on for hearing first, upheld Chittibabu's contention and dismissed the execution petition. On appeal to the Judge in Chambers, Krishnaswami Nayudu, J., confirmed the order of the Master and held that execution could not issue as Chittibabu must be deemed to be a tenant entitled to the protection of the Act. O.S. A. No. 70 of 1950 is by Sanjeevi against this order.

It will be seen that the question which has to be decided before these two appeals can be disposed of is whether the provisions of the Madras Buildings (Lease and Rent Control) Act of 1949 apply to this case. In that Act " tenant " is defined as any person by whom or on whose account rent is payable for a building and includes a person continuing in possession after the termination of the tenancy in his favour. We are not concerned with the rest of the definition. Section 7 (1) runs as follows:

" A tenant in possession of a building shall not be evicted therefrom, whether in execution of a decree or otherwise and whether before or after the termination of the tenancy, except in accordance with the provisions of this section :

*O.S.A. Nos. 70 and 133 of 1950. 3rd October, 1952.

Provided that nothing contained in this section shall apply to a tenant whose landlord is the Provincial Government:

Provided further that where the tenant denies the title of the landlord or claims right of permanent tenancy, the Controller shall decide whether the denial or claim is *bona fide* and if he records a finding to that effect, the landlord shall be entitled to sue for eviction of the tenant in a civil Court and the Court may pass a decree for eviction on any of the grounds mentioned in this section notwithstanding that the Court finds that such denial does not involve forfeiture of the lease or that the claim is unfounded."

The contention on behalf of Chittibabu is that he came into possession of the building as a tenant under the lease executed by Mohanasundara in his favour on 15th April, 1944, and that though that lease expired in 1947 he must be deemed to be holding over as a tenant, since his claim under the agreement to sell in his favour had been negatived by Court. On the other hand, Mr. Srinivasachari for Sanjeevi contended that though he might have come into possession as a tenant he subsequently set up title in himself as owner and denied his title to the property. On account of this disclaimer of his status as a tenant he could not after his failure in the suit be permitted to fall back upon his original position. According to learned counsel a person who has denied that that he was a tenant could not, after such denial, be treated as a tenant within the meaning of the Act.

Undoubtedly Chittibabu denied the title of Sanjeevi who must be deemed to have succeeded to all the rights of Mohanasundara as landlord. The effect of a denial of title under the general law is set out in section 111 of the Transfer of Property Act:

" A lease of immoveable property determines,

(*g*) by forfeiture, that is to say . . . .

(2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself, ... and . . . . . the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease."

On behalf of Sanjeevi his advocate did give such notice to Chittibabu through his advocate (Ex. P-16). It was definitely stated in this notice that as Chittibabu had set up title in himself and had renounced his character as tenant Sanjeevi was giving notice of his intention to determine the lease under the provisions of section 111 (g) of the Transfer of Property Act. So it may be taken as established that under the general law the tenancy in favour of Chittibabu had been duly terminated. But the definition of " tenant " in the Rent Control Act expressly includes a person continuing in possession after the termination of the tenancy in his favour. Chittibabu would certainly be such a person. In accordance with the finding of the trial Court which has since been affirmed by us, Chittibabu did not have title to the property at any time. He must therefore be deemed to have continued all along in possession as a tenant. He would be a tenant holding over. Under the general law a tenant holding over is deemed to be governed by the same terms as the terms of the tenancy under which he came into occupation. One of such terms would be the payment of monthly rent of Rs. 25. We therefore hold that Chittibabu was a tenant within the meaning of section 2 (4) of the Rent Control Act, as a person by whom rent was payable and as a person continuing in possession after the termination of the tenancy in his favour.

Section 7 (1) expressly provides that a tenant in possession of a building shall not be evicted therefrom, whether before or after the termination of the tenancy, whether in execution of a decree or otherwise, except in accordance with the provisions of that section. This provision is a complete answer to the execution petition filed by Sanjeevi for eviction. In this view it is not necessary to consider the effect of the proviso because the procedure indicated in the proviso has not been followed in this case. That proviso contemplates first a petition before the Rent Controller himself for eviction and a denial of title in such proceeding. If the Controller decides that the denial of title is *bona fide* and records a finding to that effect, then the landlord will be entitled to sue for eviction of the tenant in a civil Court. But even here the decree for eviction can only be passed on any of the grounds mentioned in section 7. Though the proviso in terms will not have any application to the

facts of this case, the principle of the proviso supports the view which we have already taken as regards the status of Chittibabu as a tenant under the Act. The effect of the proviso is that even if a civil Court finds that the claim of the tenant is not well founded the tenant can be evicted only on any of the grounds mentioned in section 7. In other words, even when the tenant has denied the title of the landlord and his denial has been found to be without foundation, he will be entitled to the benefits of section 7 (2).

We therefore hold that Chittibabu cannot be evicted in execution of the decree for possession obtained by Sanjeevi. We also hold that as Chittibabu must be deemed to have continued to be in possession as a tenant he would be liable only for the rent fixed under the lease in his favour and would not be liable for mesne profits. Of course, this would not prevent the landlord or the tenant from approaching the Rent Controller with an application to fix the fair rent.

Mr. Srinivasachari for Sanjeevi raised a technical objection that the plea under the Rent Control Act should have been raised in the suit. It was in a manner raised in the written statement, but was not dealt with by the learned trial Judge. But as the entire case was at large before us in appeal we see no point in this objection. It is open now to us to deal with this plea in appeal.

Another contention was raised on behalf of Sanjeevi Naidu which has no substance whatever, namely, that though Chittibabu might be a tenant within the definition in the Rent Control Act, still there is nothing to preclude the Court from decreeing mesne profits. We are unable to follow this contention. We have held Chittibabu to be a tenant because in our opinion he is liable to pay the rent as fixed under the lease deed in his favour. If that be so, how could he at the same time be made liable for a higher or different amount? The entire scheme of the Rent Control Act proceeds on the liability of the tenant to pay a definite rent. Mesne profits, on the other hand, should be ascertained from time to time and may vary.

In the result O. S. A. No. 70 of 1950 must be dismissed. O.S.A. No. 133 of 1950 must be allowed and the decree, instead of directing Chittibabu to pay mesne profits, should direct him to pay rent at the rate of Rs. 25 per month till the date of this judgment. There will be no order as to costs in O. S. A. No. 70 of 1950. In O. S. A. No. 133 of 1950, the appellant will get his costs from the respondent.

K.S. *O.S.A. No.* 133 *of* 1950 *allowed and O.S.A. No.* 70 *of* 1950 *dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AIYAR.

Belegal Gundachar and another .. *Petitioners**

v.

The State of Madras, represented by the Collector of Bellary and others .. *Respondents.*

Land Acquisition Act (*I of* 1894)—*Acquisition of land for irrigation channel—Validity—Public purpose—Test—Constitution of India* (1950), *Articles* 19 (1) (*f*) *and* 31 (2)—*Scope.*

The power of the State to acquire property compulsorily is a power to acquire it only for a public purpose. The expression " public purpose " is not capable of a precise definition and has not a rigid meaning. The State has both the right and is under a duty to regulate the distribution of irrigation water in the interests of the public. The Government has to provide major distribution channels and smaller channels which ultimately lead the water to the several fields. An acquisition for carrying out any part of such irrigation scheme will certainly be acquisition for a public purpose which is also a State purpose. Though initially a channel for which land is acquired will serve only one part of land owned by a single individual in course of time it would also serve other lands as well, it must be held that the acquisition is for a public and State purpose, namely, extension of irrigation.

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* Writ Petition No. 790 of 1951. 3rd September, 1952.

The fact that initially only one individual stands to benefit by the proposed channel would not make the acquisition any the less an acquisition for a public purpose.

Thambiran Padayachi v. *The State of Madras*, (1952) 2 M.L.J. 298, followed.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to award No. 3 of 1951 R.O.C. No. 4234 of 1951 dated 10th July, 1951, on the file of the Sub-Collector (Land Acquisition Officer), Hospet, Bellary District and quash the same.

M. S. Ramachandra Rao for Petitioners.

The Advocate-General (*V. K. Thiruvenkatachari*) for the Government Pleader (*P. Satyanarayana Raju*) and *D. R. Krishna Rao* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The two petitioners in this petition are the joint pattadars of S. No. 406 in the village of Kamalapuram, Hospet taluk, Bellary district. The said plot of land and other plots covered by S. No. 405, etc., belonging to the petitioners are being irrigated by water taken from sluice No. 68 in the Government Roya Channel through a main distributory channel which runs over some of the lands belonging to the petitioners as well as on poramboke lands. The third respondent is the pattadar of S. No. 404 lying to the north of S. No. 406. Though it is registered as dry, it can be cultivated with wet crops if there is adequate water supply. After obtaining reports from the Revenue Officers the Collector sanctioned a proposal for the acquisition of a portion of S. No. 406 belonging to the petitioners for excavating a field distributory channel to irrigate S. No. 404 belonging to the third respondent, provided the cost of the acquisition was met by the third respondent. Accordingly a notification under section 4 (1) of the Land Acquisition Act was published in the *Fort St. George Gazette* of the 31st January, 1951, wherein it was stated that an extent of 6 cents in S. No. 406 was needed for a public purpose, to wit, for excavating a field distributory channel to irrigate S. No. 404 from sluice No. 68 of the Roya Channel. After due enquiry under section 5 (*a*) of the Act a notification under section 6 was published on the 24th April, 1951. The petitioners challenge the validity of this acquisition on the ground that the purpose of the acquisition being solely for the benefit of a single individual, namely, the third respondent, cannot be said to be a public purpose. It must now be taken as well established that the power of the State to acquire property compulsorily is a power to acquire it only for a public purpose. Public purpose is a content of the power itself. Mahajan, J., in the recent Supreme Court decision, *State of Bihar* v. *Kameshwar Singh*[1] observed thus :

> " Public purpose is an essential ingredient in the very definition of the expression ' eminent domain ' as given by Nichols and other constitutional writers . . . . The exercise of the power to acquire compulsorily is conditional on the existence of a public purpose . . . . Jurisdiction to acquire private property by legislation can only be exercised for a public purpose. It may be the purpose of the Union or the purpose of the State or any other public purpose. Private property cannot be acquired for a private purpose."

The only question, therefore, is whether the purpose of the impugned acquisition can be said to be a public purpose. There is no definition of " public purpose " either in the Constitution or any other relevant statute. Indeed, as pointed out by the Supreme Court, the expression " public purpose " is not capable of a precise definition and has not a rigid meaning.

> " The definition of the expression is elastic and takes its colour from the statute in which it occurs, the concept varying with the time and state of society and its needs." (*State of Bihar* v. *Kameshwar Singh*[1].)

Mr. M. S. Ramachandra Rao, learned counsel for the petitioners, contended that whatever test be applied it could never be said that when the purpose is ostensibly only to benefit one particular individual, it is a public purpose. In support of his contention he relied on two decisions of the Supreme Court of the United States.

1. (1952) S.C.J. 354 : 65 L.W. 527.

In *Missouri Pacific Ry. Co.* v. *Nebraska Ex rel, Board of Transportation*[1], the validity of an order of the Nebraska State Board of Transportation requiring a railroad company to surrender a part of its land to private persons for the purpose of building and maintaining their elevator upon it was questioned. The Court held that it was illegal as it would result in the taking of private property of a person without his consent for the private use of another. The principle of the decision is to be found in the following passage :

> " This Court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion that the order in question so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was in essence and effect, a taking of private property of railroad corporation, for the private use of the petitioners. The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the 14th Article of Amendment of the Constitution of the United States."

It is important to notice that the order in question in that case was not and was not claimed to be a taking of private property for a public use under the right of eminent domain. The decision therefore is not of much assistance to us.

In *Chicago St. Paul Minneapolis and Omaha Ry. Co.* v. *Holmberg*[2], also there was no question of the State's exercise of its powers of eminent domain. A State railroad commission had, by an order, required, the construction at the expense of a railroad company and the landowner of an underpass connecting the farm lands on both sides of the railroad tracks solely for the convenience and benefit of the landowner in the use of his own property. The Supreme Court held that it was invalid as taking property without due process of law.

Learned counsel also referred us to the following passages from Willis book on Constitutional law :

> " According to the newer viewpoint there is a public use if the thing taken is useful to the public . . . . . Under this rule it is not necessary for the benefit to be for the whole community, but it must be for a considerable number. The fact that benefit also inures to a private individual is no objection."

After referring to instances where it had been held that there was sufficient public use, the learned text writer goes on to say :

> " In these cases there is not necessarily a general use by the public, but there is a general benefit to the public. Private enterprises are thus allowed to exercise the sovereign power of eminent domain, not because they are taking the property for their own use, but because in taking the property for their use they are benefiting the public. Of course, where the taking will benefit a private person alone, there is not a public use even in this newer sense."

The learned Advocate-General who appeared for the State invited our attention to two other decisions of the Supreme Court of the United States. The first one is *Fallbrok Irrigation District* v. *Bradley*[3]. In this case an Act of California which provided for the acquisition of land whenever 50 landowners or a majority of them in a particular locality required it for construction of a water course was upheld as valid, though it was attacked on the ground that as the acquisition would only benefit particular landowners who get water from the channel and the public as such were not benefited there was no public user. The Court observed :

> " To irrigate and thus to bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to the landowners or even to any one section of this State. The fact that the use of the water is limited to the landowners is not therefore a fatal objection to this legislation. It is not essential that the entire community, or even any considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute a public use."

In *Clark* v. *Mash*[4], it was held that a statute of Utah under which an individual landowner could condemn a right of way across his neighbour's land for the enlargement of an irrigation ditch therein in order to enable him to obtain water from a stream in which he had an interest to irrigate his land which otherwise would remain absolutely valueless was valid. It is interesting to notice the reasoning of the

1. 41 L. Ed. 489.
2. 75 L. Ed. 270.
3. 41 L.Ed. 369.
4. 49 L. Ed. 1085.

Court in arriving at its decision. Peckham, J., who delivered the opinion of the Court emphasised the fact that the validity of a statute permitting acquisition by an individual for the purpose of obtaining water for his land may depend upon a number of considerations relating to the situation of the State and its possibilities for land irrigation, and he observed :

> " But we do not desire to be understood by this decision as approving of the broad proposition. . . . . that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the State. We simply say that in this particular case, and upon the facts stated in the findings of the Court, and having reference to the conditions already stated, we are of opinion that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual, where it is absolutely necessary to enable him to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained. Other landowners adjoining the defendant in error, if any there are, might share in the use of the water by themselves taking the same proceedings to obtain it, and we do not think it necessary, in order to hold the use to be a public one, that all should join in the same proceeding, or that a company should be formed to obtain the water which the individual landowner might then obtain his portion of from the company by paying the agreed price, or the price fixed by law."

The learned Advocate-General also cited to us passages from Nichols on Eminent Domain. The learned author attempts a definition of " public use " which is consistent with the weight of judicial authority. It is as follows :

> " It is a public use for which property may be taken by eminent domain,
>
> (1) To enable the United States or a State or one of its subdivisions or agencies to carry on its governmental functions, and to preserve the safety, health and comfort of the public whether or not the individual members of the public may make use of the property so taken, provided the taking is made by a public body ;
>
> (2) To serve the public with some necessity or convenience of life which is required by the public as such and which cannot be readily furnished without the aid of some Governmental power, whether or not the taking is made by a public body, provided the public may enjoy such service as of right ;
>
> (3) In certain special and peculiar cases sanctioned by ancient customs or justified by the requirements of unusual local conditions, to enable individuals to cultivate their land or carry on business in a manner in which it could not otherwise be done, if their success will indirectly enhance the public welfare, even if the taking is made by a private individual and the public has no right to service from him or enjoyment of the property taken."

He points out that it is not the number of people who will participate in or benefit by the use for which the property is sought to be taken that determines whether the use is or is not public and also that merely because the whole or part of the expense is met by those benefited it should not be held that the use for which the property was taken was not public.

The following passage in Rottschaefer on Constitutional Law summarises the effect of the decisions on this aspect of the law of eminent domain :

> " It is frequently sufficient if the use to which the private condemnor is to put the property is one of widespread general public benefit not involving any right on the part of the general public itself to use the property. The adoption of this general test has expanded the scope of valid public uses to include uses by private parties in purely private activities. The public benefit that has been relied upon to sustain such exercises of the power of eminent domain has usually consisted in that derived from the development of a State's important natural resources rendered possible by such exercises of that power. It is on that basis that one private person has been permitted to condemn land for the purpose of conveying water in ditches across that land in order to properly irrigate his own, and to condemn a right of way across another's land for an aerial bucket line necessary for the working of the condemnor's mine. The same considerations are frequently invoked in sustaining the condemnation of property required by drainage or irrigation districts for the accomplishment of their objectives, and the condemnation of land and water rights to be used for developing power for general public distribution."

With this discussion of the material authorities on the question, let us examine the nature of the present acquisition. In the first place the extent of land acquired will vest in the State itself and will not be transferred to any private person. As mentioned in the notifications under sections 4 and 6 the land will be used for excavating a field distributory channel. The acquisition will not have the effect of transferring the property of one person to another person for his private use. What is acquired is acquired for the State.

The next question is, why does the State acquire it? It is here that a point is made of the fact that it is acquired for the private use of the third respondent. *Prima facie* this is so. But there are certain other facts which should also be borne in mind before we judge the real purpose of the acquisition.

It is now well established that one of the most important functions of the State in India is to provide for the irrigation of lands capable of being cultivated with wet crops. With this end in view the State is bound to maintain works of irrigation already existing and also to construct new works of irrigation and expand the old works. The State has both the right and is under a duty to regulate the distribution of water in the interests of the public. The Government have the right to distribute the water from Government channels for the benefit of the public subject to the rights of landholders to continue to receive such supply as is sufficient for their accustomed requirements (vide *Krishna Ayyan* v. *Venkatachalla Mudali*[1], *Sankaravadivelu Pillai* v. *Secretary of State for India in Council*[2] and Sundararaja Aiyangar's Land Tenures in the Madras Presidency, 2nd Edn., page 181). Any scheme under which the Government provide for the utilisation of the available water in Government sources of supply for the extension of cultivation will be a public purpose. The Government for this purpose has not only to construct and maintain the main sources of supply but also to provide for distribution of the water to the various pieces of land which could be irrigated with the available water by means of distributory channels. Such channels must necessarily be of two kinds, namely, the major distributory channels and the smaller distributory channels which ultimately lead the water to the several fields. All these together constitute a net work of water supply for irrigation. An acquisition for carrying out any part of this scheme will certainly be an acquisition for a public purpose, which is also a State purpose. In the present case it appears from the correspondence that passed between the Revenue officials before the acquisition was finally sanctioned that though immediately S. No. 404 alone would be benefited by the excavation of the small field channel in S. No. 406, in course of time the new channel would also serve to benefit other lands as well. Therefore the present acquisition must be held to be an acquisition for a public and State purpose, namely, extension of irrigation. The fact that now only one individual stands to benefit by the channel proposed to be excavated on the site acquired would not make the acquisition any the less an acquisition for a public purpose. It was observed by this Bench in a recent case that:

> "It is not necessary that it (property) should be available to the public as such. It might be in favour of individuals provided they are benefited not as individuals but in furtherance of a scheme of public utility." (*Thambiran Padayachi* v. *State of Madras*[3].)

The present acquisition would fall within the category indicated in that decision.

As no other point was pressed upon us by learned counsel for petitioners, the application fails and is dismissed with costs. Advocate's fee Rs. 100.

K.S. *Application dismissed.*

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1. (1872) 7 M.H.C.R. 60. at 75.
2. (1904) 15 M.L.J. 32 : I.L.R. 28 Mad. 72
3. (1952) 2 M.L.J. 298.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, MR. JUSTICE CHANDRA REDDI AND MR. JUSTICE VENKATARAMA AIYAR.

Garimella Suryanarayana .. *Appellant**

v.

Gada Venkataramana Rao .. *Respondent.*

Madras Agriculturists Relief Act (IV of 1938), section 8—Explanation I, introduced by Act XXIII of 1948—Scope—Open payments towards a promissory note—Settlement of accounts and execution of fresh promissory note for balance before 1st October, 1937—Effect—Adjustments and appropriations so made—Not liable to be re-opened. Interpretation of statutes—Amendments—Construction—Matters that can be taken into consideration.

Where there has been in fact a settlement of accounts and a fresh document executed by the debtor, that must necessarily have the effect of discharging the interest on the one hand and of appropriating the payment on the other. Such a transaction is outside Explanation I to Section 8 of Madras Act IV of 1938. Appropriations made by a debtor as part of a settlement are not liable to be reopened under Explanation I to section 8. (Case-law discussed).

To arrive at the real meaning of a statute it is necessary to consider (1) what was the law before the Act was passed, (2) what was the mischief or defect for which the law had not provided, (3) what remedy Parliament has appointed and (4) the reason of the remedy.

Appeal under Clause 15 of the Letters Patent against the judgment and order of Panchapakesa Aiyar, J., dated 11th March, 1949 in A. A. A. O. No. 150 of 1947, preferred to the High Court against the order of the District Court, East Godavari at Rajahmundry, dated 16th December, 1946, in A. S. No. 110 of 1944 (O.P. No. 23 of 1943, Sub-Court, Rajahmundry.

C. Rama Rao for Appellant.

U. Sethumadhava Rao and *N. Ramamohan Rao* for Respondent.

The Order of Reference to the Full Bench by Rajamannar, C.J., and Venkatarama Aiyar, J., dated 28th February, 1952 was delivered by

The Chief Justice.—The question raised in the appeal is of considerable importance and relates to the construction of explanation (1) to section 8 of Madras Act IV of 1938 recently introduced by Act XXIII of 1948. Our attention has been drawn to an unreported decision of a Division Bench in O. S. A. No. 17 of 1948, in which the learned Judges took the view that this Explanation would not affect adjustments and settlements already made between creditor and debtor. This decision has since been followed by a learned Judge sitting single in S. A. No. 2115 of 1947 and by another Division Bench in C. M. A. No. 180 of 1950. We are inclined to think that the learned Judges who decided O.S. A. No. 17 of 1948 have not attached sufficient importance to the word "expressly" which occurs in the Explanation in arriving at their conclusion. In the appeal now before us Panchapakesa Aiyar, J., has taken a contrary view. We think it desirable that there should be an authoritative ruling as to the interpretation of this new provision. The appeal will be posted before a Full Bench of three Judges.

Pursuant to the aforesaid Order, this appeal coming on for hearing, the Judgment of the Court was delivered by

Venkatarama Aiyar, J.—This appeal has been referred for the decision of a Full Bench as it raises a question of considerable importance on the construction of Explanation (1) to section 8 of the Madras Agriculturists Relief Act, IV of 1938, on which there is a conflict of judicial opinion. The facts are that on 12th November, 1921, the respondent borrowed a sum of Rs. 2 000 from one Lakshminarayana Sastri and executed a promissory note therefor Ex. D-1). Nine payments were made towards this promissory note and endorsed thereon. We are concerned in this appeal with five of them. The endorsements relating to them have been marked as Exs. D-1 (*e*) to D-1 (*j*) and they state that the payments were made "towards principal and interest." On 14th July, 1929, there was a settlement of accounts

*Letters Patent Appeal No. 66 of 1949. 14th November, 1952.

and after giving credit for the payments made, the balance found due was Rs. 1,658 and for this amount a fresh promissory note Ex. D-2 was executed. The appellant is an endorsee of this promissory note. The respondent filed O. P. No. 23 of 1943 on the file of the Sub-Court, Rajahmundry, for declaring the amount payable under the promissory note after scaling the debt under the provisions of the Act. Several contentions were raised, but only one of them is now material and that is as to how the five payments under Exs. D-1 (*e*) to D-1 (*j*) should be dealt with. The respondent claimed that being open payments they were liable to be appropriated towards the principal, while the appellant contended that those payments had been appropriated towards interest at the settlement which resulted in the execution of the promissory note Ex. D-2 and that that appropriation could not be re-opened. The Courts below held that though the payments under Exs. D-1 (*e*) to D-1 (*j*) were open payments at the time when they were made, the debtor had appropriated them towards interest at the time of Ex. D-2, and that such appropriation could not be re-opened. Against that decision the respondent preferred C. M. S. A. No. 150 of 1947 on the file of this Court and while that was pending, Explanation (1) to section 8 of the Act came to be enacted by the Madras Act XXIII of 1948. That Explanation is as follows :

> " In determining the amount repayable by a debtor under this section every payment made by him shall be credited towards the principal, unless he has expressly stated in writing that such payment shall be in reduction of interest."

Panchapakesa Aiyar, J., who heard the appeal held that the payments in question should be appropriated towards the principal, as the settlement of accounts and the execution of the promissory note did not amount to an express statement by the debtor that they should be appropriated towards interest as required by the new Explanation. Against this judgment, the creditor has preferred this appeal under the Letters Patent. The point for decision in this appeal is whether on a true construction of the Explanation, appropriations made by the debtor as part of a settlement could be reopened and the payments reappropriated towards the principal.

In an old English case known as *Heydon's case*[1], Lord Coke observed that to arrive at the real meaning of a Statute it was necessary to consider :

> " (1) what was the law before the Act was passed ; (2) what was the mischief or defect for which the law had not provided ; (3) what remedy Parliament has appointed ; and (4) the reason of the remedy."

In *Mayfair Property Co.*, In re, *Bartlett* v. *Mayfair Property Co.*[2], Lindley, M.R., stated :

> " In order properly to interpret any statute it is as necessary now, as it was when Lord Coke reported *Heydon's case*[1], to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief."

Following these principles, it is necessary to consider what changes were effected in the general law relating to appropriation of payments by a debtor, by the Madras Agriculturists Relief Act (IV of 1938) ; what led to the further amendment in 1948 ; and what its precise effect is.

The principles governing appropriation of payments made by a debtor are under the general law well settled. When a debtor makes a payment, he has a right to have it appropriated in such manner as he decides and if the creditor accepts the payment, he is bound to make the appropriation in accordance with the directions of the debtor. This is what is known in England as the rule in *Clayton's case*[3], and it is embodied in section 59 of the Contract Act. But when the debtor has not himself made any appropriation, that right devolves on the creditor who can exercise it at any time (vide *Cory Bros. and Co.* v. *Owners of the Turkish Steamship* " MECCA,"[4]), and even at the time of the trial. (Vide *Seymore* v. *Pickett*[5]) That is, section 60 of the Contract Act. It is only when there is no appropriation

1. (1584) 3 Co. Rep. 7-a : 76 E.R. 637.
2. (1898) 2 Ch. D. 28.
3. (1816) 1 Mer. 572 : 35 E.R. 761.
4. (1897) A.C. 286.
5. (1905) 1 K.B. 715.

either by the debtor or the creditor that the Court appropriates the payments as provided in section 61, of the Contract Act. That was the law in force at the time when the Madras Agriculturists Relief Act (IV of 1938) was enacted. That Act introduced a substantial change in the right of a creditor to make an appropriation under section 60 of the Contract Act, if there had been no appropriation by the debtor. Section 8 (1) of the Act provides that all interest outstanding on 1st October 1937, shall be deemed to have been discharged. On this, the question arose whether payments which had remained unappropriated either by the debtor under section 59 or by the creditor under section 60 prior to 1st October, 1937, could thereafter be appropriated by the creditor towards interest. But for the Act, they could have been. But it was held that as on 1st October, 1937, all arrears of interest stood discharged, it was not open to the creditor thereafter to exercise his right of appropriation and that all such payments should be appropriated only to the principal. Vide *Duraiswami Aiyangar* v. *Raghavachariar*[1]. It was further held that payments made generally towards the debt or "towards principal and interest" were open payments and were liable on the above principle to be appropriated towards the principal after 1st October, 1937. Vide *Veeraju* v. *Rayanim Dora Garu*[2] and *Venkateswarlu* v. *Narayanaraju*[3]. These authorities were understood as settling the law on the subject and had been uniformly followed, until we come to the decision in *Duraiswami Mudaliar* v. *Md. Amiruddin*[4]. There a sum of Rs. 5400 was paid "in part payment of a decree debt in C.S. No. 500 of 1930" and it was held by Gentle, C.J., and by Bell, J., that the payment was liable to be appropriated first towards the interest due under the decree and then to the principal. The reason for the decision was thus stated by the Chief Justice :

"The principle of law which always has been observed and recognised is that when a payment is made in respect of principal and interest, there is an inference that the payment is ordinarily first allocated towards interest and thereafter any balance in respect of principal. That was recognised in the decisions under the Madras Agriculturists Relief Act, 1938, in *Ramaswami Ayyar* v. *Ramayya Sastrigal*[5], and in *Venkateswara Iyer* v. *Ramaswami Iyer*[6]. In my view, the recognised and acknowledged principle regarding the utilisation of a payment which is made in respect of principal and interest has in no way been interfered with by any provision in the Madras Agriculturists Relief Act, 1938."

In the two decisions referred to in the judgment, there had in fact been appropriation of the payments before the Act came into force. The larger principle laid down in this decision was that when there was no specific appropriation by either the debtor or the creditor, an inference of appropriation would arise in law and that therefore the payments could not be re-appropriated towards principal under section 8 (1) of the Act. This of course was a reversal of the long course of authorities which had held that unless there was specific appropriation, the payments should be held to be open and that such payments should be appropriated towards principal as by the operation of section 8 (1) there would be no interest outstanding. The legislature then intervened and enacted Explanation I to section 8 by the Amendment Act (XXIII of 1948). The substance of that Explanation is that payments made by a debtor could be appropriated towards interest only if he had stated expressly in writing that they should be so appropriated. The object of the amendment was to take away the right of the creditor to appropriate payments towards interest unilaterally, as he would be entitled to under section 60 of the Contract Act ; to nullify the effect of the decision in *Duraiswami Mudaliar* v. *Md. Amiruddin*[4], and to give legislative recognition to a principle which prior thereto rested on a course of judicial decisions. Thus far, the scope of the Explanation is clear and intelligible.

The question now is, does it extend further and have the effect of annulling appropriations made, not by the creditor unilaterally, but by the debtor himself as part of a settlement. Before the amendment, it had been held in a series of cases that where accounts between the parties had been settled and a fresh document

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1. I.L.R. (1941) Mad. 57 : (1940) 2 M.L.J. 648.
2. (1940) 2 M.L.J. 758.
3. (1946) 1 M.L.J. 272.
4. (1948) 1 M.L.J. 441.
5. (1941) 1 M.L.J. 295.
6. (1941) 1 M.L.J. 9.

executed there was appropriation by the debtor and that such appropriation could not be re-opened under the provisions of Act IV of 1938. In *Venkayamma* v. *Ramakotayya*[1], the debtor executed a promissory note on 23rd August, 1931, for Rs. 259-9-6. Towards this note he paid Rs. 150 on 9th October, 1932, without expressly appropriating it either towards principal or interest. On 17th August, 1934, there was a settlement of accounts under which after giving credit for Rs. 150 with counter-interest the balance was struck at Rs. 162-10-0, and for that a promissory note was executed on 17th August, 1934. One of the questions raised was whether the payment of Rs. 150 on 9th October, 1952, which was an open payment when made should under the Act be appropriated towards the principal. It was held by Wadsworth and Patanjali Sastri, JJ., that there was an appropriation of the payment by the debtor on 17th August, 1934, and that it could not be re-opened. In *Vemareddi Rangareddi* v. *Venkataswami*[2], there was a mortgage in January, 1922 towards which two payments had been made on 29th January, 1934, the accounts were settled and a fresh mortgage was executed. In holding that the payments made under the mortgage of 1922 could not be treated as open and unappropriated, the court observed :

"When these two payments were adjusted to the debt in order to calculate the amount for which the later document was executed it could no longer be contended that they were unappropriated."

The point for decision is whether by the Explanation the legislature intended to alter the law as laid down in these decisions. An examination of the scheme of section 8 does not support the contention that such alteration was intended. Section 8 (1) enacts that "all interest outstanding" on 1st October, 1937, shall be deemed to be discharged. These words pre-suppose that interest as such remains outstanding and payable on that date and it is that outstanding interest that is discharged by the operation of the statute. If in fact there was no interest payable on that date, section 8 (1) would have no application. Likewise, when the Explanation provides that the payments shall be credited towards principal, it pre-supposes that those payments are still open and unappropriated. In other words, for the Explanation to apply there must be on the one hand arrears of interest outstanding and payable and on the other, payments, open and unappropriated and the Explanation provides how in that contingency the payments are to be appropriated. Where there has been in fact a settlement of accounts and a fresh document executed by the debtor, that must necessarily have the effect of discharging the interest on the one hand and of appropriating the payment on the other. Such a transaction would therefore seem to be outside the Explanation.

It is argued for the respondent that Ex. D-2 does not satisfy the requirements of the Explanation inasmuch as it does not expressly appropriate the payments towards interest and that it should therefore be disregarded and that if Ex. D-2 is disregarded, we are thrown back on the original payments which, being open payments, should be appropriated towards principal. Ex. D-1 is for Rs. 2000 and after giving credit for the payments made towards it, the balance struck is Rs. 1658 and that is the principal under Ex. D-2. As the amount under Ex. D-2 is less than the principal of Ex. D-1, the whole of it must represent the balance of principal due under Ex. D-1 and that means that the payments had been appropriated in discharge of the entire interest due on Ex. D-1, and also a part of the principal. Clearly, therefore, there is appropriation towards interest. Vide *Venkayamma* v. *Ramakotayya*[1]. The contention of the respondent is that the Explanation requires something more than a writing signed by the debtor from which an appropriation could be inferred, that the document should expressly state that the payments were to be appropriated towards interest and the appropriation involved in Ex. D-2 is not saved by the Explanation. But, as already mentioned, the Explanation contemplates a stage when there are open payments, remaining to be appropriated and appropriations being made in the process of scaling the debt in accordance with the provisions of the Act. But where the payments did not exist as

1. (1941) 1 M.L.J. 316. 2. (1942) 2 M.L.J. 592.

payments on 1st October, 1937, but had become merged in a settlement entered into prior thereto, the Explanation would be inapplicable.

This question has also been considered in a number of cases which have come up before this Court subsequent to the decision of Panchapakesa Aiyar, J., now under appeal. In O. S. A. No. 17 of 1948, Horwill and Raghava Rao, JJ., held that the true scope of Explanation I was only to nullify the decision in *Duraiswami Mudaliar* v. *Md. Amiruddin*[1], and that it had not the effect of overruling the line of authorities which had held that settlement made by parties involving appropriation of payments could not be re-opened. This decision was followed by Govinda Menon and Ramaswami, JJ., in C.M.A. No. 185 of 1950 and by Subba Rao, J., in S. A. No. 2115 of 1947. We agree with the views expressed in these decisions and do not find sufficient reason for upsetting the construction which had been put upon the Explanation in a long course of decisions. We are accordingly of opinion that appropriations made by a debtor as part of a settlement are not liable to be re-opened under Explanation I to section 8.

In the result, this appeal is allowed and the decree of the Courts below are restored with costs throughout.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI NAYUDU.

Syed Unnisa .. *Appellant**

v.

Rahimuthunnissa and others .. *Respondents.*

Practice—Appeal—Law amended by statute subsequent to suit—Duty of Court to apply—Muslim Personal Law (Shariat) Act (XXVI of 1937)—Amendment by Madras Act (XVII of 1949)—Applicability to pending appeals.

The High Court in appeal has not only power but a duty to apply the law as it stands on the date of the hearing of the appeal. But it must be noted that in applying the law so as to govern the rights of the parties that which was not law on the date of the institution of the suit but became law subsequently, Courts must take care not to disturb settled or completed transactions which certainly cannot be reopened by reason of a change in the law.

The provisions of the Muslim Personal Law (Shariat) Act (XXVI of 1937) as amended by Madras Act (XVII of 1949) abrogating custom was held to apply in the instant case in pending appeal.

Appeal against the decree of the Court of the Subordinate Judge, Chingleput in A. S. No. 13 of 1945 preferred against the decree of the Court of the District Munsiff, Poonamallee, in O. S. No. 439 of 1941

B. Pocker for Appellant.

S. Azizuddin and R. P. M. Ghani (Court-guardian) for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal mainly raises the question of the scope and applicability of the Muslim Personal Law (Shariat) Application Act, (Act No. XXVI of 1937.) The plaintiffs claiming to be the daughter and widow of one Fakruddin instituted the suit for a declaration that they are entitled to enjoy the properties mentioned in the plaint, manage the durgah, perform the *Urs* festival and receive all the incomes, endowments and perquisites thereof once in every eight years according to their turn on the ground that the properties originally belonged to four Mussalmans and they have been enjoyed from time immemorial for a number of generations in four equal shares by the respective descendants of four persons mentioned and that the plaintiffs and the defendants are the descendants of one Shaik Mohammed. Their case is that their turn comes once in every eight years. In 1926 during their turn they performed the *Urs* festival and in April, 1934,

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1. (1948) 1 M.L.J. 423.

* S.A. No. 2349 of 1946. 29th August, 1952.

when arrangements were made for the celebration of the *Urs* festival there was objection by the defendants and therefore they sued for the declaration and injunction. Defendants denied the allegations as to the plaintiffs taking part in the *Urs* celebrations in 1926 and it was contended that the properties having been endowed as inams for the purpose of the maintenance of the suit durgah and rendering of religious services, the surplus income after meeting all the expenses was to be taken by the office-holder, and that the terms of the grant and immemorial custom governing institutions of this kind and the rules of Mohammadan Law governing the parties prohibited the plaintiffs who are female members taking part or participating in the management of such institutions and enjoying the perquisites of the office. Both the Courts below have found against the plaintiffs on the question of the custom pleaded and rejected their claim.

A great volume of evidence has been adduced in proof of the custom which has been elaborately dealt with by the trial Court and considered with approval by the learned Subordinate Judge who held that it has been established by unimpeachable evidence that the custom pleaded by the defendants was true. I am not persuaded to hold a different view other than that taken by the Courts below as regards the existence of the custom pleaded. Long course of events for nearly over a century and oral and documentary evidence have, in my view, established the essential attributes of a legally binding custom. But for the custom, it is not suggested that the Muslim Personal Law (Shariat) would debar the female members from taking part in the management of such institutions.

During the hearing of the appeal the attention of the learned Subordinate Judge was drawn to a piece of legislation which became law relating to Succession and Inheritance governing Muslims (*viz.*,) the Muslim Personal Law (Shariat) Act (XXVI of 1937). The learned Subordinate Judge disposed of the question by observing that the Act cannot apply to the present case as the suit was instituted prior to the Act taking effect. The appeal was disposed of on the 29th June, 1946, and by that time, Act XXVI of 1937 had not been amended. Section 2 of the unamended Act is as follows:

> "Notwithstanding any customs or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession special property of females, including personal property inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) and the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

This section was amended by the Madras Act XVIII of 1949 and the amended section is as follows:

> "Notwithstanding any custom or usage to the contrary, in all questions regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of marriage, including talaq, ilah, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties and wakfs, the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

There is no doubt that if the Act is applicable to the parties custom will cease to have any force and their personal law being applicable the plaintiffs would be entitled to participate in the management and to enjoy the emoluments of the trust properties and the prohibition of the female members taking part by reason of custom ceasing to have any effect. Basheer Ahmed Sayeed, J., in *Ayisumma* v. *Mayomooty Umma*[1], in a case relating to the Moplah Muslims whose rights to property were governed by the Marumakkatayam law and with reference to a contention that the Marumakkatayam Aliyasanthana Act governed the rights of the parties held that by reason of the repeal of section 16 of the Civil Courts Act by section 6 of Act XXVI of 1937 after 1937 the customary rule of inheritance by survivorship which was till then applicable to Moplah Muslims cannot be made applicable by Courts of law in this country and that all customs and usages contrary to the

1. (1952) 2 M.L.J. 933

Muslim Personal Law became inapplicable as a rule of decision in cases where the parties were Muslims and that all customary law stood abolished and that the Muslim Personal Law took its place in all matters enumerated in section 2 of Act XXVI of 1937 and it may be added as amended by the Madras Act XVII of 1949.

The question, however, that requires to be considered is whether in respect of pending actions where the rights to properties are of the nature that are the subject matter of these proceedings the Muslim Personal Law (Shariat) which is applicable also to trusts and trust properties and wakfs and other religious institutions by reason of the Amending Act, Madras Act XVII of 1949 could be made applicable so as to govern the rights of parties. It is urged on behalf of the respondents that the Act is not retrospective in its operation and unless there is any specific provision in the enactment the further amendment should be construed only as prospective and not retrospective in effect. A passage from Maxwell's "The Interpretation of Statutes" 9th Edn., page 223, is quoted which is as follows:

"Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates, a new obligation, or imposes a new duty or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the legislature, to be intended not to have a retrospective operation. Where vested rights are affected *prima facie*, it is not a question of procedure. There is nothing intended to alter past rights which became vested before the new Act came into operation by reason of the parties acting upon and being entitled to act upon the law as it stood before the new Act came into operation."

With reference to this enactment Mullah in his "Principles of Mahomedan Law" (13th Edn.) at page 4 observes as follows:

"The Act does not purport to disturb settled transactions or to dispossess persons who have lawfully obtained possession in the past, whether it would be applied in cases which were pending at the commencement of the Act is doubtful."

Before considering whether by reason of a declaration and injunction granted in favour of the appellants, plaintiffs, the vested rights of the respondents would be affected it will be necessary to consider what the powers of an appellate Court are under the Civil Procedure Code, and whether when a suit comes up for appeal and before it is finally determined it would not be open to the appellate Court to take note of subsequent events not only with regard to the facts but also in regard to laws enacted and make them applicable to the facts coming up before the Court before a final decision is given in appeal. In *Attorney-General* v. *Birmingham, Tame, and Rea District Drainage Board*[1], it was held by the House of Lords that an appeal to the Court of appeal is by way of re-hearing, and the Court may make such order as the Judge of first instance could have made if the case had been heard by him at the date on which the appeal was heard. Lord Gorell in his judgment after referring to the Judicature Acts and Rules stated that the hearing of an appeal from the judgment of a Judge is by way of re-hearing and the Court has power to give any judgment and to make any order which ought to have been made, and to make such further or other order as the Court may think fit (*See* Order 58, rules 1 and 4). The Court also has power to take evidence of matters which have occurred after the date of the decision from which the appeal is brought (see Order 58, rule 4.) It seems clear, therefore, that the Court of Appeal is entitled and ought to re-hear the case as at the time of hearing, and if any authority were required for this proposition it is to be found in the case *Quilter* v. *Mapleason*[2]. *Quilter* v. *Mapleason*[2] is a case where a new enactment came into operation after the institution of the suit and the appeal was filed and before it came up for hearing in appeal. It was held that assuming the judgment of the Court below to have been correct according to the law as it then stood, the Court of appeal could grant to the tenant the relief to which he was entitled according to the law as it stood at the hearing of the appeal, since the general orders provide that appeals shall be by way of rehearing, and give power to the Court of appeal not merely to make any order which ought to have been made by the Court below but to make such further order as the case may require. Bowen, L.J., observed:

1. (1912) A.C. 788. 2. (1882) 9 Q.B.D. 672.

"The only remaining question is, whether the Court of Appeal can give relief where a judgment has been obtained by the landlord before the Act came into operation. I think we should be misreading the judicature rules if we held that it could not when the landlord has not obtained possession. The rules were intended to enable the Court of appeal to do complete justice. If the law has been altered pending an appeal, it seems to me to be pressing rules of procedure too far to say that the Court of appeal cannot decide according to the existing state of the law. I think that such is not the true construction of the rules, for Order 58, rule 5 does not merely enable the court of appeal to make any order which ought to have been made by the court below, but to make such further or other order as the case may require."

The provisions of sections 107 and Order 41, rule 33, Civil Procedure Code, practically incorporate Order 58, rule 5, of the Judicature rules which were relied on by the learned Judges in both the cases cited. Therefore it is not only permissible but in my view it is necessary in the interests of justice to apply to the case, the law as it stands on the date when the matter comes up before Court whether in trial or in appeal and before the final determination of the case. With respect to Bowen, L.J., I agree with the observations quoted above which correctly represent the attitude which Courts should adopt in taking notice of subsequent change of events either of fact or in law. Gwyer, C.J., Sulaiman and Varadachariar, JJ., in *Shyamakant v. Rambajan*[1] and Viswanatha Sastri, J., in *Lakshmiammal v. Narayanaswami*[2], adopt and approve the view taken by the Law Lords in the above-cited decisions.

Therefore it goes without saying that this Court in appeal has not only power but a duty to apply the law as it stands on the date of the hearing of the appeal. But it must be noted that in applying the law so as to govern the rights of the parties which was not law on the date of the institution of the suit but became law subsequently, Courts must take care not to disturb settled or completed transactions which certainly cannot be re-opened by reason of a change in the law. In the present case, however, it is for consideration whether there were any such settled or completed transactions whereby the rights of the plaintiffs have become extinguished or properties in which they had a right have passed into the hands of third parties or are not available for them to manage and enjoy. The first plaintiff was 19 years old on the date of the institution of the suit and it is not in dispute that both the plaintiffs are the heirs under the personal law they being the daughter and the widow of Fakruddin Sahib and having become entitled in accordance with their respective shares in the other properties excepting those to which by virtue of custom they have been considered not to be entitled to claim the right to manage the durgah, perform the *Urs* festival and also to enjoy the surplus income if any. It cannot be said that the defendants have acquired vested rights which require to be divested by reason of the application of the new enactment. Nor could it also be said that by reason of the new enactment any final judgments or settled transactions are sought to be re-opened. Plaintiffs as heirs of the late Fakruddin Sahib who died in 1922 have become entitled to share in his property but in respect of a particular item which was endowed for charity their right was only to manage and to participate in the surplus income. The plaintiffs who are female members by virtue of custom were excluded from the right to manage the durgah and to perform the *Urs* festival. There is force in the argument of Mr. Pocker Sahib, learned counsel for the appellant that the right to manage came to be vested in the hands of the defendants male members not by virtue of custom but by virtue of their being the sharers but custom deprived the plaintiffs of their rightful share to participation in the management and to their rightful share in the surplus income and since the new Act has abrogated any such custom the plaintiffs could be governed by the Act. Moreover would it be open to the defendants to contest the claim of any female member who might come forward after the enactment of the legislation under which personal law is held to override any custom and to deny such a female member her right to manage the charities and participate in the income. The only answer is there could be no such prohibition or disqualification of the female members under the existing law.

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1. (1938-39) F.L.J. 183 : (1939) 2 M.L.J. (Supp.) 45 (F.C.).
2. (1950) 1 M.L.J. 63.

It will not be open to the defendants to plead that they have acquired vested rights since the rights of the female members would not depend upon whatever rights the defendants might claim to have acquired but on the rights which they are entitled to under the new legislation. It must, however, be noted that in the present case the first plaintiff was 19 years old on the date of the suit. The suit having been instituted on 2nd April, 1937, in no view, could it be said that her rights have been taken away or have become vested in the defendants. Her claim to establish such rights can be enforced within three years of her attaining majority and the suit having been instituted within a year of her attaining majority the defendants cannot also raise any plea of limitation or prescription. This question as to limitation was neither raised nor considered by the lower appellate Court and there is no substance in the plea of limitation.

Under these circumstances I consider that the provisions of the Muslim Personal Law (Shariat) Act are applicable to the present case and that the plaintiffs are entitled to a decree as prayed for. The appeal is allowed. There will be no order as to costs. No leave.

K.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AYYAR.

A. Ananthalakshmi Ammal and another .. *Appellants**

v.

Indian Trades and Investments, Ltd., and another .. *Respondents.*

Companies Act (VII of 1913)—Failure to hold the annual meeting within the specified time after the last preceding one for election of directors—Directors due to retire deemed to have vacated their office—Directors' power to co-opt—Conditions necessary for the exercise of.

If in any calendar year an annual meeting is not held under an article of the company those directors who would have retired at the meeting had the same been held will vacate office on the last date of the year.

In re *Consolidated Nickel Mines, Ltd.,* (1914) 1 Ch. 883 ; *Morris* v. *Kanssen,* (1946) A.C. 458 ; *Srinivasan* v. *Watrap Subramania Iyer,* (1931) 61 M.L.J. 724 ; *Buckley's Companies Act* (12th Edn., p. 882), followed.

There is nothing in the Companies Act or in the decided cases to support the position that the power to co-opt directors comes to an end when once an annual meeting is convened.

The power to co-opt directors by the Board of Directors of a company could be exercised even though the strength of the board has fallen below the minimum and even when there is only one director capable of acting. The words ' the remaining directors should be read as including the case of a remaining director. The fact that a person exercising that power does not constitute a quorum is not really a relevant matter.

In re *Scottish Petroleum Company,* (1883) 23 Ch.D. 413; In re *Bank of Syria,* (1900) 2 Ch. 272 ; In re *Sly Spink & Co.,* (1911) 2 Ch. 430 ; *Channel Collieries Trusts, Ltd.* v. *Dover St. Margaret's and Martin Mill Light Railway,* (1914) 2 Ch. 506, followed.

That the directors of a company are in a fiduciary position in relation to its shareholders cannot seriously be questioned. *Forguson* v. *Wilson,* (1866) 2 Ch. Appeals 77 ; *G. E. Railway* v. *Turner,* (1872) 8 Ch. App. 149, referred to. If a co-option of a director is not made in the interests of the shareholders but for other purposes it cannot stand. Where no particular reason has been shown why a co-option should have been made a few days prior to an annual meeting convened for the purposes of election of directors and the circumstances under which the co-option is made clearly stamp it as *mala fide* such co-option cannot be valid and cannot stand.

Appeal against the Judgment and Order of the Hon'ble Mr. Justice Krishnaswami Nayudu, dated 14th November, 1951, and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 2813 of 1950.

G. Vasantha Pai for Appellant in O.S.A. No. 120 of 1951 and for Respondent in O.S.A. No. 15 of 1952.

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*O.S.A. Nos. 120 of 1951 and 15 of 1952. 4th April, 1952.

V. Radhakrishnayya and *V. Sambamurthy* for Respondent in O. S. A. No. 120 of 1951 and for Appellant in O.S.A. No. 15 of 1952.

The Court delivered the following

JUDGMENT.—The question raised in these appeals is whether the co-option of K.N. Narayana Iyer and K.C. Chandy as directors in a company called the Amalgamated Coffee Estates, Ltd., is valid. This company was formed with the object of carrying on business in coffee, tea, cardamom and other commodities and was incorporated under the Indian Companies Act in 1944. The last annual meeting of the company was held on 31st January, 1949. Article 55 of the Articles of the company provides that a general meeting shall be held within 18 months from the date of its incorporation and thereafter once at least in every calendar year at such time (not being more than 15 months after the holding of the last preceding general meeting), and place as the directors may decide. In accordance with this provision the last day for holding the annual meeting would be 30th April, 1950, but no meeting was held either on or before that date. Notices were issued by the management on 21st July, 1950, for an annual meeting to be held on 6th August, 1950. But this meeting, however, was cancelled on the ground that objections were taken to its legality. On 14th August, 1950, one of the shareholders, Mrs. A. Ananthalakshmi Ammal filed an application under section 76 (3) of the Indian Companies Act, Application No. 2813 of 1950 for an order that the Court should call for a general meeting, and in the affidavit filed in support of that application it was alleged that no general body meeting had been called after 31st January, 1949, that the directorate consisted of only three members, V.R. Veeramani, A.S. Padmanabhan and B.V. Raman while Article 75 provided for a minimum of four directors: that the affairs of the company were being grossly mismanaged and that accordingly the Court should direct that a general body meeting should be convened for scrutinising the balance sheets, appointing auditors and electing " new directors in the vacancies caused." There was also a prayer that a Commissioner should be appointed to convene the meeting and act as Chairman therefor. A similar application was filed by one of the debenture holders, Application No. 2813 of 1950 and therein Application No. 2826 of 1950 was made for an injunction restraining the management from co-opting any person as director. On 18th August, 1950, an interim injunction was issued. On 21st August, 1950, the management applied in Application No. 2954 of 1950 for cancelling the interim injunction and all the four applications were heard together by Krishnaswami Nayudu, J., who passed an order on 26th September, 1950, that the annual meeting be called on 29th October, 1950, for discussing the balance sheet and profit and loss account for " election of directors in the places vacant " and to consider the auditor's report, and that notices of the said meeting be issued in the names of the two directors, V.R. Veeramani and B. V. Raman. He also appointed an advocate, Mr. Sanjeevi Naidu as Commissioner to preside over the meeting. The injunction petition was dismissed on the ground that in view of the orders passed in Application Nos. 2813 of 1950 and 2814 of 1950 no orders were necessary. On 7th October, 1950, notices were issued for an annual meeting on 29th October, 1950, in terms of the order dated 26th September, 1950. The notices also stated that " two directors, A. S. Padmanabhan and B. V. Raman retire. The vacancies created by their retirements have to be filled. Of the retiring directors Mr. B. V. Raman offers himself for re-election."

On 9th October, 1950, two of the directors, Veeramani and B. V. Raman passed a resolution co-opting K. N. Narayana Iyer as a director in the place of one Dakshinamurthi who had resigned on 18th June, 1950. On 11th October, 1950, V. R. Veeramani resigned his office as an elected director and was nominated by the managing agents as a director under Article 82-A ; and in the vacancy thus created K. C. Chandy was co-opted as a director. Both the co-options took place after the Court had passed an order on 26th September, 1950, for holding the annual meeting on 29th October, 1950, and after notices thereof had actually been issued. Thus on 29th October, 1950, the position was that V.R. Veeramani had become a

nominated director; two directors had to be elected in the place of Padmanabhan and B. V. Raman whose terms of office had expired; and K. N. Narayana Iyer and K. C. Chandy had been co-opted as directors.

At the annual meeting held on 29th October, 1950, when the subject of "election of directors in the places vacant" was taken up disputes arose as to the number of vacancies which were available to be filled. On behalf of Mrs. Ananthalakshmi Ammal it was contended that the expression "places vacant" would include the maximum number of directors that could be elected under Article 75 and that should be determined by the general body and that further the co-options of K. N. Narayana Iyer and K. C. Chandy were invalid. The management contended that the election should be limited to the two vacancies mentioned in the notice and that the co-options of Narayana Iyer and K. C. Chandry were valid. In this conflict of opinion it was decided to adjourn the meeting and obtain from the Court a clarification of the order dated 26th September, 1950. Application No. 4025 of 1950 was then filed by Mrs. Ananthalakshmi Ammal for that purpose and on that Krishnaswami Nayudu, J., passed an order on 3rd November, 1950, that apart from the two vacancies mentioned in the notice there was also a vacancy caused by the resignation of Dakshinamurthi on 18th June, 1950, and that an election should be held to fill up that vacancy as well. On the question of the validity of the co-options he observed that it was unnecessary to go into the question in these proceedings.

Against this order the management filed O.S.A. No. 103 of 1950, their contention being that as there was valid co-option in the place of Dakshinamurthi there were only two vacancies. Mrs. Ananthalakshmi Ammal filed O.S.A. No. 110 of 1950, claiming that V. R. Veeramani was the only director validly in office, that all the other places were vacant and that the shareholders had the right to fill the vacancies up to the maximum as provided under Article 75. Both these appeals were disposed of by the judgment of this Court dated 9th February, 1951. Therein it was held that for the purpose of election of directors "in the places vacant" as provided in the order dated 26th September, 1950, it was necessary to determine the number of vacancies and that to decide that, it was necessary to decide whether the co-options were valid or not. The matter was accordingly remanded for decision on the validity of the co-options of K. N. Narayana Iyer and K. C. Chandy. There was also a direction that the Court might order, at its discretion, addition of parties for the purpose of a satisfactory disposal of the points in dispute.

In pursuance of this order of remand Application Nos. 2813 of 1950 and 2814 of 1950 came up for re-hearing before Krishnaswami Nayudu, J. The two directors, the validity of whose co-option was at issue, Narayana Iyer and K. C. Chandy, were also impleaded as parties. The whole case was reheard and on 14th November, 1951, Krishnaswami Nayudu, J., pronounced judgment upholding the co-option of K. N. Narayana Iyer and rejecting that of K. C. Chandy. It is against this judgment that the present appeals have been brought. In O.S. A. No. 120 of 1951, Mrs. Ananthalakshmi Ammal contends that the co-option of K. N. Narayana Iyer on 9th Ocotber, 1950, is invalid. In O.S. A. No. 15 of 1952, Mr. K. C. Chandy contends that this co-option on 11th October, 1950, is valid. These are the questions that fall to be determined in these appeals.

In O.S.A. No. 120 of 1951, Mr. Vasantha Pai, the learned advocate for the appellant, contends that the co-option of Narayana Iyer on 9th October, 1950, was invalid because there was only one director who was entitled to act on that date and that the power to co-opt could not be exercised when there is no Board of Directors competent to act under Article 75; that in any event such a power could not be exercised after an annual meeting had been called; that at any rate on the facts of the present case such a power could not be exercised as the Court had ordered on 26th September, 1950, that the shareholders should elect the directors in the vacancies at an annual meeting to be held on 29th October, 1950, and that the resolution dated 9th October, 1950, did not comply with the requirements of Article 99 of the Articles of the company. It was further argued that even if the

power to co-opt could be validly exercised on 9th October, 1950, it was not in fact so exercised as the co-option was made not in the interests of the shareholders but of the management. The management controverts the soundness of these contentions.

The position that the power to co-opt directors comes to an end when once an annual meeting is convened, is not sought to be supported by anything in the Companies Act or in the articles of the company. Nor is any authority cited in support of it. We have no hesitation in rejecting it. Nor is there any substance in the argument that the order of the Court dated 26th September, 1950, directing that the annual meeting be convened for filling up vacancies has the effect of extinguishing that power. Though interim injunction was issued against co-option in Application No. 2826 of 1950 on 18th August, 1950, that became dissolved on the dismissal of that application on 26th September, 1950. It is true that the order of dismissal was made not on the merits but in view of the orders passed in Application Nos. 2813 of 1950 and 2814 of 1950 and it must have been assumed that all the places would be filled by election, at the annual meeting on 29th October, 1950. This circumstance, though material on the question whether the exercise of power on 9th October, 1951, and 11th October, 1951, was *bona fide* or not, does not operate to deprive the management of its powers under Article 81. The objection based on Article 99 that the resolution dated 9th October, 1950, was not signed by all the directors but only by two of them must also be rejected inasmuch as no contention is raised by the management that the co-option of K. N. Narayana Iyer, if not valid under Article 81 could still be upheld as one passed in circulation under Article 99.

The two substantial contentions urged on behalf of the appellant are (1) that on 9th October, 1950, there was only one director competent to act and according to the articles of the company he would have no power to co-opt a director, and (2) that in any event the exercise of the power was not for the benefit of the shareholders and therefore void. With reference to the first contention it is necessary to set out the relevant articles of the company on which it is based. Under Article 75 "Until otherwise determined by a general meeting the number of the directors shall not be less than four or more than nine." Article 83 provides that "at the first ordinary meeting of the company the whole of the directors excepting the *ex-officio* directors, shall retire from office and at the ordinary meeting in every subsequent year, one-third of the directors (other than the *ex-officio*) directors for the time being or if their number is not three or a multiple of three, then the number nearest to one-third shall retire from office." Section 83-A (1) of the Indian Companies Act enacts that "every company shall have at least three directors." Turning to the facts it should be remembered that the last annual meeting was held on 31st January, 1949. Even at that time there were only three directors in office, A. S. Padmanabhan, M. S. Periasami Nadar and V. R. Veeramani. Of these Padmanabhan was due to retire under Article 83 at the next annual meeting. Periasami Nadar resigned in August, 1949, and in his place Dakshinamurthi was co-opted on 25th September, 1949. On 22nd March, 1950, one B. V. Raman was co-opted as the fourth director but he was also due to retire at the next annual meeting. The meeting should have been held under Article 55 on 30th April, 1950, at the latest. On 18th June, 1950, Dakshinamurthi resigned and it was in his place that K. N. Narayana Iyer was co-opted by a resolution of the directors, Veeramani and B. V. Raman.

On these facts it was argued by the learned advocate for the appellants that two of the directors, Padmanabhan and B. V. Raman who were due to retire at the annual meeting next to that held on 31st January, 1949, should be held to have vacated their office on the last date on which the annual meeting should have been held and that in consequence they ceased to be directors after 30th April, 1950. This contention is amply supported by the authorities. In re *Consolidated Nickel Mines, Ltd.*[1], the question arose whether two directors, Steel and Phillips were

1. (1914) 1 Ch. 883.

entitled to remuneration as directors. Article 101 of the company provided that at the ordinary meeting all the directors should retire from office. Section 49 of the Companies Act provided that the directors were bound to summon a general meeting of the company once in every calendar year. After 1905, no meeting was called but the two directors continued to act. It was held that they vacated the office on the last day on which the annual meeting should have been held, that is on 31st December, 1906, and that therefore they were not entitled to remuneration thereafter.

In *Srinivasan* v. *Watrap Subramania Iyer*[1], Cornish, J., followed the decision in *In re Consolidated Nickel Mines, Ltd.*[2] In *Kansseen* v. *Rialte*[3], the point for decision was whether the allotment of shares made at a directors' meeting held on 30th March, 1942, was valid. Two persons Cromie and Strelitz purported to act as directors and made the allotment. Strelitz claimed to have been appointed as director at a meeting held on 1st February, 1940. It was found that there was no such meeting or appointment. Cromie was one of the original directors but under rule 73 of Table A of the Companies Act, 1929, which in substance corresponds to Article 83 in the present case the directors would have to retire at the annual meeting and the last day on which such a meeting should have been held was 31st December, 1941. On these provisions Lord Green, M.R., who delivered the leading judgment of the Court of appeal observed as follows :—

> "Neither Mr. Cromie nor Mr. Strelitz was then (on 30th March, 1942) a director of the company. Mr. Cromie had been a director but he had vacated the office on 31st December, 1941, by reason of Article 73 of the Company's articles of association. See *In re Consolidated Nickel Mines, Ltd.*"[2]

This decision was affirmed by the House of Lords in *Morris* v. *Kanssen*[4]. On the point now under consideration the decision is thus stated in the head note :—

> "No general meeting was held in 1941 and accordingly by the effect of Article 73 of Table A as varied by Article 22 of the Company's articles of association, there were thereafter no *de jure* directors." *Vide* the observations in the speech of Lord Simonds at pages 467-468 and 471.

In Buckley on Companies Act the learned author commenting on rule 89 in schedule (1) of the Companies Act, 1948, which in terms corresponds to the present Article 83 states the law as follows :—

> "If in any calendar year an annual meeting is not held under an article in this form, those directors who would have retired at the meeting had the same been held will vacate office on the last date of the year." (12th edition, page 882.)

On these authorities it must be held that both Padmanabhan and B. V. Raman ceased to be directors after 30th April, 1950, and that at the time of the co-option of K. N. Narayana Iyer on 9th October, 1950, there was only one director, Veeramani who was lawfully in office.

What follows on this conclusion? The appellant contends that if on 9th October, 1950, there was only one director, then there was no board of directors as required by Article 75 and that therefore there could be no valid co-option as the power to co-opt could only be exercised by the board. The respondent relies on Article 81 which is in these terms :—

> "The continuing directors may act notwithstanding any vacancy in their body; but so that if the number falls below the minimum above fixed the directors shall not, except in emergencies or for the purpose of filling up vacancies, act so long as the number is below the minimum."

The argument is that this is a special provision made for meeting contingencies like the present and that the co-option made thereunder is valid. The contention of the appellant is that even for invoking the power under Article 81 there must be a board with the minimum strength as required by Article 75 but this is opposed to the plain language of the Article which expressly confers power on the continuing

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1. (1931) 61 M.L.J. 724.
2. (1914) 1 Ch. 883.
3. (1944) Ch. 346.
4. (1946) A.C 458.

directors to fill vacancies when the number falls below the minimum and the minimum that is referred to in this Article is the minimum prescribed under Article 75.

There is also considerable body of authority in England on the construction of clauses similar to Article 81. In re *Scottish Petroleum Company*[1], the Article fixed a minimum strength of the board of directors at four and the quorum for the board's meeting at two as do Articles 75 and 93 in the present case. The strength of the board came down to two, when they co-opted another director and allotted shares to him. Article 83 of the company provided that the continuing directors may act notwithstanding any vacancy in the board. On these provisions it was held that the power to co-opt a director could be exercised even though the strength of the board had fallen below the minimum. The following observations occurring in the judgment of Baggallay, L.J., may be usefully quoted :—

"It is also contended that though by the articles two directors form a quorum when the board is duly constituted, there could not be a quorum capable of transacting business when the Board of directors was not filled up to the minimum number. I assume that the retiring directors had ceased to be directors, and if that be so, the board was not made up to the minimum number. Still I think that having regard to Article 83, the objection cannot be maintained. It is urged that this article can only apply when the number of directors is more than four, but I see no reason for adopting that view."

In re *Bank of Syria, Owen and Ashworth's claim, Whitworth's claim*[2] Article 38 of the company provided that the members of the council shall be not less than three and not more than nine. At the time of the transaction there were only two directors and the question arose whether they had the power to act. Article 42 provided that "the continuing council may act notwithstanding any vacancy." It was held by Wright, J., that under this clause the directors were entitled to act. He observed :

"I am asked to say that in as much as there were only two directors acting at that time, they had no power to bind the company. But it seems to me that I ought to hold, having regard to the authorities, that Article 42, which provides that a continuing council may act notwithstanding any vacancy, gets over the difficulty. . . . . It seems to me having in view Article 42, that the principle in In re *Scottish Petroleum Company*[1] applies to the present case."

There was an appeal against this decision. *Vide* in In re *Bank of Syria, Owen and Ashworth's claim, Whitworth's claim*[2].

Lord Alverston, C.J., in agreeing with the decision of Wright, J., on this point observed that even if the number of directors fell below the quorum fixed for a directors' meeting the principle laid down in *Scottish Petroleum Company*[1], would apply and that the continuing directors would be entitled to act under Article 42. That is to say the power to co-opt might be exercised notwithstanding that the strength of the directorate has fallen below the minimum required and below the quorum prescribed, by the articles.

In re *Sly Spink & Co.*[3], the articles required that the number of directors should not be less than four, that the quorum for a board's meeting should be three and Article 88 gave authority to the continuing directors to fill in vacancies. From the very start the company had never a board of four directors. Only three directors were appointed and they allotted shares. The company having gone into liquidation the question arose whether the allotment of shares was valid. It was contended that the three directors had authority to act under Article 88 and that the allotment was consequently valid. Noville, J., held that Article 88 would apply only if there had been a properly constituted Board of directors in the first instance but that where there never was a board with the minimum strength, Article 88 would not apply. The following observations may be quoted :—

"It is said that they were continuing directors because they had not ceased to be directors. I do not think that is a reasonable interpretation to put upon the words contained in the articles. The expression is familiar one and it applied to cases where the number of the original board has been

1. (1883) 23 Ch. D. 413.
2. (1900) 2 Ch. 272.
3. (1911) 2 Ch. 430.

reduced by death or otherwise, and in such cases those who are left, subject to the provisions of Article 88, would be entitled to conduct the business of the company. With regard to that, I think the two cases which were cited—In re *Scottish Petroleum Company*[1] and In re *The British Empire Match Co., Ltd.*, Ex parte *Ross*[2] show very clearly the distinction between the case where the directors too few in number can and cannot act as continuing directors. In one case you have a board insufficient in number from the first and notwithstanding the continuing clause it was held that the board could not transact business. In the other case you have a board which was originally competent to transact business but was diminished by retirement to a number less than that provided for by articles. The continuing clause was held to apply and those directors were held to be competent to transact the business of the Company."

The company in the present case started with four directors, being the minimum strength under Article 75. *Vide* the allegations in paragraph 5 in the affidavit of Davar in Application No. 2954 of 1950 ; and therefore the continuing directors would under the decision In re *Sly Spink & Co.*[3], have power to act under Article 81. In *Channel Collieries Trust, Ltd.* v. *Dover, St. Margaret's and Martin Mill Light Railway*[4], the articles of the company provided that the minimum number of directors should be three : that the quorum for the board's meeting should be two and Article 89 gave power to the 'remaining directors' to fill vacancies. The company began with three directors, then two of them resigned leaving only one director in office and he co-opted a director under Article 89. It was contended that this co-option was invalid because the board had neither the minimum strength nor even the quorum provided by the articles. Rejecting this contention Lord Cozens Hardy, M.R., observed as follows :

"Sir John Jackson thus became sole director. What was his power? Under the Companies Clauses Act, 1845, as continuing director, he had power to fill up the vacancies on the board. The fact that a person exercising that power does not constitute a quorum is not really a relevant matter. The generality of the language used in section 99 is so clear that it is impossible for us to overlook it. Any other view on that point would paralyse many a company."

The following observations occurring in the judgment of Swinfen Eady, L.J., might also be usefully quoted :—

"I think that the context requires that the words 'remaining directors' should include the case of a remaining director. It is obvious that the number of the board may, by death or resignation or otherwise, be so reduced that it may be below the quorum, as well as that there may be vacancies occurring in the board whilst still leaving a quorum, but in either case it is necessary or proper that the vacancy should be filled up. In my opinion the necessity of the case requires that 'the remaining directors' should be read as including the case of a remaining director, so that if and so long as there is any remaining director he may proceed to fill up the board by appointing persons when casual vacancies occur. For these reasons I am of opinion that it was open to Sir John Jackson as the sole remaining director, under section 89, to appoint duly qualified persons to be directors in the place of the two who had ceased to be members of the board."

Applying these principles it must be held that the power under Article 81 could be exercised even though the strength of the board had fallen below the minimum prescribed by Article 75 and below the quorum mentioned in Article 92 and even when there is only one director capable of acting. The co-option of Narayana Iyer on 9th October, 1950, must, therefore, be held to be within the scope of the authority conferred on the continuing directors under Article 81.

The only question that remains to be decided is whether on the facts and circumstances of this case the co-option of Narayana Iyer is open to attack as improper and *mala fide*. The learned advocate for the appellant argued that the directors stand in a fiduciary relationship to the shareholders, that any power conferred on them must be exercised for the benefit of the shareholders, that the co-option of directors should also be made only in the interests of the shareholders and that Narayana Iyer was co-opted only for the purpose of strengthening the hands of the management in their fight with their shareholders and it is, therefore, invalid. That the directors are in a fiduciary position in relation to the shareholders cannot seriously be questioned. In *Ferguson* v. *Wilson*[5], Lord Cairns while holding that

1. (1883) 23 Ch. D. 413.
2. (1888) 59 L.T. 291.
3. (1911) 2 Ch. 430.
4. (1914) 2 Ch. 506.
5. (1866) 2 Ch. App. 77 at 90.

the directors of the company were in the position of agents of the company in its dealings with the outside world, they were in the position of the trustees in relation to the shareholders. Similar observations are to be found in the judgment of Lord Selborne in *Great Eastern Railway Co.* v. *Turner*[1].

The position is thus summed up in Palmer's Company precedents.

"Where the directors of a company are invested by the regulations with certain powers, the authority thus conferred is to be read subject to the general rules applicable to the exercise by directors of the powers vested in them, and in particular to the rule that the directors are to exercise the powers for the benefit of the company and in the true interests of the company and according to the best of their judgment, for they stand in a fiduciary position, and must act accordingly." (*Vide* Volume 1, page 434, paragraph 21, 16th edition).

We, therefore, agree with the appellant that if the co-option of a director under Article 81 is not made in the interests of the shareholders but for other purposes it cannot stand.

What then are the facts ? It is common ground that the affairs of the company were during this period in a very unsatisfactory condition. For want of funds the coffee and tea estates were in a state of neglect. More than Rs. 96,000 had to be paid for income-tax and the Government were taking coercive steps to recover the same. Interests due to the debenture-holders had not been paid ; nor dividends which had been declared on the shares. The creditors had obtained decrees against the company and execution proceedings were in progress. These facts are stated in the affidavits filed on behalf of the appellants in these proceedings. But it also appears from these affidavits that the coffee and tea plantations owned by the company were extensive and valuable and if finance was forthcoming they could be properly worked and made to yield profits. It is clear from the records that the managing agents were making strenuous attempts to get at a financier who would be willing to advance the necessary funds for the working of the estate and at last they found him in Narayana Iyer. This Narayana Iyer was the managing director of a company called Messrs. Parkins (India), Ltd., which has under its management several plantation companies owning tea, coffee and rubber estates. He has had experience in this line of business for about twenty years and is a man of considerable worth. It cannot be doubted that it would be to the advantage of the company if he could be persuaded to join it. It appears from paragraph 3 of his affidavit that early in August, 1950, the shareholders themselves approached him with a request to join the company and advance the necessary funds. This is borne out by a letter dated 7th September, 1950, written by a director of Messrs. Parkins (India), Ltd., to the advocate for the appellant. This letter gives particulars about the status of Messrs. Parkins (India), Ltd., and of its managing director, Narayana Iyer and proceeds to state :

"Messrs. Parkins (India), Ltd., are willing and they are in a position to provide working finance and other finance required immediately to pay the pressing creditors of the Amalgamated Coffee Estates, Ltd."

A reading of this letter leaves no doubt that the shareholders considered that the accession of Narayana Iyer would add to the strength of the company and enable it to tide over its difficulties. It is admitted in the affidavit filed in application No. 2828 of 1950 that as early as August the management itself had been negotiating with Narayana Iyer with the object of bringing him in. He insisted naturally that if he should advance the necessary funds he should have a voice in the control and management of the company. The management agreed to this and co-opted him as a director on 9th October, 1950. It appears from the affidavit of Narayana Iyer that after his co-option he advanced monies to the extent of a lakh of rupees for the working of the estate and harvesting coffee. The facts clearly show that the company was in need of finance, that Narayana Iyer was co-opted for the purpose of finding the necessary funds and that both from the point of view of his experience and financial status he would be a source of strength to the company.

1. (1872) 8 Ch. App. 149 at 152.

But it is argued on behalf of the appellant that notwithstanding the above circumstances, the co-option of Narayana Iyer must be rejected as improper and *mala fide* because the vacancy in which he was filled arose on 18th June, 1950, when Dakshinamurthi resigned, that the management did not choose to fill that vacancy then ; that on the other hand they stated in their counter-affidavits in Application Nos. 2813 of 1950 and 2814 of 1950 that they thought it fair not to co-opt a director in view of the general body meeting, that was proposed to be convened ; that an injunction was actually issued on the 18th of August, 1950, restraining the managing agents from making any co-option and though it became dissolved on 26th September, 1950, it was understood by all persons that the vacancy would be filled by the shareholders at the annual meeting and that, therefore, the co-option on 9th October, 1950, must be held to have been made with the object of depriving the shareholders of their right to elect a director.

But it must be remembered that during this period the management was on the look out for a suitable financier and that it was commendable on their part to have left the place vacated by Dakshinamurthi vacant until a suitable person could be found and to have left it to the shareholders to fill the place if their endeavours to get at a financier did not succeed. Nor can any sinister purpose be spelt out of the fact that the co-option was made after a general meeting had been called. It is admitted that the coffee crops were ready for harvesting and if early steps were not taken to gather them considerable damage would result. In paragraph 13 of the counter-affidavit filed by Davar in Application No. 2954 of 1950 it is alleged that

> "the coffee plantations in Palghat and the cardamoms are deteriorating ; crops were being spoilt and what little can be gathered from the crops would be lost to the shareholders and the debenture-holders on account of the neglect and irresponsible attitude of the managing agents."

This was in August 1950. It is obvious that the urgency must have been greater in October and the managing agents acted in the best interests of the shareholders in concluding a bargain with Narayana Iyer on 9th October, 1950.

On a review of all the circumstances we agree with Mr. Krishnaswami Nayudu, J., that the co-option of Narayana Iyer was a proper exercise of the power under Article 81. O.S.A. No. 120 of 1951 must accordingly be dismissed with costs.

In O.S.A. No. 15 of 1952 the point for determination is whether the co-option of K. C. Chandy on 11th October, 1950, was a valid exercise of the power under Article 81. The facts relating to this co-option present a picture totally different from what has been seen in the case of Narayana Iyer. No particular reason has been shown why this co-option should have been made on 11th October, 1950, when the annual meeting had been called for on 29th October, 1950. It is not stated that this co-option was made under any arrangement to advance funds for the company. That arrangement had already been concluded with Narayana Iyer. Nor does K. C. Chandy possess anything like the experience which Narayana Iyer undoubtedly does possess. He is an Advocate practising at Kottayam. The circumstances under which the co-option was made clearly stamp it as *mala fide*. V. R. Veeramani who was the one director who has been in active management resigned his place as an elected director on 11th November, 1950 and as part of the same proceedings he became a nominated director. It is clear that this manoeuvre was adopted for co-opting a director of the choice of the managing agents and it is open to the objection that it was made with a view to strengthen the hands of the managing agents and not in the interests of the shareholders. We agree with Krishnaswami Nayudu, J., that this co-option cannot be upheld.

It was argued by Mr. V. Radhakrishnayya the learned advocate for the appellant that the validity of this co-option cannot be gone into in these proceedings but the matter is concluded by the judgment of this Court, dated 9th February, 1951 and even otherwise the decision on the validity of the co-option is incidental to the exercise of the powers under section 76 (3) of the Companies Act. In the result the appeal fails and is dismissed with costs.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AYYAR.

Buddu Satyanarayana and others .. *Appellants**

v.

Dasari Butchayya and others .. *Respondents.*

Madras Hindu Religious Endowments Act (*II of* 1927), *Chapter VI-A, section* 78—*Hereditary archakas in possession of lands belonging to deity—If can be dispossessed by Executive officer—Appropriate order.*

In the interests of the general public and the satisfactory continuance of worship, it is not desirable that hereditary archakas who have been looking after the daily worship of the temple should be turned out of the lands which they had been enjoying partly in lieu of remuneration for their services and partly for defraying the expenses of the daily worship. The allotment of portion of the properties to such archakas must depend on the facts of each case. The archakas and their successors would be entitled to be in possession of the properties only so long as they performed their daily services properly and faithfully according to usages of the temple meeting the expenses of the daily worship themselves. If they failed to carry out these terms it would be open to the Executive Officer to take possession of the lands and make other managements for carrying on the worship. The archakas will not have the right to alienate the properties allotted to them.

Appeal against the decree of the Court of the Subordinate Judge of Tenali dated the 23rd day of July, 1947, in O. S. No. 19 of 1946.

N. C. Raghavachari for Appellants.

C. A. Vaidyalingam, *T. Venkatadri* and *K. Ramachandra Rao* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The appellants are the hereditary archakas of the temple of Sri Malleswaraswamyvaru in the village of Chinnapulivaru in the Guntur District. The Hindu Religious Endowments Board notified the said temple under Chapter VI-A of the Madras Hindu Religious Endowments Act and appointed an Executive Officer. He applied under section 78 of the Act for delivery of the lands in possession of the archakas which formed the subject-matter of the suit and the appeal on the ground that the lands belonged to the deity. The petition under section 78, O. P. No. 40 of 1945, on the file of the District Court of Guntur, was eventually ordered, and it is represented that in pursuance of the order in that petition, the Executive Officer has since taken possession of the lands. While the petition under section 78 was still pending, the appellants filed a suit for declaration that they were entitled to be in possession of the plaint lands and were not liable to be dispossessed by the Executive Officer. Subsequent to the institution of the suit, the District Court passed an order directing the petitioners to deliver possession of the lands. Therefore there was an amendment in the plaint adding an additional prayer, namely, to set aside the order of the District Court in O. P. No. 40 of 1945. The main case of the appellants in the trial Court was that the deity had no manner of right to the lands and the lands were attached to the office of archaka.

The learned Subordinate Judge of Tenali held on a consideration of the entire evidence that the suit lands were granted to the deity and not to the archakas and the plaintiffs could not be permitted to set up a title adverse to the deity. As according to the learned Judge the plaintiffs were not entitled to be in possession of the lands, the suit was dismissed with costs. Hence this appeal.

Learned counsel for the appellants very wisely did not challenge the correctness of the finding of the learned trial Judge as to the title to the properties. It must therefore be taken as established that the properties belong to the deity and not to the appellants.

Ordinarily this finding must dispose of the case. But as pointed out in several recent decisions of this Court, in the interests of the general public and the satis-

* Appeal No. 709 of 1947. 7th October, 1952.

factory continuance of worship, it is not desirable that hereditary archakas who have been looking after the daily worship of the temple should be turned out of the lands which they had been enjoying partly in lieu of remuneration for their services and partly for defraying the expenses of the daily worship. In Appeal No. 285 of 1945, a Division Bench of this Court observed as follows :

> "We consider that in the interests of the temple and the worshipping public and the archakas who for generations have been hereditarily looking after the worship of the temple and enjoying the temple properties in lieu of remuneration a proper arrangement would be to permit the archakas to remain in possession of roughly about two-thirds of the temple lands so long as they properly and faithfully perform the daily worship in defraying the expenses thereof and on condition of their having no rights of alienation."

Similar observations were made in a later judgment by Satyanarayana Rao and Chandra Reddi, JJ., in Appeal No. 218 of 1946.

It is obvious that while the principle is of general application the allotment of the properties must depend upon the facts of each case. In the present case, we find that the total extent of the plaint lands is 20 acres 42 cents. These lands lie in three demarcation numbers, namely, No. 55 of an extent of 6 acres 29 cents, No. 52 measuring 9 acres 32 cents and No. 45 of an extent of 4 acres 81 cents. All the lands are wet lands. Taking all the circumstances into consideration, we consider that it would be a just and equitable arrangement to allow the archakas, the appellants, to be in possession of demarcation Nos. 55 and 45. The income from the lands comprised in demarcation No. 55 may be taken by the archakas as their remuneration and the expenses of the daily worship may be met from the income from 4 acres 81 cents in demarcation No. 45. The appellants and their successors will be entitled to be in possession of the properties only so long as they perform their daily services properly and faithfully according to the usages of the temple, meeting the expenses of the daily worship themselves. If they fail to carry out these terms it will be open to the Executive Officer to take possession of the lands and make other arrangements for carrying on the worship in the temple. The archakas will of course not have any right to alienate the properties allotted to them. The extent of 9 acres 32 cents in demarcation No. 52, will be in the possession of the Executive Officer or the trustee for the time being and the income therefrom shall be utilised for the general purposes of the temple including making provision for the other servants like paricharakas If the Executive Officer is convinced at any time that the income on 4 acres 81 cents of land in demarcation No. 45 is not sufficient to defray the expenses of the daily worship, he will be at liberty to give such further amounts as may be necessary for the same. The appeal is allowed to this extent. The decree of the Court below dismissing the suit is hereby set aside and there will be a decree in the above terms.

Learned counsel for the appellants represented to us that as the Executive Officer had taken possession of the entire lands and we have now declared that the appellants would be entitled to be in possession of demarcation Nos. 55 and 45 they would be entitled to the profits of these lands for the period subsequent to such taking over. That is not a matter, however, with which we can deal in this appeal. This is a suit for a mere declaration that the appellants are not liable to be dispossessed by the Executive Officer. The appellants will of course be at liberty to take such steps as they are advised for obtaining such relief as they are entitled to on the basis of our judgment in this appeal.

There will be no order as to costs in this appeal

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRA REDDY.

Periasami Gounder .. *Appellant**

v.

Vellama Naicker and others .. *Respondents.*

Madras Estates Land Act (I of 1908), section 107—Scope of—Limitation for suit to set aside a sale—Limitation Act (IX of 1908), Article 12—Applicability.

If a junior member of a Hindu joint family happens to be an officer or subordinate officer holding a Revenue sale under the Madras Estates Land Act for recovery of arrears of rent due to the landlord and the manager of the joint family purchases the interest sold at the sale, the sale is hit by the provisions of section 107 of the Madras Estates Land Act. It is only voidable, and is valid until set aside. To a suit to set aside the sale Article 12 of the Limitation Act applies. Even if such a sale is to be deemed only void the original owner lost title to the property by reason of the auction purchasers having remained in possession of the property for over the statutory period in assertion of title hostile to the real owners.

Appeal against the decree of the Subordinate Judge of Dindigul dated 16th April, 1942, in A. S. No. 124 of 1947, preferred against the decree of the Court of the District Munsiff, Palni, in O. S. No. 151 of 1946.

K. S. Ramamurthi and *V. Seshadri* for Appellant.

V. C. Viraraghavan for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of an action brought by the appellant for partition and separate possession of his 2/5th share in an extent of 1 acre 38 cents situated in Idayakottai Zamin, Madurai district. The suit properties originally belonged to two brothers by name Vellama Naicker and Rangappa Naicker. They conveyed their 2/5th share in the family properties by two sale deeds executed in 1927 and 1929 respectively to one Koolayappa Rowther. As the vendee failed to pay the rent due to the land-holder, the properties were brought to sale and were purchased by one Muthu Naicker, the manager of the joint family of which defendants 3 to 9 were members in 1930 and possession was taken by the auction purchasers after having obtained the necessary sale certificate. In spite of this, Gulam Muhammad, son of the said Koolayappa Rowther, sold them to the plaintiff on 14th August, 1943, as if title in this property still inhered in him. On the basis of this sale deed, the present suit is filed for the reliefs mentioned above. On 16th February, 1944, the defendants 3 to 9 who were the surviving members of the family of which Mutha Naicker was the managing member, sold the property to the 10th defendant.

The suit was contested only by the 10th defendant. He filed a written statement contending that after the revenue sale, Koolayappa Rowther had no title to property and that the auction purchasers, who acquired title to this property, conveyed it to the 10th defendant and that in any event as the suit was brought more than 16 years after the revenue sale, it was barred by limitation.

The trial Court decreed the suit holding that the revenue sale was hit by section 107 of the Madras Estates Land Act and therefore, the vendors did not get any title to the property and consequently they could not convey any title to the 10th defendant. He also found that in spite of the sale, Koolayappa Rowther, the predecessor in interest of the plaintiff continued to be the owner thereof and that the sale in favour of the plaintiff passed valid title to the property. In his opinion the suit was not barred by limitation and the plaintiff could recover possession of the property at any time ignoring the sale.

On appeal, the learned Subordinate Judge came to a contrary conclusion on the effect of section 107 of the Madras Estates Land Act on the revenue sale and also on the question of limitation. In the result, he allowed the appeal and dismissed the suit with costs.

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* Second Appeal No. 2061 of 1948. 29th October, 1952.

The plaintiff who is dissatisfied with the decree and judgment of the learned Subordinate Judge, has preferred this second appeal. It is urged by Mr. K. S. Ramamurthi in support of the appeal that the revenue sale is hit by section 107 of the Madras Estates Land Act and is void, and consequently, title to the property still vested in the family of the plaintiff's vendors and that the plaintiff is entitled to recover possession of the same. On the other hand it is submitted on the other side that the sale is not governed by the provisions of section 107 of the Madras Estates Land Act.

The first question I have, therefore, to consider is whether the sale is void for contravention of section 107. Section 107 of the Madras Estates Land Act runs thus :

"No officer holding a sale of property under this Act and no person employed by or subordinate to such officer shall either directly or indirectly bid for, acquire or attempt to acquire any interest in any property sold at such sale."

It is seen this section expressly prohibits the bidding or the purchasing of the property not only by the officers holding the sale but also by a person subordinate to such an officer. In this case, it was the Revenue Inspector that held the sale and it cannot be denied that a village munsiff is a subordinate of the officer, who held the sale. The 6th defendant, who was a member of the family of which Mutha Naicker was the manager, was holding the office of the village munsiff at the time the sale was held. The point for consideration is whether the fact that one of the members of the family was a subordinate of the officer holding the sale renders the sale an invalid one.

Section 107 of the Madras Estates Land Act prohibits either the officer holding the sale or any subordinate of his from acquiring any interest not only directly but also indirectly in the property sold at such a sale. It cannot be controverted that a junior member of a joint family acquires an interest in the property purchased by the manager of the family. The intendment of the section appears to me to be that persons, who have special opportunities of knowing the details about the property, should not be allowed to bid or buy the property as they are likely to misuse the opportunities they have. If the argument that although an officer or his subordinate is prohibited from directly buying or acquiring any interest in the property brought to sale the other members of the family could bid for the property, is accepted, the provisions of the section can be rendered nugatory. It will then be open to the officer concerned to acquire the property indirectly through other members of his family. It looks to me that section 107 of the Madras Estates Land Act applies to a case like the present one. This view of mine gains support from a passage in Lewin on Trusts, 15th Edn., page 799 :

"The partner of a trustee or any other person through whom the trustee may directly or indirectly derive benefit by reason of the purchase cannot purchase the trust property from the trustee."

The principle enunciated there applies equally to a member of a joint family of the officer holding the sale or of his subordinate. There does not seem to be any difference in principle between these two cases. It may also be mentioned that in *Veeranna* v. *Lakshmipathi Somayajulu*[1], a Bench of this Court expressed the opinion that the prohibition contained in section 107 of the Madras Estates Land Act is an absolute one and not a conditional one. What emerges from this discussion is that the purchase made by Mutha Naicker was obnoxious to the provisions of the Madras Estates Land Act and, therefore, is an invalid one.

This leads me to the next point whether the sale is void or is voidable, if the sale is void, it need not be set aside and the plaintiff can recover the property from the auction purchasers or their successors in interest, ignoring the sale. In my judgment, the sale is voidable and not void and, therefore, has to be set aside, within the time prescribed by Article 12 (*b*) of the Limitation Act. This view obtains support from various decisions not only of this Court but also of other High Courts as well. In *Rai Radhakrishna* v. *Bisheshar Sahay*[2], the provisions of Order 21, rule 72, which

1. (1939) 1 M.L.J. 678.
2. (1922) 44 M.L.J. 718 : L.R. 49 I.A. 312 : I.L.R. 1 Pat. 733 (P.C.).

contains a prohibition similar to the one in section 107 of the Madras Estates Land Act fell to be considered by the Privy Council. Their Lordships expressed the opinion that a purchase at an execution sale by the decree-holder or his agents without the leave of the Court is only voidable and not void and a suit to set it aside must be brought within one year under Article 12 of the Limitation Act. This was followed by Sundaram Chetty, J., in *Chinnakannu Padayachi* v. *Paramasiva*[1]. There a sale was held in contravention of the provisions of section 99 of the Transfer of Property Act corresponding to the present Order 34, rule 14, Civil Procedure Code, and there was also an infringement of the provisions of Order 21, rule 72, Civil Procedure Code, for the reason that the property was purchased by a pleader of the decree-holder without the leave of the Court. The learned Judge held that the sale (which took place prior to 1908) in violation of the provisions of section 99 of the Transfer of Property Act and also of Order 21, rule 72 did not make the sale void and it was only voidable, and had to be set aside under the appropriate article of the Limitation Act.

This principle was applied by Somayya, J., in *Velliappa Chettiar* v. *Muthu Koundan*[2]. In this case, the learned Judge was concerned only with the contravention of the provisions of Order 21, rule 72 which runs thus :

"1. No holder of a decree in execution of which property is sold shall without the express permission of the Court bid for or purchase the property.

2. Where a decree-holder purchases with such permission, the purchase money and the amount due on the decree may subject to the provisions of section 73, be set off against one another and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

3. Where a decree-holder purchases, by himself or through another person, without such permission, the Court may if it thinks fit, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale ; and the costs of such application and order and any deficiency of price which may happen on the resale and all expenses attending it, shall be paid by the decree-holder."

A case more in point is to be found in the decision reported in *Jamuna Prasad* v. *Motilal*[3]. In that case also, when the properties were brought to sale, the pleader for the decree-holder purchased the properties without the leave of the Court. It was found that the sale was hit by Order 21, rule 73 in that the pleader was an officer of the Court.

Order 21, rule 73 enacts :

"No officer or other person having any duty to perform in connection with any sale shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold."

In view of the mandatory provisions of the rule, it was contended that the sale was a nullity. This was met by the learned Judges in the following words :

"It cannot be affirmed as a proposition of universal application that non-compliance with every imperative provision of law renders the proceedings a nullity. The question depends on the nature, scope and object of the particular provision, which has been violated."

The learned Judges further observed that the rule in question was intended for the benefit of the decree-holder and the judgment-debtor and could be waived by them without any infringement of public right or policy. In the result, the learned Judges found that the sale was only voidable and it was valid till it was set aside and not void. They relied upon the decision in *Ashutosh Sikdar* v. *Beharilal Kirtania*[4]. In this context, the observations of Coleridge, J., in *Holmes* v. *Russell*[5], may be usefully extracted :

"It is difficult sometimes to distinguish between an irregularity and a nullity but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection ; if he can waive it, it amounts to an irregularity, if he cannot, it is a nullity."

I express my respectful accord with the principle enunciated in these cases. The provisions of section 107, Madras Estates Land Act, are analogous to those of

1. A.I.R. 1927 Mad. 1135.
2. (1941) 2 M.L.J. 943.
3. A.I.R. 1950 Cal. 63.
4. (1907) I.L.R. 35 Cal. 61.
5. (1841) 9 Dowl. 487.

Order 21, rule 73, Civil Procedure Code and the policy underlying both seems to be the same.

It follows on this discussion that although the sale in question was invalid for the reason that the provisions of section 107 of the Madras Estates Land Act were infringed, it was not void in the sense that the plaintiff could recover the property ignoring the sale but was only voidable and was valid till set aside within the time prescribed by Article 12 of the Limitation Act.

In this view of the matter, it is unnecessary for me to go into the question whether, if the sale is void, the suit will be governed by Article 142 or Article 144 of the Limitation Act and if Article 144 is applicable whether the auction purchasers acquired any title to the property by adverse possession. Even if it were necessary to decide this point, I have no hesitation in coming to the conclusion that the original owner Koolayappa Rowther lost title to the property by reason of the auction purchasers having remained in possession of the property for over the statutory period in assertion of title hostile to the real owners. On any ground, the suit is liable to be dismissed. For these reasons, I hold that the decision of the lower appellate Court allowing the appeal filed by the defendants against the judgment of the District Munsiff decreeing the suit is right and ought to be affirmed.

In the result, the appeal is dismissed with costs. No leave.

R.M. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AIYAR.

Raja of Vizianagaram .. *Petitioner.**

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), sections 53 and 12—Application to have ryotwari patta granted in respect of house sites—The sites formed part of the permanently settled estate—Effect of.

Where the estate of a zamindar was not notified under the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, his claim to have certain sites as his own within the ambit of his estate on the ground that they were given practically free to the zamindar and must be taken to be outside the scope of the permanent settlement,

Held, that once it is granted that the sites formed part of the permanently settled estate, section 3 (*a*) of the Estates Abolition Act certainly gives power to the Government to take them over unless the zamindar was entitled to be granted the ryotwari patta under section 12 and similar provisions of the Act. As these lands did not fall within such provisions, the ryotwari patta in respect of them cannot be granted to the zamindar.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in connection with the proceedings in B. R. Rt. No. 3284 (S.E.) of 1951 dated 3rd December, 1951, of the Board of Revenue pertaining to the vacant house sites in the Municipalities within the Vizianagaram estate and quash the same.

P. Rami Reddi and *V. Venkataramana Reddy* for Petitioner.

The Order of the Court was made by

The Chief Justice.—The Rajah of Vizianagaram is the petitioner in this application. The estate of Vizianagaram was notified under the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 in September, 1949. This application relates to certain vacant house sites in the town of Vizianagaram. These houses sites certainly form part of the estate of Vizianagaram. They are admittedly situated within the ambit of the estate and it is impossible to accept the contention raised in the affidavit that the petitioner's predecessor owned these lands before the Permanent Settlement. It is not suggested that they were parts of pre-settlement inams. It was contended that the permanent assessment was not arrived at after taking into account uncultivated arable lands and waste lands.

* Writ Petition No. 118 of 1952. 22nd February, 1952.

and these were given practically free to the zamindar without any additional assessment and therefore the vacant sites in question which fall under that category must be taken to be outside the scope of the permanent settlement. The contention is based on a fallacy. What passed to the zamindar under the sanad was not confined to the lands on which the peishcush was calculated—see *Prasadha Row* v. *Secretary of State for India*[1]. The fact that in 1802 no income accrued to the zamindar from these lands does not really affect the question. Once it is granted that these sites form part of the permanently settled estate, section 3 (*b*) of the Abolition Act certainly gives power to the Government to take them over unless the zamindar is entitled to be granted ryotwari pattas under section 12 and similar provisions of the Act. Obviously, these lands do not fall within such provisions and the petitioner will not be entitled to a ryotwari patta in respect of them.

There is no reason therefore to quash the order of the Board of Revenue which gave effect to correct principles in directing the vesting of the sites in question in the Government.

The application is therefore dismissed.

K.C. —— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Kakarla Narasayya .. *Petitioner.**

Penal Code (XLV of 1860), section 379—Removal of property—Intent to cause wrongful gain or loss—Absence of—Effect—Theft—Gist of offence.

Section 379 of the Indian Penal Code requires that the removal of the property from the possession of another should be with intent to cause wrongful gain to himself or wrongful loss to the other person. Dishonest intention is the gist of the offence. It is the intention of the taker which must determine whether the taking or removing of a thing is theft. When a person is prosecuted for the offence of theft it is for the prosecution to show that he was acting dishonestly. If the circumstances show that he was acting in the assertion of a *bona fide* claim of right, a dishonest intention cannot be attributed to him and the offence of theft would not be made out. Even where the *bona fides* of the claim is doubtful, the benefit of the doubt must be given to the accused and the criminal case thrown out. Such a doubt however must be a reasonable one. (Tests of reasonableness of doubt and *bona fides* discussed.)

Taking by a person in assertion of a partnership and his right as a partner and claiming to be in joint possession when supported by reliable evidence as to claim of partnership is something more than a colourable pretence and justifies a doubt.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate, Peddapur, in C.A. No. 53 of 1951, dated 31st January, 1951, preferred against the order of the Court of the Additional Stationary Sub-Magistrate, Rajahmundry, in C.C. No. 343 of 1950, dated 4th December, 1950.

G. Chandrasekhara Sastry for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Court made the following

ORDER.—This is a criminal revision case filed against the conviction and sentence of the learned Sub-Divisional First Class Magistrate of Peddapur in C.A. No. 53 of 1951 confirming the conviction and sentence of the Additional Stationary Sub-Magistrate, Rajahmundry, in C.C. No. 343 of 1950.

The facts are : The complainant has purchased Musurumilli Bamboo Coupe No. 1 for the year 1949-50, *i.e.*, for the year ending 30th June, 1950 for Rs. 5,000 in auction held by the Forest Department and was working the Coupe through the men engaged by him. He was getting the stock of bamboos from the Coupe to Gokavaram and stocking them in the site of one Dasari Bulliah. This site was held under a lease of the accused from whom the complainant has taken it on an

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1. (1917) 33 M.L.J. 144 : L.R. 44 I.A. 261 : I.L.R. 40 Mad. 886 (P.C.).

* Criminal Revision Case No. 900 of 1951. 13th November, 1952.
(Criminal Revision Petition No. 885 of 1951.)

annual rent of Rs. 35 for the purpose of securing the bamboos therein. The complainant noticed that the stock in the depot was being diminished, having been misappropriated by the accused and so he asked his agent at Gokavaram to stock the bamboos in another site and accordingly on 5th December, 1949, at 9 A.M., when 12 bandies of bamboos arrived from the Coupe and they were being directed towards the new site the accused interfered and threatened the cartmen and the agent and got the stock forcibly unloaded in the old yard and misappropriated them. Out of the 12 bandies, four bandies consisted of 748 plain bamboos and the remaining 8 bandies contained 2,681 sugarcane bamboos and they were worth about Rs. 400.

The complainant is said to have reported this matter to the Forest Range Officer who in his turn reported the matter to the Station House Officer, Gokavaram. The Police did not investigate the offence. Hence the private complaint by the complainant.

The case for the accused was that himself and the complainant were doing business conjointly, that though the contract stood in the name of the complainant he (accused) had a share therein by private understanding and that he did not commit the offence of theft.

The accused examined three witnesses who gave the following information D.W. 1 Majeti Ramarao, a resident of Ramannapalam testified that he worked in the concern as a clerk for writing accounts for five months and that the accused and P.W. 1 have got equal shares in the business that the accused used to receive the stock from the Coupe at the depot in Gokavaram and conduct sales while P.W. 1 acted as cash keeper. D.W. 2 Garugu Parvathisam, a resident of Gokavaram, deposed that he was present at the time of auction of the Coupe when P.W. 1 and the accused came to an understanding to have half share each in the Coupe and that they were running the business on that footing. D.W. 3 Dasari Satyanarayana of Gokavaram swore that the Coupe was purchased in the name of P.W. 1 and that the site on which the material received from the Coupe was being deposited belonged to him and that accused told him that he had a share in the business and that it appeared to him that the accused and P.W. 1 were jointly conducting the business.

The learned Sub-Magistrate came to the conclusion that it was established by P.W. 1 that he was the contractor of the Coupe and that the accused only claimed a share in the business by private understanding with P.W. 1 and that even conceding for a moment that the accused had a share in the business privately he cannot on that ground claim publicly a title over the produce in the Coupe when no written agreement between them to that effect was got executed. Therefore, he convicted the accused for an offence under section 379, Indian Penal Code, in regard to the acts which were not disputed and sentenced him to pay a fine of Rs. 100.

The learned Sub-Divisional Magistrate, on appeal, confirmed the conviction and sentence on the foot of the following reasoning :

" In appeal before this Court the learned defence counsel argued that the accused and the complainant are partners in the bamboo business and that the evidence on record does not disclose the offence under section 379, Indian Penal Code. But I cannot agree to these arguments. The plea that the appellant is partner and a shareholder along with the complainant is an obvious invention and after-thought. He has not produced a scrap to prove his contention. I therefore reject this argument as untenable. I agree with the learned Stationary Sub-Magistrate that the appellant has committed the offence of theft."

There is no doubt that the reasoning of the learned Sub-Divisional Magistrate cannot commend itself to us as sound. The essentials of partnership are that there must be a business and there must be an agreement to share the profits of the business and the business must be carried on by all or any of the partners acting for all : *Seth Suganmal* v. *Mt. Umaraobi*[1] and *Tajamal Hussain* v. *Ahmed Ali*[2]. This agreement necessary for creation of a partnership may be either express or implied : *Mirza Mal* v. *Rameshar*[3] *and Jakiuddin* v. *Vithoba*[4]. In this case the contention of the

1. A.I.R. 1938 Nag. 550, 553.
2. A.I.R. 1937 Oudh 438, 448.
3. (1929) I.L.R. 51 All. 827 : A.I.R. 1929 All. 536.
4. A.I.R. 1939 Nag. 301.

accused is that the contract was taken in the name of P.W. 1 because the rules require that the contract cannot be taken in the name of undisclosed persons or by unregistered firms and that the business was actually carried on by reason of an agreement as a partnership. There is no point in saying that this is an invention and after-thought because the accused can put forward this defence only when he appears before Court and after disputes had arisen. This version of the accused is spoken to by no less than three persons and the learned Sub-Magistrate and the Sub-Divisional Magistrate have not assigned any reason for discrediting the testimony of these witnesses. On this version set up by the accused and supported by three witnesses whose testimony has not in any way been discredited, the fact emerges that the accused committed the acts complained of in his role as a partner.

Section 379, Indian Penal Code, requires that the removal of the property from the possession of another should be with intent to cause wrongful gain to himself or wrongful loss to the other person. Dishonest intention is the gist of the offence : *Jay Mahto* v. *Emperor*[1]. It is the intention of the taker which must determine whether the taking or removing of a thing is theft. Thus where the tenant cuts down trees standing on his own holding *bona fide* believing that he is entitled to them though as a matter of fact they might belong to the zamindar, there is no theft : *Dori Lal* v. *Emperor*[2]. Therefore when a person is prosecuted for the offence of theft, it is for the prosecution to show that he was acting dishonestly. If the circumstances show that he was acting in the assertion of a *bona fide* claim of right, a dishonest intention cannot be attributed to him and the offence of theft would not stand made out : *Bhagvan Sahai* v. *Divisional Forest Officer*[3], *and Bacchitarsing* v. *Rahim Baksh.*[4]

In India the chief forms in which a *bona fide* claim of right can be set up are the following : (*a*) where the accused believes the thing to be his own ; and (*b*) when the dispute is between the landlord and tenant : *Srinivasalu Reddiar* v. *Govinda Gounden*[5]. In these cases it is not enough for an accused to assert that he removed the property under a *bona fide* claim of right ; the Court must also find that the plea is not a mere pretence to cover an otherwise unjustifiable act but his claim to the property is based on certain and palpable facts. The claim must not be *mala fide* : *Harihar Narain Singh* v. *Bankey Singh*[6]. A claim of right asserted in defence for prosecution for theft must be an honest one : *Rainu* v. *The Crown*[7]. In other words, there must be something more than a mere assertion or an untested and uncorroborated statement from the dock in order to make out the claim of *bona fide* right : *Nasib Chowdhry* v. *Nannoo Chowdhry*[8], *Reinnoo Singh* v. *Kalichurn Misser*[9], *Hurischander Das* v. *Bolai Audicary*[10], *Madhabhari*, In re[11], *Jagatchandra Roy* v. *Rakhal Chandra Roy*[12], *Hari Bhuimali* v. *The Emperor*[13], *Chaitan Charan* v. *Kalachand*[14], *Dhirendramohan*, In re[15], *Afran Ali*, In re[16], *Sadasiv Singh*, In re[17], *Imam*, In re[18], *Lakanaw* v. *Emperor*[19], *Udai Narain* v. *Ramanath*[20], *Bhagwat Saran Misir* v. *Emperor*[21], *Lunidomal*, In re[22], *Hari Bapuji*, In re[23], and *Alagarsami*, In re[24]. It is sometimes stated that where property is removed in assertion of a contested claim of right, however ill-founded that claim may be the removal does not constitute theft. But this is the English law which requires proof of felonious intent to constitute theft. To prevent the taking from being felonious the claim of right must be honest one though it may be unfounded in fact ; *R. v. Bernard*[25] Halsbury's Laws of England,

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1. A.I.R. 1941 Pat. 383.
2. (1919) 17 A.L.J. 500.
3. A.I.R. 1947 Pat. 264.
4. A.I.R. 1938 Lah. 759: I.L.R. (1939) Lah. 100.
5. (1922) 44 M.L.J. 138.
6. A.I.R. 1944 Pat. 274.
7. I.L.R. (1950) Nag. 526 : A.I.R. 1950 Nag. 92.
8. (1871) 15 W.R. 47.
9. (1871) 16 W.R. 18.
10. (1871) 16 W.R. 75.
11. (1887) I.L.R. 15 Cal. 390 (n).
12. (1899) 4 C.W.N. 190.
13. (1905) 9 C.W.N. 974.
14. (1906) 10 C.W.N. 233 (n).
15. (1909) 14 C.W.N. 408.
16. (1916) I.L.R. 44 Cal. 66.
17. (1917) 1 Pat. L.W. 135 : 39 I.C. 475.
18. (1916) 38 I.C. 318.
19. (1916) 2 U.B.R. 124 : 38 I.C. 739.
20. (1917) 40 I.C. (C.) 732.
21. (1916) 14 A.L.J. 399.
22. (1915) 30 I.C. 1003.
23. (1897) B.U.C. 920.
24. (1904) I.L.R. 28 Mad. 304.
25. (1938) 107 L.J.K.B. 448, 452.

2nd Edn., Vol. IX, p. 497. The *mens rea* requisite for an offence under section 379 is set out in the section itself and we cannot travel beyond it. So it is not the Indian law, and even as an English rule it rejects a mere pretention unless it was *bona fide* ; and presumably there can be no *bona fide* claim if it was wholly ill-founded : *Dhirendramohan*, In re[1]. Such a claim might be asserted by anybody even a thief ! So the mere plea by an accused that the property with the theft of which he is accused is his own property, unsupported by proof by some circumstances which do not indicate that there is truth in the statement, is insufficient. The claim must be tried and determined by the Court and must be proved by evidence to be fair and adequate though not necessarily acceptable or adequate in a civil Court for the making or refusing of a decree. *Bhan Prasad* v. *The Emperor*[2]. A mere colourable pretence to obtain possession of property cannot therefore be put forward as a *bona fide* claim of right. *Bhura Singh* v. *Emperor*[3], *Gudar* v. *Emperor*[4] and *Panigrahi* v. *R. Das*[5]. In such a case the jurisdiction of the criminal Court is not ousted : *Madanlal* v. *King-Emperor*[6] and *Advocate-General, Orissa* v. *Bhikari Charan*[7]. But in case of a clear plea of *bona fide* title the Court should leave the parties to have their rights determined by a civil Court and throw out the criminal case : *Bhim Bahadur Singh* v. *Emperor*[8]. But even where the *bona fides* of the claim is doubtful, the benefit of the doubt must be given to the accused and the criminal case thrown out. Not be it noted of every doubt for everything relative to human affairs and dependent on human evidence is open to some possible or imaginary doubts—but a reasonable doubt. Reasonable doubt is that condition of mind which exists when the Magistrate cannot say that they feel an abiding conviction, a moral certainty of the truth of the charge. For it is not sufficient for the prosecution to establish a probability even though a strong one according to the doctrine of chances, he must establish the fact to a moral certainty—a certainty which convinces the understanding, satisfies the reason, and directs the judgment. As was said by Cockburn, C.J., in the (1874) *Tichborne case* it must not be the mere doubt of a vacillating mind, that has not the moral courage to decide upon a difficult and complicated question and takes shelter in an idle scepticism—or as section 4 of the Indian Evidence Act has it a fact is said to be not proved when after considering the matters before it the Court either does not believe it to exist or considers its existence so improbable that a prudent man ought under the circumstances of the particular case, act upon the supposition it does not exist. This is essentially a question of fact and is dependent for its decision upon the circumstances of each case. *Srinivasalu Reddiar* v. *Govinda Gounden*[9]. The fact that the accused had repeatedly and for a length of time asserted his claim to the property would be some evidence of *bona fides* for it will then connect the taking with that claim. But the mere fact that a claim was boldly asserted and persisted in after it has received *quietus* from the Court would not make it *bona fide*. Thus where a Magistrate issued an injunction to the accused but this he disregarded, held that it is impossible to find that he acted under *bona fide* claim of right : *Sreenibash Mahta* v. *Emperor*[10]. It may be material in considering as a question of fact whether the claim was a *bona fide* claim to consider whether or not there was any right at all because the complete absence of right and circumstances such as the Court would be justified in saying could not have led any reasonable man to a belief that he had a right : *Srinivasalu Reddiar* v. *Govinda Gounden*[9]. Similarly to test the adequacy of the *bona fides* of the claim it may be considered whether in asserting his right to some property which a person believes to be good, he does something which he knows he has no right to do, *e.g.*, by taking the law into his own hands and removing the property from the possession of his opponent who claims the property for himself : *Rangaswami* v. *King-Emperor*[11], *Hari Bhuimali* v. *Emperor*[12], *Reg* v. *Bhichajee*[13], *Bhagwat Saran*

1. (1909) 14 C.W.N. 408.
2. A.I.R. 1927 Pat. 385.
3. A.I.R. 1935 Sind 115 : 36 Cr.L.J. 1310.
4. A.I.R. 1933 Oudh 50 : 34 Cr.L.J. 547.
5. A.I.R. 1950 Orissa 196.
6. (1930) A.L.J. 457.
7. A.I.R. 1940 Pat. 588.
8. A.I.R. 1922 Pat. 265.
9. (1922) 44 M.L.J. 138.
10. (1928) 29 Cr.L.J. 501.
11. (1927) I.L.R. 6 Rang. 54.
12. (1905) 9 C.W.N. 974.
13. 1 Weir 22.

v. *Emperor*[1] and *Queen-Empress* v. *Sheomeshur Rai*[2]. In such a case the *bona fides* might be destroyed by the fact that the proper course for accused would have been to have had recourse to the civil Court and not taken the law highhandedly into his own hands and remove the property. In all these cases the nature and extent of the right claimed must be shown before it can be permitted to have the effect of arresting the case in progress ; it must be made to appear that it is not a mere cobweb right that is set up but that it is such as to raise a real and substantial doubt as to whom the property belongs.

In the instant case the *bona fide* claim of right is set up on the foot of a partnership. In a partnership each partner is part owner of the business in the same way as each member of a joint family is a co-owner in the family estate. He is not a mere servant or agent employed for a special purpose ; and being an owner he has as much right to enjoy and use the joint property for his own benefit as any other co-owner : *Suganchand & Co.* v. *Laduram Balkisandas*[3]. This assertion of a partnership seems to be something more than a colourable pretence as it is supported by the evidence of three witnesses who have not been discredited by both the courts below.

It is not also the case for the complainant that though the taker was in joint possession of the property that joint possession had been converted into exclusive possession amounting to theft. The accused would have been guilty of committing theft in such a case : *Queen-Empress* v. *Ponnurangam*[4]. It must however be joint possession which is converted into exclusive possession and not merely joint title. In this respect the law of this country is not different to the English law under which there may be criminal conversion of partnership property so as to amount to theft : *see* 31 and 32 Vict., Ch. 116, section 1.

This case-law is only an amplification of illustration (*p*) to section 378, Indian Penal Code :

> " *A*, in good faith, believing property belonging to *Z* to be *A's* own property takes that property out of *Z's* possession. Here, as *A* does not take dishonestly, he does not commit theft."

It embodies only the principle contained in section 79, Indian Penal Code, which protects acts done by a person justified, or by mistake of fact believing himself justified, by law.

In the result, the removal of the property was in the assertion of a *bona fide* claim of right and which by evidence was shown to be more than a mere colourable pretence to obtain or get possession of the property, though probably it might turn out to be one which would not stand the test in a civil Court. This defence is valid and negatives dishonest intention which is the gist of the offence of theft.

The conviction and sentence of the accused cannot be supported and are hereby set aside and the accused is acquitted. The fine amount, if collected, will be refunded to him.

K.S. — *Accused acquitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AYYAR.

K. Indira Bai .. *Appellant**

v.

R. Venkata Sivaprasada Rao .. *Respondent.*

Hindu Law—Joint family—Telegraph form declaring intention to separate signed by coparcener and duly despatched—Will executed after signing such declaration—If affects testator's share in joint family properties —Succession Act (XXXIX of 1925), section 59—Scope of testamentary suit.

On the 4th August sometime before the execution of his will the testator who was a member of a joint Hindu family signed a telegraph form in which he declared his intention to separate and the express telegram was duly despatched to his coparcener. The telegram should ordinarily have been

1. (1916) 35 I. C. 167.
2. (1888) A.W.N. 97.
3. A.I.R. 1941 Nag. 105.
4. (1887) I.L.R. 10 Mad. 186.

* O.S.A. No. 2 of 1949. 10th August, 1951.

received by the brother on the 5th. After signing the telegraph form the testator executed a will bequeathing his property to his widow and died on the 6th August. In a suit by the widow for letters of administration with the will annexed, the caveator and defendant in the suit, *viz.*, the brother raised the contentions that (i) the testator had no sound disposing state of mind, (ii) the will was executed under coercion and undue influence, and (iii) the testator was a member of a joint Hindu family and had no power to dispose of joint family properties.

Held, (i) that the first and second contentions only are germane to a testamentary suit and the trial Court having found on the contentions in favour of the plaintiff should have decreed the suit. (ii) The parties having gone to trial on the third contention also, the important question to be decided was not whether a testator was or was not an undivided coparcener at the time of the execution of the will but whether he died a divided or an undivided member of a joint family, bceause a will speaks only from the date of the death of the testator. The telegram having been despatched on the 4th evening should have been delivered on the fifth and the testator having died only on the sixth it must be held that the testator died divided from his brother and that therefore the will was valid and operative in respect of his share of the joint family property. (iii) Section 59 of the Indian Succession Act declares that every person of sound mind not being a minor may dispose of his property by will. An undivided coparceners who is not under any personal disability and who is in a sound disposing state of mind has the capacity to execute a will. The rules of Hindu Law only curtail the powers of the testator to affect by will joint family property and do not take away the capacity of the coparcener to make a will.

Case-law reviewed.

On appeal from the judgment and decree of the Honourable Mr. Justice Yahya Ali, dated 16th December, 1948 and passed in the exercise the testamentary jurisdiction of the High Court in T.O.S. No. 19 of 1947.

G. Chandrasekhara Sastri and *R. Venkata Rao* for Appellant.

D. Narasaraju and *P. Ramachandra Reddi* for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This is an appeal against the judgment of Yahya Ali, J., dismissing a suit brought by the appellant for grant of Letters of Administration with the will of the deceased K. V. Balakrishnamurthy annexed. She is the widow of the testator. The caveator, the defendant in the suit and the respondent herein is the uterine brother of the deceased. The appellant alleged that her husband Balakrishnamurthy duly executed on 4th August, 1947, the will in respect of which letters of administration were sought. He died on 6th August, 1947. The defendant pleaded that when the will was executed by him Balakrishnamurthy was not in a sound and disposing state of mind and in any event the will was executed under coercion and undue influence exercised on the testator by his father-in-law one Dr. G. Venkata Rao. In addition to these pleas which are strictly germane to a testamentary suit, the defendant also pleaded that the deceased was an undivided member of a joint family along with the defendant when he executed the will and when he died and that therefore it was not valid and binding as the deceased had no power to dispose of joint family properties. The following issues were framed on the pleadings :

(1) Was the will, dated 4th August, 1947, executed by late Kathirisetti Venkata Balakrishnamurthy while in a sound disposing state of mind ?

(2) Was the will, dated 4th August, 1947, executed by late K. V. Balakrishnamurthy under coercion and undue influence exercised by his father-in-law ?

(3) Was the deceased not divided in status from the other members of his family at the time when he executed the will and when he died ?

Though a determination of the third issue was not necessary for the grant of the relief prayed for by the plaintiff, yet both the parties went to trial on the issue and the learned Judge has given his finding on that issue as well.

The learned Judge found in favour of the plaintiff on both issues 1 and 2. Ordinarily, on these findings, the suit should have been decreed. But the learned Judge found against the plaintiff on issue 3 on the ground that the deceased was not divided in status from the defendant at the time when he executed the will and

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* O.S. Appeal No. 2 of 1949. 10th August, 1951.

therefore the will was not valid and binding on the defendant. In the result he dismissed the suit, though the learned Judge felt constrained to observe that the result was by no means satisfactory. The plaintiff appeals against the dismissal of her suit.

The learned counsel for the respondent challenged the findings of fact arrived at by the learned trial Judge and sought to support the dismissal of the suit on grounds on which the trial Judge had held against him. The appellant's counsel besides supporting the findings of the learned Judge on the facts attacked the correctness of the learned Judge's finding on issue 3. It is convenient first to take up issues 1 and 2 together.

The deceased Balakrishnamurthy was the son of one Venkatanarasayya by his second wife Kesavanarayanamma. By his first wife he had a son and a daughter. The daughter was married to one Dr. G. Venkata Rao and the plaintiff is their daughter. She was married to Balakrishnamurthy on 22nd November, 1945. Venkatanarasayya died in 1934 leaving behind him a will, dated 5th January, 1934. He bequeathed a third share in the family properties to his second wife, the mother of the deceased and the defendant.

The deceased Balakrishnamurthy was a Bachelor of Engineering and was employed at the time of his death as Supervisor in the Sanitary Engineer's Office at Madras, after having served in various other places. He was transferred to Madras in July, 1947, but was unable to secure a house and was therefore compelled to put up with a friend. His wife was staying with her father Venkata Rao at Chicacole (Srikakulam). He appears to have been given a quinine injection, it is not clear for what disease, and he developed an abscess at the place where he was injected. Unfortunately tetanus also set in ; symptoms became very acute on the 1st August, 1947 and he was therefore admitted as an in-patient into the General Hospital, Madras, on that day. In spite of large doses of ante-tetanus serum administered to him, he did not improve. He had lock jaw and abdominal rigidity on the 2nd August. He was given pareldehyde and chloral bromide by the rectum. In spite of the treatment and though he appears to have been in a better condition on the 5th, he never rallied and finally he expired at 11-30 A.M. on the 6th August, 1947.

The will in dispute was executed on 4th August, 1947, at the General Hospital. It was a short will and its operative portion runs as follows :

"I hereby declare my intention to get separated from brother Venkata Sivaprasada Rao. I bequeath all my moveable properties including cash and moneys in banks, insurance policies, all immoveable properties belonging to my share, out of love and affection to my wife Indira Bai absolutely.

I hereby authorise my wife to adopt any boy of her choice to perpetuate my line.

I reserve to myself the power to cancel this will."

The will is in the handwriting of an Advocate of this Court, Mr. M. S. Ramachandra Rao. It was attested by Major Reddi, Civil Assistant Surgeon, Government General Hospital, on duty, K. Kesava Rao, Deputy Commercial Tax Officer, Madras, N. Prakasa Rao, House Surgeon, General Hospital, Madras and another advocate Mr. G. Balaparameswari Rao. The will contains both the signature and the thumb impression of the testator. The signature and the thumb impression are not disputed and it was not alleged that there was no proper attestation. The defendant's case was that on account of the feeble physical state to which the testator was reduced at the material time, he was not in a sound disposing state of mind and it was also possible for his father-in-law G. Venkata Rao to exercise coercion and undue influence on him to make him execute the will.

On behalf of the plaintiff the two advocates, namely, the writer and attestor, two of the other attestors Mr. K. Kesava Raoo and Major Reddi and Dr. G. Venkata Rao, the father of the plaintiff, were examined, besides the plaintiff herself who gave evidence. On behalf of the defendant, one of the attestors Dr. Prakasa Rao

and one Narasamma who is alleged to have seen the testator the day next after the execution of the will along with the testator's mother and Mr. Ramamurthy (Handwriting Expert) were examined in Court and the evidence of the mother of the deceased and one Mr. Prabakara Rao Nayudu, then Collector and Magistrate of Guntur was taken on commission. The learned counsel for the respondent did not impeach the veracity of the two Advocates nor of Major Reddi, though he pointed out discrepancies between their version as to what happened on the fourth and the version as deposed to by Kesava Rao and Venkata Rao. So far as the issue relating to sound disposing state of mind is concerned, the onus will be on the plaintiff, while it is equally clear that the onus of establishing coercion and undue influence would lie heavily on the defendant.

We have no hesitation in concurring in the finding of the learned trial Judge that the will was executed by Balakrishnamurthy while in a sound disposing state of mind. We are equally in agreement with his finding on the plea of undue influence and coercion. The learned counsel did not keep the two questions as entirely separate in canvassing the evidence. The learned Judge had the great advantage of watching the witnesses, such of those who were examined in Court, while giving evidence and noting their demeanour and we see no reason not to accept the finding arrived at by him on a consideration of the entire evidence. The case-sheet relating to the testator in the Pottinger Ward in the General Hospital (Exhibit P-10) and the prescription register relating to the same patient (Exhibit D-4) were both exhibited in this case. The plaintiff relied upon the fact that in the case-sheet there was no entry as regards the treatment on the 4th August and the inference sought to be drawn was that the patient must have been in a better condition. On the other hand, the defendant relied upon the entries in the prescription register which showed that at about 4 P.M. both paraldehyde and chloral bromide were prescribed to be given per rectum, and this showed that the patient could not have improved on the 4th ; if at all his condition should have deteriorated. We think it very unsafe to draw any conclusion from the entries or the absence of entries in either of the two documents, and it was conceded by Dr. Prakasa Rao, the first witness for the defence, that in a case of tetanus the mind of the patient remains clear to the last, the patient being acutely sensible of his condition. There was a suggestion that the injection of chloral bromide might cloud his mind, but he did not see any symptoms of any clouded mind. Major Reddi was the Civil Assistant Surgeon on duty and who attested the will, deposed that he examined the patient at about the time of the execution of the will and that the patient's mental condition was very clear and he was in a position to understand what he was then doing. He asked the patient whether he wanted to make a will and he said " yes " and also that he was making the will in favour of his wife. The will was read out in his presence and Major Reddi was asked whether the patient was in a fit condition to make the will and he said " yes " with a full sense of responsibility. Though certain hypothetical questions were asked of him in cross-examination, the doctor gave a consistent version of the mental condition of the testator at the time of the execution of the will, in clear and unambiguous terms. Mr. Ramachandra Rao who was responsible for the drafting of the will, who is an advocate practising in this Court, was definitely of the opinion that the testator was in possession of all his faculties at the time of the execution though he might have been physically ailing. He was able to talk and answer questions. Mr. Balaparameswari Rao, the other Advocate, also deposed that the testator was fully alert and answering all questions and giving them instructions and replies to their questions in an intelligent manner. We accept without any hesitation the testimony of these three independent and disinterested witnesses and on the strength of their testimony, even ignoring the evidence given by the plaintiff herself, her father and Kesava Rao we are of opinion that it is established that the testator was in a sound disposing state of mind when he executed the will in question.

We must next consider the defendant's case of coercion and undue influence exercised by Dr. Venkata Rao, the father of the plaintiff. The learned trial Judge

was of opinion that the counsel for the defendant did not and could not go to the extent of contending that this case had been established. According to him no attempt even was made to substantiate the allegations made by the defendant in the written statement to the slightest extent. That is why he recorded a finding that as the onus lay upon the defendant to prove coercion and undue influence and as there was no such evidence, the issue had to be found against the defendant. Before us Mr. Narasaraju, the learned counsel for the defendant-respondent, tried to rehabilitate this issue and so it has become necessary to deal with it. The case which he presented to us was briefly this: that it was at the persistent pressure which Dr. Venkata Rao brought to bear on the testator that the will came to be executed, under which the entire property of the testator was bequeathed to his wife, the plaintiff. A general argument was advanced that the provisions of the will were not natural, because there was no bequest either to the mother or to the brother. To us, however, the will appears to be perfectly natural in the circumstances. The brother was entitled to an equal share in the family properties and there is no reason why the testator should have thought of making a bequest to him. As stated already, the mother was amply provided for by her husband who had bequeathed a third share in the properties which he had obtained at a family partition by his will. She was a widow nearly 60 years old without any possibility of increasing needs. The fact that the testator had affection for his mother is not inconsistent with the omission to make any bequest in her favour.

The facts which emerge from the evidence which have a bearing on this aspect of the case are as follows: Prakasa Rao, a friend of the testator, who was at the material time working as a House Surgeon in the General Hospital, Madras, despatched two telegrams at the request of the testator, one to the brother (the defendant) and one to Dr. Venkata Rao, the plaintiff's father on the morning of the second. Dr. Venkata Rao was the first to arrive on the 4th. The mother and plaintiff came on the 5th. Along with the mother came D.W. 2, a widow. Venkata Rao who was himself a medical practitioner was apparently worried over the state of the testator's health and probably expected that the worst might happen. He therefore telephoned to Kesava Rao who was then working as Deputy Commercial Tax Offier in the Harbour Division sometime in the afternoon and asked him to get the necessary legal help for the execution of a will. It was Kesava Rao who was responsible for the presence of the two advocates Messrs. M. S. Ramachandra Rao and G. Balaparameswari Rao and for the part they played in the execution of the will. There are slight discrepancies between the evidence of Kesava Rao and the evidence of the advocates as regards the manner in which they were informed of the purpose for which they were required, but we attach no importance whatever to such minor discrepancies. It cannot be denied—and it was not denied—that both the advocates were in the General Hospital that evening and took part in the execution of the will. Mr. Narasaraju wanted us to infer from the evidence that Dr. Venkata Rao was very anxious and was pressing on the testator to have the will executed. We think that this anxiety was quite natural and we see nothing sinister in it. Venkata Rao was the father of the plaintiff, a very young girl who might be left a helpless widow in case the testator did not survive. If he therefore wanted a will to be executed as soon as it could be conveniently done, there was nothing wrong. We do not agree with Mr. Narasaraju, that the execution of the will on the 4th was deliberately with the intention of having the execution completed before the arrival of the testator's mother on the scene. There is no evidence to conclude that the testator's mother was not well disposed to the plaintiff and that she would have objected to bequest of his property to his wife. The evidence of the two advocates clearly shows that the will was drafted to the instructions of the testator who was in a sound disposing state of mind, though he might have been physically weak and ailing.

Mr. Narasaraju very strongly relied upon the story deposed to by the testator's mother that the testator complained to her that he had been compelled to execute a will. There are different versions of this story to be found in the evidence of the

defendant's witnesses. The mother said that the teatator told her that a will was written and that he was made to sign in it, and she told him that it did not matter as he would be well and he could revoke it. The testator did not tell her who got the will executed by him. This was when she first saw him after arrival. She again saw him at about 3-30 P.M. that day (*i.e.*) the 5th and the testator said to her :

> " Mother, they got a will executed by me according to their wishes. I do not know what brother will think of it ".

Even then, the mother did not ask him who it was who had got the will written. Nor did he tell her about it. She then told him that when his brother came, he could revoke the will and everything would be all right In the evening Mr. Prabakara Rao, then District Collector, Guntur, came to Hospital at about 5-30 P.M. and she told him that her son was complaining that a will had been got executed by him. Prabakara Rao said that it did not matter, they that were all members of a joint family and that when he got well, he could revoke the will. This evidence strikes us as entirely artificial. One of the surprising features of the story is that she did not know of the contents of the will; she never asked anybody about it; she was not told that it was Venkata Rao who had forced the testator to execute the will and she did not ask her son who had compelled him to do so. Apart from the inherent weakness in the story, we think the story must be completely disbelieved, in view of a letter which she admittedly addressed to her daughter on the same day, *i.e.* the 5th (Exhibit D-1). It was actually addressed to the defendant, because the daughter was living with him. This letter must have been obviously written after she had seen her son. The following portion of the letter is most material,

> " At the time I went he was able to talk. Immediately on seeing him I became perplexed. As soon as I went he asked " *Amma*, how is *Anna* ?". If the case is adjourned, *Anna* and yourself should see Chinna Babu and go. *Anna* stated that he would come tomorrow or the day after. . . . God has helped. They say that there would be improvement in a couple of days ".

There is no mention in this letter of any complaint by the testator of the execution of any will by compulsion. It is most unlikely that she would have omitted to write to her daughter of such an important fact and particularly when that letter was intended to be a letter also to the defendant. Mr. Prabakara Rao was examined on commission and his evidence was relied on as corroborating the evidence of the mother. In the examination-in-chief he deposed that the mother told him that her boy had complained that a will was got executed by his father-in-law and he told her that the boy would get better in a couple of days. The witness himself saw the testator in the hospital. The testator merely told him that a will was executed and turned to his mother to know whether she had told him that. She told him that she had informed the witness. The witness then asked the testator not to be worried and said that he would be all right in a couple of days. In the cross-examination the witness said that from the mother's complaint he understood that the will was got signed against his wishes. He did not advise the testator to revoke the will. Nor did he take any steps about it. Accepting the evidence of Mr. Prabakara Rao taken as a whole, we do not think that it corroborates the story deposed to by the mother in material particulars. We get yet another version from D.W. 1 (Dr. Prakasa Rao). According to him when the mother first came to see the testator, the testator said " Mother, brother-in-law wrote a will " (Dr. Venkata Rao was the testator's brother-in-law as well as his father-in-law). The mother consoled her son saying that he need not worry and his brother would come and look after it. The learned trial judge did not believe this witness ; nor are we inclined to believe him. We have no hesitation in rejecting the story of a complaint by the testator himself that he had been coerced and unduly influenced to execute the will. The learned trial judges finding on Issue 2 was right.

On the findings on the first two issues the plaintiff-appellant would be entitled to the relief for which she prayed, namely, the grant of Letters of Administration with the will annexed. But the third issue was framed on the plea raised by the defendant and the parties went to trial on that. The suit itself has been dismissed, because the learned judge found against the plaintiff on that issue. We have thought it therefore desirable to deal with it also. For the disposal of this issue,

the following facts may be taken as undisputed. The testator and the defendant were members of an undivided family till 4th August, 1947. Though an attempt was made at the trial to contend that according to the will of the testator's father made in 1934, there was a division in status between the testator and the defendant, this contention was not pressed before us by the appellant's counsel. On the 4th sometime before the execution of the will, the testator signed a telegraph form (Exhibit P-3). The telegram was addressed to his brother at Srikakulam and ran as follows :

"Hereby declaring my intention separating from you. Am executing will."

The genuineness of the signature on the form was disputed by the defendant before the trial judge, but before us the learned counsel for the defendant accepted the finding of the learned judge that the testator did sign the telegraph form. The form itself shows that it was handed in at the Mount Road Telegraph Office at 8-20 p.m. and that it was signalled from that office at 8-32 P.M. It was an express telegram. In the ordinary course, the telegram should have been delivered at the defendant's address on the 5th. The defendant was given notice to produce the telegram received by him, but he did not produce it. Nor did he go into the box and depose if and when he received it. The will was executed at about 7-30 P.M. The testator died on the 6th morning. On these facts it was contended on behalf of the respondent that though the telegraph form might have been signed by the testator before the execution of the will, it was not handed over at the Telegraph Office till after the execution. The testator had therefore no testamentary capacity at the time when he executed the will, because the intention to separate must be deemed to have been communicated to the defendant at the earliest only when the telegram was handed in at the Telegraph Office. Mr. Narasaraju for the respondent went further and argued that even the handing in of the telegram was not sufficient, it must be proved when the telegram actually reached the defendant, because it was only then that the intention could be said to have been really communicated. The learned judge did not accept the contention on behalf of the plaintiff that handing over the telegram to a messenger which was before the execution of the will amounted to communication and held that the testator must be deemed to have become divided from his brother only after the telegram had been handed in at the Telegraph Office. As this was after the execution of the will, the learned judge held that the testator did not possess testamentary capacity at the time of the execution of the will. He therefore felt constrained to hold that the will was invalid and dismissed the suit.

With due respect to the learned judge we have no hesitation in holding that he was in error in his conclusion. The learned judge was evidently misled by the use of the words " Testamentary capacity ". He apparently proceeded on the assumption that an undivided Hindu coparcener had no testamentary capacity. This of course is wrong. Section 59 of the Indian Succession Act declares that every person of sound mind not being a minor may dispose of his property by will. An undivided coparcener who is not under any personal disability and who is in a sound disposing state of mind has the capacity to execute a will. The rules of Hindu Law only curtail the powers of the testator to affect by will joint family property and do not take away the capacity of the coparcener to make a will. Obviously an undivided coparcener can validy dispose of his separate property. His status as undivided coparcener does not prevent him from doing so. Only a member of an undivided family cannot validly bequeath his undivided coparcenery interest in the family property. It is not a lack of capacity ; it is a lack of power to bequeath. In other words the will cannot affect joint family property. The reason is succinctly stated in a very early Madras Case *Vitla Butten* v. *Yammenamma*[1] thus,

" At the moment of death the right by survivorship is at conflict with the right by devise. Then the title by survivorship, being the prior title, takes precedence to the exclusion of that by devise ".

A will speaks only from the date of the death of the testator. But on the death of an undivided member of a coparcenery his interest survives to the other member

1. (1874) 8 M.H.C.R. 6.

or members with the result that the will cannot operate on such interest. In this view, the important question to be determined is not whether a testator was or was not an undivided coparcener at the time of the execution of the will but whether he died a divided or an undivided member of a joint family. If at the time of his death he was an undivided member, the will will not have any effect on his undivided share of joint family property, but if he was divided, then the will would be valid, and the disposition of his divided share would be valid. The case in *Shib Sabitri Prasad* v. *Collector of Meerut*[1], is directly in point. In that case one Hanakchand executed a will on 20th January, 1885. He died on 16th October, 1899. It was admitted that Nank died separate from the rest of his family. It was contended that the will was invalid because he was not divided at the time of the Execution of the will. The learned judges did not accept the contention. Assuming that he was joint at the time of the will, as it was admitted that he was separate when he died, they held that the will must be construed as

> "speaking and taking effect with reference to the state of things in existence immediately before the testator's death, when admitttedly he had separated from the members of his family."

In *Bodi* v. *Venkataswami Nayudu*[2], a Hindu, who had no male issue or an undivided coparcener along with him, executed a will which devised ancestral properties to which he was at that time absolutely entitled as the sole surviving coparcener. But subsequent to the execution of the will, the testator had a son born to him. But the son died shortly after his birth, so that the testator had no son alive at the time of his death. The question was whether the will had been revoked by reason of the birth of a son after the execution of a will. It was held that it was not. In discussing the law on the point, the learned judges start with the basic principle that a will is to be understood as speaking at the death of testator and its validity is to be determined accordingly. They also take it as well settled that even property which a person does not possess at the time of the will may be validly bequeathed. Then then say :—

> "Survivorship has the effect of rendering a will invalid with respect to property which the testator could not dispose of at the time of his death. All other dispositions made by him are valid".

This principle is also illustrated by cases in which it has been held that where a sole surviving coparcener makes a will of ancestral property and subsequently makes an adoption, the will becomes inoperative and by cases in which it has been held that where subsequent to the will a son is born who survives the testator or when a posthumous son is born, the will becomes inoperative so far as joint family property is concerned ; see *Krishnamurthy Ayyar* v. *Krishnamurthy Ayyar*[3] and *Minakshi* v. *Virappa*[4].

It is therefore clear that if the testator in this case can be said to have died a divided member, then the will would certainly be operative in respect of the divided share of the testator. The fact that at the time of the execution of the will he was not separate would not be material. The learned judge erred in thinking that the testator should have been a divided member even at the time of the execution of the will.

The learned Judge held that the testator must be deemed to have become divided in status from 8-30 P.M., on the 4th August, that is to say, before his death. Mr. Narasaraju for the respondent contended that it is only when the telegram actually reached the defendant that the severance can be held to have taken place and as there was no proof when it reached him it has not been established that the testator died separate from the defendant. Mr. Narasaraju was unable to cite any authority in support of his contention On the other hand, the ruling in *Narayana Rao* v. *Purushothama Rao*[5], is directly against him. In that case *S* and his son were members of a joint Hindu family. On 3rd August, 1926, *S* sent to his son

1. (1906) I.L.R. 29 All. 82.
2. (1913) 25 M.L.J. 363 : I.L.R. 38 Mad. 369.
3. (1927) 53 M.L.J. 57 : L.R. 54 I.A. 248 : I.L.R. 50 Mad. 508 (P.C.).
4. (1884) I.L.R. 8 Mad. 89.
5. (1938) 1 M.L.J. 45 : I.L.R. 1938 Mad. 315.

a registered notice of his intention to become divided from him. On 4th August, 1926 he executed a will disposing of his share in the joint family property in favour of a stranger and died on 5th August, 1926. The notice was in fact received by the son on 9th August, 1926, *i.e.*, after the death of *S*. It was contended that the division in status arose only on the 9th when the son received the notice and as *S* had died on the 5th, the estate had passed by survivorship to his son and the will was therefore not valid. It was held by Varadachariar and King, JJ., that the issue of the notice was sufficient to prevent the operation of the principle of survivorship and the will was valid. Varadachariar, J., who delivered the judgment of the Bench observed at page 318 :

"It is true that the authorities lay down generally that the *communication* of the intention to become divided to other coparceners is necessary, but none of them lays down that the severance in status does not take place till after such communication has been received by the other coparceners".

In that case the testator was certainly justified in expecting that in the ordinary course his notice would have been delivered to his son on the 4th or at least on the 5th and the testator died on the 5th. In these circumstances it was held that the issue of the notice was sufficient to bring about a separation in status. In the case before us the telegram was despatched on the 4th evening and in the ordinary course it must have been delivered on the 5th and the testator died only on the 6th morning.

In this view, it is unnecessary to call in aid the dictum of Viswanatha Sastri, J., in *Kathesumma* v. *Beechu*[1], that once there is a clear unequivocal and unambiguous declaration of an intention to become divided on the part of a member of a joint Hindu family, there would be forthwith a severance in status and the despatch to or the receipt by the other members of the family of a communication or notice showing the intention to divide on his part is not essential nor its absence fatal to a severance in status. The testator in this case must be held to have died divided from his brother (the defendant) and therefore the will was valid and operative in respect of his share of the joint family property.

In the result the appeal is allowed and the suit decreed with costs of the trial and the appeal. Advocate's fee in the trial Court Rs. 1,000, here in appeal Rs. 750.

V.P.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATARAMA AIYAR.

Anaithalayan *alias* Maruda Kandar .. *Petitioner**

v.

Marudamuthu *alias* Veerappa Kandar .. *Respondent.*

Civil Procedure Code (V of 1908), *Order* 9, *rule* 13, *Proviso (Madras Amendment)—Irregularity in service of summons—If cured—Order* 5, *rule* 17, *Provisions, if mandatory.*

The failure to take an acknowledgment or to affix the summons as contemplated under Order 5, rule 17, Civil Procedure Code, is cured by the proviso to Order 9, rule 13, Civil Procedure Code, enacted in Madras, though the provisions of Order 5, rule 17, may be mandatory. The proviso is intended to apply to all cases in which there has been a failure to observe the provisions as to service of summons under Order 5. If it be proved that the defendant had sufficient notice it will only be an irregularity such as will be cured by the proviso.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order and decree of the Court of the District Judge, Salem, dated 15th November, 1948, in C. M. A. No. 30 of 1948 preferred against the decree and order of the Court of the District Munsiff, Namakkal in I. A. No. 835 of 1946 in O. S. No. 302 of 1946.

C. A. Seshagiri Sastri for Petitioner.

R. Desikan for Respondent.

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1. (1949) 2 M.L.J. 268.

*C.R.P. No. 1427 of 1949. 7th November, 1952.

The Court delivered the following

JUDGMENT.—The respondent instituted O. S. No. 302 of 1946 in the Court of the District Munsiff, Namakkal, for recovery of possession of certain properties and for mesne profits, and the same was decreed *ex parte* on 16th September, 1946.

The defendant then applied in I. A. No. 835 of 1946 to set aside the decree passed *ex parte* on the ground that the summons was not duly served on him. The facts as found by the Courts below are that the summons was tendered to the defendant on 14th September, 1946, and that he refused to sign the acknowledgment. The contention of the petitioner is that the process-server must either take an acknowledgment from the defendant or affix the summons to the outer door of the house and that as neither was done, there was no due service of summons as required by Order 5, rule 17 and that, therefore, the Court was bound to set aside the *ex parte* decree under Order 9, rule 13. The Courts below met this contention by reference to the proviso to Order 9, rule 13 enacted in Madras. The proviso runs thus :

> " Provided further that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons if it be satisfied that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim."

The Courts below have held that the defendant had notice of the hearing in sufficient time and that the failure to affix the summons on the outer door was only an irregularity. They accordingly dismissed the application to set aside the *ex parte* decree.

Mr. Seshagiri Sastri, the learned advocate for the petitioner contends that the proviso to Order 9, rule 13, applies only when there is merely an irregularity in the service of summons but that the failure to take an acknowledgment or to affix the summons is much more than an irregularity ; and that it is an illegality vitiating the entire service and that the proviso has accordingly no application. In support of the position that the failure to affix the summons amounted to an illegality, he relied upon the decision in *Ganeshmal* v. *Kesoram Cotton Mills, Ltd.*[1]. That case arose under the Arbitration Act. An award having been filed into Court, notice thereof was directed to be given to the party. The summons was tendered to the party but he refused to receive it. No acknowledgment by him was taken nor was summons affixed on the outer door. An *ex parte* order was passed and an application was filed for setting aside the *ex parte* order on the ground that the provisions of Order 5, rule 17, had not been complied with. This petition was opposed on the ground that non-affixing of a copy was only an irregularity and that it was not a ground for setting aside the order. It was held, on a review of the authorities, that the failure to affix a copy amounted to much more than an irregularity ; and that the procedure laid down in Order 5, rule 17 must be strictly followed and if it is not followed, the decree must be set aside under Order 9, rule 13. The judgment refers to the contrary view taken in some of the Courts but holds that the provisions of Order 5, rule 17 are mandatory and must be strictly complied with.

The question is whether this decision can be applied to the present case which is governed by the proviso to Order 5, rule 13 enacted in Madras. Though it is true that in *Ganeshmal* v. *Kesoram Cotton Mills, Ltd.*[1], the failure to observe the procedure is described as something more than an irregularity, I am of opinion that the matter really falls under the proviso to Order 9, rule 13. It is difficult to see to what case the proviso can be applicable if it is not to apply to cases like this, where the provisions as to service of summons are not complied with strictly. In my opinion, the proviso applies to all cases in which there has been a failure to observe the provisions as to service of summons under Order 5. In all such cases if it be proved that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim, it will be an irregularity, such as will be cured by the proviso.

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1. (1952) 55 C.W.N 349.

In view of the finding that the petitioner had knowledge of the date of hearing, the application for setting aside the *ex parte* decree under Order 9, rule 13, was rightly dismissed by the Courts below.

This revision fails and is dismissed with costs.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRA REDDI.

Anganna Thevan .. *Appellant**

v.

Ayyasami Thevan and another .. *Respondents.*

Hindu Law—Alienation by mother—Son's time-barred debts—Alienation for discharge of—Whether binding on reversioner.

A mother succeeding to the estate of her deceased son is not competent to alienate the property in order to discharge a time-barred debt of her son.

Harakh Sonar v. *Gopikrishun*, A.I.R. 1926, All. 120 and *Sheoram Pande* v. *Sheo Ratan Pande*, (1921) I.L.R. 43 All. 604, followed.

Daroga Rai v. *Basdeo Mahto*, (1936) I.L.R. 16 Pat. 45. doubted.

Appeal against the decree of the District Court, Coimbatore, in A. S. No. 379 of 1947, preferred against the decree of the Court of the District Munsiff, Tiruppur, in O. S. No. 38 of 1946.

P. S. Balakrishna Aiyar and *P. S. Ramachandran* for Appellant.

A. Balasubramaniam and *V. S. Mayilerumperumal* for 1st Respondent.

The Court made the following

ORDER.—This second appeal arises out of a suit instituted in the Court of the District Munsiff of Tiruppur for a declaration that the sale deed Ex. B.-7 executed by the 2nd defendant on 7th June, 1945, in favour of the first defendant is not binding on the plaintiff after the 2nd defendant's lifetime. The plaintiff filed the present suit claiming to be the reversioner to the estate of one Kandaswami who died in or about August, 1936, and whose estate devolved on his mother, the 2nd defendant. The suit properties were sold for a sum of Rs. 400 in favour of the 1st defendant. The consideration was made up of Rs. 272 to be paid to the mortgagee Subbakkal under Ex. B-3 dated 14th June, 1941, for Rs. 200 and Rs. 128 to be paid in discharge of the mortgage, Ex. B-6 dated 15th April, 1941, both the mortgages having been executed by the 2nd defendant in discharge of the debts incurred by the last male holder himself in connection with his marriage. Two promissory notes were executed by Kandaswami one on 9th May, 1936, for Rs. 200 evidenced by Ex. B-1 in favour of a person called Kandaswami Thevan and another for a sum of Rs. 200 on 25th May, 1936, evidenced by Ex. B-4 in favour of the 1st defendant. The 2nd defendant executed Ex. B-2 in renewal of Ex. B-1 on 9th June, 1939 while Ex. B-4 was renewed by her by Ex. B-5 on 15th May, 1939. It was to discharge the debt due under Ex. B-2 that Ex. B-3, the mortgage in favour of Subbakkal, was executed while Ex. B-6, was executed in favour of Kandaswami Tevan, in discharge of Ex. B-5. The plaint proceeded on the footing that the mortgages in discharge of which the sale deed Ex. B-7 was executed were nominal and that nothing was really due and payable by Kandaswami the last male holder. According to the plaint all these documents were brought into existence with a view to defraud the reversioner.

The suit was resisted on the ground that the mortgages were really supported by consideration and the sale deed brought about for the purpose of discharging the mortgages was a valid and binding one. The trial Court went into the question whether the debts were really in existence during the lifetime of Kandaswami or not and came to the conclusion that the sale deed Ex. B-7 and the mortgages

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* S.A. No. 1910 of 1948. 3rd November, 1952.

in discharge of which the sale deed was executed were fully supported by consideration and the sale deed Ex. B-7 was binding on the reversion. In the result, the District Munsiff dismissed the suit.

On appeal by the plaintiff the lower appellate Court while holding that both Ex. B-7 the sale deed and the mortgages were genuine transactions, reversed the decision of the trial Court as it thought that the major portion of the consideration for Ex. B-7 was in discharge of a time-barred debt. According to the learned District Judge, Ex. D-2 in renewal of Ex. B-1 was executed after Ex. B-1 was time-barred and Ex. B-3 the mortgage in favour of Subbakkal was created for the purpose of discharging the time-barred debt evidenced by Ex. B-1. In the opinion of the learned District Judge the mother of the last male holder was under no pious obligation to renew a time-barred debt and therefore Ex. B-3, which was executed for the purpose of discharging the debt, under Ex. B-2 could not bind the reversion and therefore to the extent that the consideration of Ex. B-7 was utilised for the discharge of Ex. B-3, it would not bind the plaintiff. The result was that he decreed the suit subject to payment of Rs. 128 which was the amount paid by the 1st defendant to discharge Ex. B-6. Evidently, the learned District Judge in coming to the conclusion that Ex. B-2 was a renewal of a time-barred debt relied on the deposition of the 2nd defendant that on the date on which Ex. B-2 was executed the debt under Ex. B-1 was already barred and that she did not make any payment to the payee towards interest.

I think the lower appellate Court should not have granted a decree on a point not taken by the plaintiff in the pleadings. It may be stated that it was not pleaded in the plaint that as a portion of the consideration for Ex. B-7 covered a time-barred debt, the sale deed would not bind the reversion to that extent nor was any issue raised on that question. If the lower appellate Court wanted to base its decision on the question of limitation, in fairness to the parties concerned it ought to have framed an issue whether Ex. B-2 was in renewal of a time-barred debt and sent it back to the trial Court to determine that issue after giving opportunities to both sides to let in evidence on that point. It is not desirable that some stray statements made by the parties in the witness box should be made the basis of a finding when it had no relation to any issue that was raised in the suit. Since the lower appellate Court has based its decision on the question of limitation without giving an opportunity to the parties concerned to agitate this matter fully in the trial Court, I think I have to ask the trial Court to consider the issue afresh on the material to be placed before it and submit a finding on the question whether Ex. B-2 was in renewal of a time-barred debt. Finding to be submitted within two weeks of the reopening of that Court after summer recess. The parties are at liberty to adduce evidence on this point. Objections, if any, within two weeks thereafter.

The question whether the mother can renew a time-barred debt of her son will be considered after the submission of the finding.

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After the return of the finding, the Court delivered the following

JUDGMENT.—The finding submitted by the learned District Munsiff is that Ex. B-2 was executed in renewal of a time-barred debt. The question therefore arises for consideration whether a mother succeeding to the estate of her son, can alienate property to discharge the time-barred debt of her son. Mr. Ramachandran appearing for the appellants contends that it is the duty of the mother, to discharge the son's debt, as the Hindu Law recognises no limitation, so far as the discharge of the debts is concerned. In support of this contention he relied on a decision of a Bench of the Patna High Court in *Daroga Rai* v. *Basdeo Mahto*[1]. There the daughters during the lifetime of their mother who succeeded to the estate of her husband borrowed some monies for performing the Shradha of their father. In order to discharge these debts which became barred, they alienated a portion of their

1. (1936) I.L.R. 16 Pat. 45.

father's estate. This alienation was attacked by the ultimate reversioners on two grounds, *viz.*, (1) that the daughters were not competent to contract debts during the lifetime of the widow so as to bind the reversioners, and (2) that they could not alienate property for payment of debts incurred for legal necessities which had become barred. The learned Judges construed the borrowing as one on behalf of the widow. On the second point the learned Judges held that since it was open to the daughters to keep the debts alive by renewing them so as to bind the reversion, there is no reason why they should not be allowed to pay off the debts which they could have kept alive merely because they became time-barred. No doubt this decision lends support to the position taken up by Mr. Ramachandran.

But another Bench of the same High Court was inclined to doubt the correctness of this ruling in *Harakh Sonar* v. *Gopi Krishun*[1]. The learned Judges thought that the case in *Daroga Rai* v. *Basdeo Mahto*[2], required reconsideration.

A case on the point is to be found in *Sheoram Pande* v. *Sheoratan Pande*[3]. There it was laid down that a Hindu mother succeeding to her son's estate could not validly alienate a part of the property in order to pay off the time-barred debts of her husband. Referring to cases in which the opinion was expressed that the debt contracted by the husband could be discharged by the widow, if sonless, or if her husband enjoined on her to do so on the death bed, the learned Judges stated that they were not authorities for the proposition put forward in that case. The case in *Sheoram Pande* v. *Sheoratan Pande*[3], is quoted with approval in Mayne's Hindu Law and Usage, 11th Edn., page 771. This is referred to also in "Principles of Hindu Law" by Mulla at page 187 (11th Edn.).

In my opinion, this decision if I may say so with respect is sound and I express my respectful accord with the reasoning adopted in that case. Applying this principle, I must hold that a mother succeeding to the estate of her son is not competent to alienate the property in order to discharge the time-barred debts of her son. In these circumstances I must uphold the decision of the lower appellate Court subject to this modification that the appellant will get Rs. 128 with interest at 6 per cent. per annum from the date of sale. The parties will bear their own costs throughout.

R.M. ——— *Decision modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SUBBA RAO.

The South India Bank, Ltd., Tirunelveli ... *Petitioner**

v.

T. D. Pichuthayappan and another ... *Respondents.*

Madras Shops and Establishment Act (XXXVI of 1947), section 41 (2)—Constitutional validity—Constitution of India (1950), Article 14—Scope—Equality before law and equal protection of law—Scope.

"All persons are equal before the law" is fundamental of every civilised Constitution. Equality before law is a negative concept; equal protection of laws is a positive one. The former declares that every one is equal before law, that no one can claim special privileges and that all classes are equally subjected to the ordinary law of the land; the latter postulates an equal protection of all alike in the same situation and under like circumstances. No discrimination can be made either in the privileges conferred or in the liabilities imposed. It has also been held—for without that apparently just laws may in their application be so abused as to subvert the fundamental concept of equality before law—the laws should be applied by public authority without arbitrariness or discrimination. The law which though apparently fair, but contains inherent possibilities for discrimination and arbitrary action, is in itself bad. But these propositions conceived in the interests of the public, if logically stretched too far, may not achieve the high purpose behind them. In a society of unequal basic structure it is wellnigh impossible to make laws suitable in their application to all persons alike. So a reasonable classification is not only permitted but is necessary if society should progress. But such a classification cannot be arbitrary but must be based upon differences pertinent to the subject in respect of, and the purpose for which, it is made. Further the Supreme Court of America evolved the doctrine of police power which enables the State to prescribe regulations to promote the health, peace, morals and good order of the people. But the Indian Constitution does not recognise any such power in the State but specifically prescribed the cirumstances and to the extent fundamental rights recognised can be restricted in the interests of the public.

1. A.I.R. 1926 All. 120.
2. (1936) I.L.R. 16 Pat. 45.
3. (1921) I.L.R. 43 All. 604.

* Writ Petition No. 296 of 1951. 13th August, 1952.

The object of section 41 of the Madras Shops and Establishment Act is to prevent the arbitrary dismissal of the employees. Under the section the employer cannot dispense with the service of a person employed for a continuous period of not less than six months except for reasonable cause. He is also bound to give one month's notice or wages in lieu of such notice. But such a notice is not necessary if the employee is found guilty of misconduct after due enquiry. The employee is given a right of appeal to the authority prescribed. It cannot be said that the discrimination in favour of employees invalidates the section. There are obvious differences between the two classes of persons, employers and employees, which do not yield to common treatment. One is rich, the other is poor; one is powerful, the other is weak; one can dispense with the services of another and reappoint another in his place without detriment to his interest, but the other, if discharged may have to starve and go without any appointment. The purpose of the law is to protect this class of employees from the arbitrary action of the employers. The classification is based upon the differences pertinent to the subject-matter and the purpose of the legislation. The separate treatment meted out to the employers coming under the definition of the Act is not an arbitrary classification. It cannot be said that such classification is not reasonable. The power conferred on the prescribed authority by section 41 of the Act is a *quasi* judicial power which in the nature of things cannot be exercised arbitrarily. The section does not offend the provisions of Article 14 of the Constitution of India.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to Case No. 555 of 1950 on the file of the Additional Commissioner for Workmen's Compensation and quash the order of the 2nd respondent dated 23rd July, 1951, in the said case No. 555 of 1950.

K. V. Venkatasubramaniam Aiyar and *T. P. Gopalakrishnan* for Petitioner.

S. Mohan Kumaramangalam, A. Ramachandran for *Row and Reddy* and *Vepa P. Sarathy* for Government Pleader (*P. Satyanarayana Raju*) for Respondents.

The Court made the following

ORDER.—This is an application for issuing a writ of *certiorari* to quash the order of the Additional Commissioner for Workmen's Compensation, Madras, dated 23rd July, 1951. The petitioner is the South India Bank, Ltd. The first respondent was a clerk in the office of the petitioner. On 25th September, 1950, he was served with a notice of termination of his employment. In the said notice it was stated that on account of retrenchment his services were terminated with effect from 1st October, 1950. On 18th October, 1950, he preferred an appeal under section 41 (2) of the Madras Shops and Establishment Act, 1947 (hereafter called the Act) to the Labour Commissioner, Madras, questioning the validity of the termination of service. The Additional Commissioner for Workmen's Compensation, after making the prescribed enquiry and after hearing the parties, held that the discharge of the applicant was not for a reasonable cause and set aside the order of the bank discharging the petitioner. The bank filed the aforesaid writ for quashing that order.

Learned counsel for the petitioner made a three-prolonged attack on section 41 of the Act based on Article 14 of the Constitution of India which guaranteed to every person equality before the law and equal protection of the laws in the territory of India. It was said that the provisions of the Act made a discrimination between employee and employee and employer and employer and also conferred on the Commissioner a naked arbitrary power to interfere with the right of the employer to discharge the employee. To appreciate the contentions raised, it will be convenient at the outset to read the relevant sections of the Act and to consider the case-law on the subject.

" Section 2 (5) : ' employer ' means a person owning or having charge of the business of an establishment and includes the manager, agent or other person acting in the general management or control of an establishment.

Section 2 (3) : ' Commercial establishment ' means an establishment which is not a shop but which carries on the business of advertising, commission, forwarding or commercial agency, or which is a clerical department of a factory or industrial undertaking or which is an insurance company, joint stock company, bank, brokers' office or exchange and includes such other establishment as the Provincial Government may by notification declare to be a commercial establishment for the purposes of this Act.

Section 2 (12): 'Person employed' means (iii) in the case of a commercial establishment other than a clerical department of a factory or an industrial undertaking a person wholly or principally employed in connexion with the business of the establishment, and includes a peon.

Section 5 : Notwithstanding anything contained in section 4, the Provincial Government may by notification apply all or any of the provisions of this Act to any class of persons or establishments mentioned in that section other than those mentioned in clauses (c) and (f) of sub-section (1), and modify or cancel any such notification.

Section 6 : The Provincial Government may, by notification exempt either permanently or for any specified period, any establishment or class of establishments, or person or class of persons, from all or any of the provisions of this Act, subject to such conditions as the Provincial Government deem fit.

Section 41 (1) : No employer shall dispense with the service of a person employed continuously for a period of not less than six months, except for a reasonable cause and without giving such person at least one month's notice or wages in lieu of such notice, provided, however, that such notice shall not be necessary where the services of such person are dispensed with on a charge of misconduct supported by satisfactory evidence recorded at an inquiry held for the purpose."

The Act was passed to provide for the regulation of conditions of work in shops, commercial establishments, restaurants, theatres and other establishments and for other purposes, the Act was conceived and enacted to improve the conditions of the employees of the particular class of establishments under private control. Under section 41, the validity whereof is now questioned, a person employed in an establishment defined in the Act is given protection against arbitrary determination of his services. He is also given a right of appeal to the authority prescribed in the Act. I shall revert to the subject of validity after noticing some of the leading American cases cited at the Bar.

The relevant provision of the Constitution is Article 14. It declares :

"The State shall not deny to any person equality before the law or the equal protection of the laws within territory of India."

The phrase "equality before the law" occurs in all written Constitutions; but the phrase "equal protection of the laws" is adopted from the Constitution of the United States. *See* Article 14 of the Amendment of the Constitution of the United States of America. Article 14 says :

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law ; nor deny to any person within its jurisdiction the equal protection of the laws."

In *William Adair* v. *United States*[1], the question raised was the constitutionality of certain provisions of the Act of Congress concerning carriers engaged in inter-state commerce and their employees. No employer shall threaten an employee with loss of employment or unjustly discriminate against any employee because of his membership in labour corporations, associations or organisations. William Adair discharged the employee, O. B. Coppage, because of his membership in a labour organisation. He was therefore charged for unjustly discriminating against an employee of a common carrier and an employer engaged in inter-state commerce because of his membership in a labour organisation. The question was whether the impugned part of the tenth section of the Act was repugnant to the Fifth Amendment of the Constitution declaring that no person shall be deprived of liberty or property without due process of law. It may be mentioned that the Fifth Amendment of the Constitution does not provide for "equal protection of the laws." The Supreme Court therefore was investigating in that case whether the right of property and personal liberty were violated by the Article 14. Harlan, J., laid down the scope of the Fifth Amendment at page 441 as follows :

"In our opinion that section, in the particular mentioned, is an invasion of the personal liberty, as well as of the right of property, guaranteed by that Amendment. Such liberty and right embrace the right to make contracts for the purchase of the labour of others, and equally the right to make contracts for the sale of one's own labour ; fundamental condition that no contract, whatever its subject-matter, can be sustained which the law, upon reasonable grounds, forbids as inconsistent with the public interests, or as hurtful to the public order, or as detrimental to the common good. This Court has said that 'in every well-ordered society, charged with the duty of conserving the

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1. 52 L.Ed. 436.

safety of its members; the rights of the individual in respect of his liberty may, at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand' . . . ."

To put it shortly, they approach the question from two aspects :

1. Whether the impugned section deprived the liberty of property without due process of law ; and

2. Whether the restrictions imposed are reasonable regulations under what is technically called as the 'police power' in America. The passage strongly relied upon by the learned counsel may now be extracted. At page 442, Harlarn, J., observed :

"While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the function of Government—at least, in the absence of contract between the parties—to compel any person, in the course of his business and against his will, to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labour upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labour to prescribe the conditions upon which he will accept such labour from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. It was the legal right of the defendant, Adair,—however unwise such a course might have been to discharge Coppage because of his being a member of a labour organisation as it was the legal right of Coppage, if he saw fit to do so,—however unwise such a course on his part might have been,—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labour organisation. In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no Government can legally justify in a free land."

I have quoted the passage in extense as this passage was the sheet anchor of the learned counsel's argument. The Supreme Court held that there was no such connection between inter-state commerce and membership of a labour organization as to authorise Congress by the Act to make it a crime against the United States for an agent or officer of an inter-state carrier having full authority in the premises from his principal, to discharge an employee from service to such carrier, because of the membership on his part. In the aforesaid passage itself the Supreme Court recognised the right of the Congress to put reasonable restraints as the common good or general welfare may require, but having regard to the facts of that case they held that the said restrictions would not come within the "police powers" of the State. Apart from the fact that that decision does not turn upon the phrase "equal protection of the laws" for that phrase is not found in the Fifth Amendment, it is only an authority for the position that the impugned section is an arbitrary interference with the liberty of contract in cases where the restriction so imposed does not come under the police power of the State. Under the Indian Constitution, liberty of contract is not one of the fundamental rights in Part III. In *T. B. Coppage* v. *State of Kansas*[1], the Supreme Court considered the scope of the 14th Amendment. There a person was convicted by the Kansas Chief State Court under information charging violation of a statute of a State forbidding employers to exact a promise not to join or retain membership in a labour organisation as a condition of securing or retaining employment. The Supreme Court of the United States set aside that order. The Supreme Court accepted the principles laid down in *Adair* v. *United States*[2] and restated them at page 446 in the following manner :

"The principle is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labour and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the labourer as to the capitalist, to the poor as to the rich ; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.

An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the State."

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1. 59 L.Ed. 441. 2. 52 L.Ed. 436.

At page 447 they again reiterated the principle of police power :

"We need not refer to the numerous and familiar cases in which this Court has held that the power may properly be exercised for preserving the public health, safety, morals or general welfare, and that such police regulations may reasonably limit the enjoyment of personal liberty, including the right of making contracts."

The decision accepted two concepts :

1. The right of personal liberty and private property including the right to make contracts for acquisition of property ; and

2. The power of the State to impose reasonable restrictions of that right in exercise of the police power.

This decision also does not purport to deal with the ambit and the limits of the phrase "equal protection of the laws." On the facts of the case it was held that the impugned Act could not be sustained on the police power of the State.

In *Williams Truax* v. *Michael Corrigan*[1], the Supreme Court considered the scope of the phrase "equal protection of the laws." There a dispute arose between the plaintiffs and the defendants Union concerning the terms and conditions of employment of the members of the Union. As the plaintiffs refused to yield to the terms of the Union, the Union ordered a strike. To win the strike and to coerce and compel the plaintiffs to comply with the demands of the Union, the defendants and others, unknown to the plaintiffs, entered into a conspiracy and boycott to injure plaintiffs, in their restaurant and restaurant business, by inducing plaintiffs' customers and others theretofore well and favourably disposed to cease to patronise or trade with the plaintiffs. To achieve that object they resorted to picketing, displaying banners, advertising the strike, denouncing plaintiffs and circulating handbills containing abusive and libellous charges against the plaintiffs, etc. The defendants relied for immunity on 1464 of the Revised Statutes of Arizona, 1913, which says :

"No restraining order or injunction shall be granted by any Court of this State, or a Judge or the Judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right of the party making the application, for which injury there is no adequate remedy at law . . . . . . And no such restraining order or injunction shall prohibit any person or persons from terminating any relation of employment, or from ceasing to perform any work or labour, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at or near a house or place where any person resides or works, or carries on business, or happens to be for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person, to work to abstain from working, or from ceasing to patronise or to employ any party to such dispute ; or from recommending, advising or persuading others by peaceful means so to do."

The Supreme Court held that the prohibition contained in the aforesaid section against interference by injunction between employers and employees in cases growing out of a dispute concerning terms or conditions of employment denies equal protection of the laws when applied to defeat injunctive reliefs which under the local statutes would have been proper had the controversy been any other than between employers and former employees. At page 262, Taft, C.J., brought out in bold relief the distinction between the scope of the 14th Amendment and the 5th Amendment in the following terms :

"This brings us to consider the effect in this case of that provision of the 14th Amendment which forbids any State to deny to any person the equal protection of the laws. The clause is associated in the Amendment with due process clause, and it is customary to consider them together. It may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. The due process clause brought down from Magna Charta was found in the early State constitutions and later in the 5th Amendment to the Federal Constitution as a limitation upon the executive, legislative and judicial powers of the Federal Government, while the equality clause does not appear in the 5th Amendment and so does not apply to congressional legislation. The due process clause requires that every man shall have the protection of his day in Court, and the benefit of the general law,—a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only

1. 66 L.Ed. 254.

after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty, and property, which the Congress or the Legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law'; this is a Government of laws, and not of men; 'No man is above the law'—are all maxims showing the spirit in which Legislatures, executives, and courts are expected to make, execute and apply laws. But the framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty. The guaranty was aimed at undue favour and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process . . . . The 14th Amendment does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. Thus, the guarantee was intended to secure equality of protection not only for all, but against all similarly situated . . . . equal protection of the laws is a pledge of the protection of equal laws."

At page 264 the learned Judge elaborated the scope of the 14th Amendment in this way:

"The 14th Amendment as this Court said in *Barbier* v. *Connolly* already cited intended not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances, in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; *that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts*; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances . . . . ."

Having regard to the aforesaid principles, the Supreme Court held that the impugned section offended the provisions of the 14th Amendment.

In *Yick Wo* v. *Peter Hopkins*[1], the Supreme Court considered the question of administrative arbitrariness in enforcing the law which was otherwise fair. One Yick Wo was deprived of his personal liberty by the Sheriff of the City and County of San Francisco. The Sheriff stated that he held the petitioner in custody by virtue of a sentence of the police Judge's Court whereby he was found guilty of violation of certain ordinances of the Board of supervisors of that county and adjudged to pay a fine, and in default of payment, be imprisoned in the county jail. Under the ordinances the board of supervisors have a discretion for granting or withholding their assent to the use of wooden buildings, as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire. There is nothing in the ordinance which points to such a regulation of the business of keeping and conducting laundries. They conferred a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. Mr. Justice Mathews in dealing with the validity of the said ordinances, cited with approval the following passage from the judgment of the Court of Appeal of Maryland in the case of *Baltimore* v. *Radecke*[2]:

"But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the prosecution of any business in the City of Baltimore, to cease to do so and by providing compulsory fines for every day's disobedience of such notice and order or removal renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide or control his action. It lays down no rules by which its impartial execution can be secured or partiality and oppression prevented. It is clear that giving and enforcing these notices may, and quite likely will, bring ruin to the business of those against whom they are directed, while others, from whom they are withheld, may be actually benefited by what is thus done to their neighbours; and, when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favouritism and other improper influences and motives easy of concealment and difficult to be detected and exposed it becomes unnecessary to suggest or comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to everyone who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void."

1. 30 L.Ed. 220. 2. 49 Md 217.

The learned Judge applied the aforesaid principles to the ordinances in question and proceeded to observe :

"In the present cases, we are not obliged to reason from the probable to the actual and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, or unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

It was therefore held that the ordinances were invalid and the imprisonment based upon them was illegal. This judgment is a leading authority which establishes that a law, though apparently fair, but possessing inherent possibilities for illegal discrimination in its application, is void.

The Supreme Court of India had to advert to this aspect in dealing with the question of the validity of section 5 (1) of the West Bengal Special Court Act (X of 1950) in *State of West Bengal v. A. A. Sarkar*[1]. The Court by a majority, the Chief Justice dissenting, held that the section was constitutionally bad. The learned Judges in different judgments elaborately considered the scope and the application of the fundamental rights guaranteed under Article 14 to the facts of the case before them. "Classification" has been defined by Bose, J., in the following words :

"What after all is classification ? It is merely a systematic arrangement of things into groups or classes, usually in accordance with some definite scheme. But the scheme can be anything and the laws which are laid down to govern the grouping must necessarily be arbitrarily selected ; also, granted the right to select, the classification can be as broad based as one pleases or it can be broken down and down until finally just one solitary unit is divided of from the rest. Even those who propound this theory are driven to making qualifications. Thus, it is not enough merely to classify but the classification must not be 'discriminatory'. It must not amount to 'hostile action', there must be 'reasonable grounds for distinction, it must be 'rational' and there must be no 'substantial discrimination' . . . ."

Chandrasekhara Aiyar, J., at page 93 makes the following remarks in respect of a statute conferring uncontrolled power on the executive :

"Discrimination may not appear in the Statute itself but may be evident in the administration of the law. If an uncontrolled or unguided power is conferred without any reasonable and proper standards or limits being laid down in the enactment, the Statute itself may be challenged not merely the particular administrative act."

As regards classification, Mahajan, J., said at page 70 :

"By the process of classification the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality ; but if a law deals with the liberties of a number of well-defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. The classification permissible, however, must be based on some real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained and cannot be made arbitrarily and without any substantial basis. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily."

In *Gulf, Colorado and Santa fe Railway Co.* v. *W. H. Ellis*[2], Mr. Justice Brewer of the Supreme Court of America held that a state statute imposing attorney's fee not exceeding $10 in addition to costs upon railway corporations omitting to pay certain claims after certain time after presentation, which applied to no other corporations or individuals, was unconstitutional as denying to them equal protection of the laws. At page 667 Mr. Justice Brewer said :

"The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They

1. (1952) S.C.R. 284 : 1952 S.C.J. 55. 2. 41 L. Ed. 666.

cannot appeal to the Courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favour, they recover no attorneys' fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the Courts upon equal terms. They must pay attorneys' fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against and are not treated as others. They do not stand equal before the law. They do not receive its equal protection."

The learned Judge proceeded to state at page 672:

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th Amendment, and that in all cases, it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection."

In *Thomas Connolly* v. *Union Sewer Pipe Co.*[1], Mr. Justice Harlan stated the law as follows:

"The 14th Amendment, in declaring that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the Courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burden should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences."

It is not necessary to multiply cases, for they only reiterate and reaffirm the principles so well stated in the cases already referred to.

The law on the subject may now be summarised. "All persons are equal before the law" is fundamental of every civilized Constitution. Equality before law is a negative concept; equal protection of laws is a positive one. The former declares that every one is equal before law, that no one can claim special privileges and that all classes are equally subjected to the ordinary law of the land; the latter postulates an equal protection of all alike in the same situation and under like circumstances. No discrimination can be made either in the privileges conferred or in the liabilities imposed. It has also been held—for without that apparently just laws may in their application be so abused as to subvert the fundamental concept of equality before law—that the law should be applied by public authority without arbitrariness or discrimination. The law which though apparently fair but contains inherent possibilities for discrimination and arbitrary action, is in itself bad. But these propositions conceived in the interests of the public, if logically stretched too far, may not achieve the high purpose behind them. In a society of unequal basic structure it is well nigh impossible to make laws suitable in their application to all persons alike. So a reasonable classification is not only permitted but is necessary if society should progress. But such a classification cannot be arbitrary but must be based upon differences pertinent to the subject in respect of, and the purpose for which, it is made. Further, the Supreme Court of America evolved the doctrine of police power which enables the State to prescribe regulations to promote the health, peace, morals and good order of the people. But the Indian Constitution does not recognise any such power in the State but specifically prescribed the circumstances and to the extent the fundamental rights recognised can be restricted in the interests of the public.

Applying the aforesaid principles, I shall now consider whether section 41 of the Act offends the provisions of Article 14 of the Constitution of India. The object of that section is to prevent the arbitrary dismissal of the employees. Under the section, the employer cannot dispense with the service of a person employed for a continuous period of not less than six months except for reasonable cause. He is also bound to give one month's notice or wages in lieu of such notice. But

1. 46 L. Ed. 679 at 689.

such a notice is not necessary if the employee is found guilty of misconduct after due enquiry. The employee is given a right of appeal to the authority prescribed. Learned counsel argued that this section discriminates the employers from the employees. The discrimination pointed out is that the employee can resign with impunity, whereas the employer can discharge the employee only for reasonable cause or for proved misconduct, and that subject to an appeal to the prescribed authority. Can this differentiation of treatment between the two be justified on the principle of reasonable classification? Ordinarily, the employer has the right to discharge the employee and the employee has the right to resign from the employment. This right is the subject-matter of the legislation. There are obvious differences between the two classes of persons which do not yield to common treatment; one is rich, the other is poor; one is powerful, the other is weak; one can dispense with the service of another and reappoint another in his place without detriment to his interest, but the other, if discharged, may have to starve and go without any appointment. The purpose of the law is to protect this class of employees from the arbitrary action of the employers. I have therefore no hesitation to hold that the classification is based upon the differences pertinent to the subject-matter and the purpose of the legislation.

It was then contended that the section also makes an unreasonable discrimination between the employer defined under the Act and the employers to whom the Act does not apply. The argument was that the law hits only the class of employers coming under the definition of the Act and leaves the other class of employers unaffected, and, therefore, is discriminatory. This argument again ignores the subject-matter of the legislation and the purpose for which it is enacted. The preamble of the Act shows that the Act was passed to provide for the regulation of conditions in shops, commercial establishments, restaurants, theatres and other establishments. Establishments are of various kinds. Some are controlled by the law of the State and the others function under statutory regulations, but there are many which are under private control such as shops, theatres, restaurants, private banks and firms carried on by individuals or group of individuals. These institutions are not controlled by statute either in their inception or during their progress. The employees are working under great hardships and the employers were dictating their own terms. In view of the small establishments and the lack of organisation among the labourers, the employers were able to exercise arbitrary powers and were found not to care for the amenities of the employees. A separate Act therefore became necessary to regulate the conduct of this class of employees of private institutions. The Act prescribes for the opening and closing hours, daily and weekly hours of work, regulates the employment of children and young persons, provides for the health and safety of the employees, deals with their pay and allowances and lays down the conditions under which they can be discharged. I cannot therefore say that the separate treatment meted out to the employers coming under the definition of the Act is an arbitrary classification. The Legislature having regard to all the aforesaid facts and the nature of the institutions, the arbitrary control exercised by the employers and the relief required by the employees, thought fit to make special provisions for this class of institutions and employers of those institutions. I cannot say that the classification has no reasonable basis, either in respect of the subject-matter of the legislation or the purpose for which it was enacted.

In this connection the learned counsel had taken me through the various sections of the Act, particularly section 6. It is true that the provisions defining "establishment" and "commercial establishment" are not artistically and precisely drafted and gave ample scope for argument. It was said that the Government under the definition may declare any institution as an establishment under the Act. But the said clause can only be construed to mean that the Government can only declare similar institutions as establishments. Under section 6, the Provincial Government, by notification, may exempt certain establishments or persons from the operation of the Act and it was said that that conferred an arbitrary power on the Government and therefore is void. I am not concerned in this case

with the validity or otherwise of section 6 for nothing turns upon it in considering the validity of section 41 of the Act. They are not so related to each other that one cannot exist without the other.

Learned counsel then contended that the order in question made by the Commissioner for Workmen's Compensation is arbitrary. The employee was given notice to the effect that on account of retrenchment his services are dispensed with. Before the appellate authority, it was contended for the employee that though there were many clerks who are admittedly junior to him, the establishment arbitrarily determined his services, whereas it was argued on behalf of the Bank that his services were dispensed with as he was an unqualified person. But the Commissioner pointed out that under the rules the Bank had reserved power to grant exemption in deserving cases and had exempted the respondent and appointed him as clerk some five years ago and therefore, it was not reasonable to discharge him on the ground of want of qualification which they had waived. On the facts he came to the conclusion that the discharge of the employee was not for a reasonable cause. The Commissioner had jurisdiction to decide under section 41 whether the discharge of an employee was for reasonable cause or not, and having taken into consideration the contentions advanced by either side, he came to the conclusion in favour of the employee. His finding is not liable to be questioned.

Nor am I satisfied with the contention that section 41 offends the provisions of Article 14 of the Constitution on the ground that it confers an arbitrary power on the authority prescribed. No such arbitrary power has been conferred under section 41. An appeal lies to the prescribed authority and the prescribed authority has to decide on the merits whether the conclusion arrived at by the employer is correct or not. He is bound to dispose of the appeal judicially and as an appellate tribunal. He is bound to give his reasons, as he has done so in this case, why in his opinion the order of the employer is wrong. The power conferred upon the authority is therefore a quasi-judicial power which in the nature of things cannot be exercised arbitrarily.

For the aforesaid reasons, I hold that the order of the Additional Commissioner is valid and not liable to be quashed. The application is therefore dismissed with costs. Advocate's fee Rs. 100.

K.S. —————— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

A. N. Rangaswami and another .. *Petitioners**

v.

The Industrial Tribunal, Fort St. George, Madras and others .. *Respondents.*

Industrial Disputes Act (*XIV of* 1947), *as amended by Industrial Disputes* (*Appellate Tribunal*) *Act* (*XLVIII of* 1950), *section* 36 (4)—*Provision that Advocate cannot represent a party before tribunal without consent of other party and leave of tribunal—Not* ultra vires *or repugnant to fundamental rights of the advocate or party under the Constitution of India* (1950).

Section 36 (4) of the Industrial Disputes Act is constitutionally valid. The section though it limits the right of an advocate to practise before an Industrial Tribunal does not violate the fundamental rights of an advocate under Article 19 (1) (*g*) of the Constitution. The rule is intended to prevent one party taking advantage of the other party's weakness and also to prevent the unnecessary prolongation of an amicable settlement between the parties. The classification is not arbitrary but is based upon the nature of the tribunal and the purpose for which it is constituted. The fact that a party cannot insist as of right to be represented by an advocate cannot make the procedure prescribed contrary to the principles of natural justice.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in respect of the order of the first respondent herein, the Industrial Tribunal,

* Writ Petition No. 591 of 1951. 29th September, 1952.

Fort St. George, Madras, in I.A. No. 62 of 1951 in I.D. No. 14 of 1951, dated 24th September, 1951, relating to the Industrial Dispute referred to the said 1st respondent concerning the Liberator, Ltd., the 2nd petitioner herein, and to quash the said order therein.

D. Narasaraju and *K. B. Krishnamurthi* for the Petitioners.

Srinivasamurthi for the Government Pleader (*P. Satyanarayana Raju*)) for the State.

A. Ramachandran of *Row and Reddy* for the Respondents.

The Court made the following

ORDER.—This is an application under Article 226 of the Constitution of India for issuing a writ of *certiorari* to quash the order of the first respondent, dated 24th September, 1951. The second petitioner is the Liberator, Ltd., represented by its Secretary. The first petitioner is an advocate. By G.O. No. 3167, dated 10th July, 1951, the Government of Madras referred the industrial dispute between the second petitioner and its employees to the first respondent, the Tribunal constituted by the second respondent, the State of Madras. On 11th September, 1951, the first petitioner sought to file his vakalat on behalf of the second petitioner before the Tribunal. The representative of the labourers objected to the first petitioner appearing for the second petitioner. On 24th September, 1951, after hearing the parties, the Tribunal held, relying upon the provisions of section 36 (4) of the Industrial Disputes Act, 1947, that it had no power to grant leave to the first petitioner to appear on behalf of the company, the second petitioner. Section 36 (4) of the Industrial Disputes Act, 1947 as amended by the Industrial Disputes (Appellate Tribunal) Act, 1950, reads as follows :—

"In any proceeding before a Tribunal, a party to a dispute may be represented by a legal practitioner with the consent of the other parties to the proceeding and with the leave of the Tribunal."

The provisions of this section are clear and unambiguous. Before a Tribunal a legal practitioner cannot appear unless the Tribunal gives its leave and the other parties to the proceedings give their consent. Learned counsel for the petitioners therefore contended that the provisions of section 36 (4) are constitutionally void viewed from two different aspects. From the standpoint of the first petitioner, *i.e.*, the advocate, it is argued that the section violated his fundamental right to do business guaranteed to him under Article 19 (1) of the Constitution of India. From the viewpoint of the second petitioner, *i.e.*, the employer, it is pointed out that the section infringes the rule of equality embodied in Article 14 of the Constitution. Learned counsel further addds that the prohibition to be represented by an advocate before the Tribunal except with the consent of the other side is against all principles of natural justice.

The constitutional validity of the section from the standpoint of the advocate mainly depends upon the nature of his right. Learned counsel for the petitioner would say that every person has a right to practise in a court or before a tribunal and the section which unreasonably restricts that right is void under Article 13 of the Constitution of India. The question therefore is, what is the nature of the petitioner's right to practise before a court or tribunal. This question was raised and answered in this High Court as well as the Bombay High Court. Before the cases are noticed, the relevant provisions of the Bar Councils Act may be read :

"Sec. 9 (1) : The Bar Council may, with the previous sanction of the High Court, make rules to regulate the admission of persons to be advocates of the High Court :

Provided that such rules shall not limit or in any way affect the power of the High Court to refuse admission to any person at its discretion.

Sec. 14 (1) : An advocate shall be entitled as of right to practise.—(*b*) Save as otherwise provided by sub-section (2) or by or under any other law for the time being in force in any other Court in British India and before any other tribunal or person legally authorised to take evidence ; and

(*c*) before any other authority or person before whom such advocate is by or under the law for time being in force entitled to practise."

In *Mulchand* v. *Mukund*[1], Chagla, C.J. and Gajendragadkar, J., defined the scope of the right of a person to practise having regard to the aforesaid provisions in the following words :

"Therefore, his right to practise is controlled by this important provision that any other law for the time being in force may restrict or take away his right. Therefore, if the Co-operative Societies Act were to provide that an advocate of the High Court of Bombay shall not practise before the arbitral tribunal set up under that Act, then the right of the advocate will be circumscribed by the provisions of that law. It should be remembered that it is not the fact that a man has passed a law examination or has acquired a law degree that entitles him to practise in Courts of law ; his right to practise depends upon his being enrolled as an advocate and he is enrolled as an advocate on terms and conditions laid down in the Bar Councils Act. Therefore, as I said before, his very charter which entitles him to practise lays down conditions and limitations and one of the conditions and limitations is that he can only practise before such tribunal as the law permits him and he may not practise before such tribunals as the law lays down as being prohibited to lawyers."

After considering similar provisions in the Legal Practitioners Act, the learned Judges proceeded to say :

"It is a right subject to the provisions of any law for the time being in force. Therefore, the only right of a lawyer that has been safeguarded under the Constitution is the right to practise his profession. Now, that right not being an absolute right, no absolute right is conferred upon the lawyer by the provisions of the Constitution. The Constitution guarantees to the lawyer such right as he has under his charter. If any such right is affected or contravened, then undoubtedly he can rely upon the provisions of Article 19 (*f*). But if the right given to him is a limited right and that right is not in any way affected, he cannot claim a wider right or a larger right under the Constitution."

Much the same view has been expressed by Rajamannar, C.J. and Venkatarama Ayyar, J., in *S. Ananthakrishnan* v. *State of Madras*[2]. The question in that case was whether the Madras Stamp Amendment Act (VI of 1922) which prescribed a fee of Rs. 625 for making an entry in the rolls of the High Court was not constitutional or an infringement of the provisions of Article 19 (1) (*g*) of the Constitution. At page 218 the learned Chief Justice observed :

"Taking the profession of law, what does this right consist in ? Is the effect of Article 19 (1) to confer on every person who may be otherwise qualified the right to practise in any Court in the land ? I see nothing in Article 19 (1) (*g*) to justify the conclusion that this Court or any other High Court or Supreme Court cannot lay down rules for the admission of advocates who alone will be permitted to represent the suitors before them. On the other hand the clauses in the Letters Patent granted to the Chartered High Courts to which reference was made earlier on in this judgment clearly confer on the High Courts the power to virtually prevent even qualified persons other than the advocates on their rolls to plead and act before them on behalf of suitors. This power of the High Court has been continued under Article 225 of the Constitution. The Bar Councils Act recognises this right and lays down that only the persons enrolled as advocates of a particular High Court have certain rights of audience . . . . . Besides acting and pleading in Courts there are many ways in which a lawyer can pursue his profession and he is free to so practise his profession. If any one wants the additional privilege of being entitled as of right to act and plead in the High Court he has got to be enrolled in the rolls of that Court. Enrolment consists in making an entry in the roll. So far it was not suggested that there was anything unconstitutional."

In Writ Petition No. 537 of 1952 I expressed my view as follows :

"From the aforesaid rules it is obvious that there is no absolute right to be an advocate. A person enrolled as an advocate has a privilege to practise subject to certain limitations. This privilege to practise therefore is conditioned by the limitations imposed on him under the provisions of the Bar Councils Act and the rules framed thereunder."

If so the first petitioner's right to practise is subject to the limitations contained in the Bar Councils Act. One of such limitations is that he shall be entitled to practise save as otherwise provided by or under any other law for the time being in force in any other court in British India and before any other Tribunal or persons legally authorised to take evidence. Section 36 (4) of the Industrial Disputes Act is certainly a law limiting his right to practise before a Tribunal. He cannot accept the privilege or right to practise before tribunals and at the same time reject the limitations subject to which that right was conferred on him. If so understood, his right to practise, *i.e.*, the right circumscribed by the provisions of the Act whereunder he is enrolled, is not infringed by the provisions of section 36 (4) of the Industrial Disputes Act. There is therefore no violation of his fundamental right under Article 19 (1) (*g*) of the Constitution of India.

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1. A.I.R. 1952 Bom. 296.

2. (1952) 1 M.L.J. 208 : I.L.R. (1952) Mad. 933.

It was then contended from the standpoint of the second petitioner that the section violated the fundamental right guaranteed under Article 14 of the Constitution of India. Under Article 14 :

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

It is said that a party to a dispute before courts and other tribunals is entitled to be represented by an advocate, and the said right is practically denied to him before the Industrial Tribunal Such a discrimination it is argued, violated the fundamental right embodied in the equality clause. Adverting to the provisions of this Article I summarised the law on the subject in *South India Bank, Ltd.* v. *Picuthayappan*[1], W.P. No. 296 of 1951 as follows :

"All persons are equal before the law is fundamental of every civilised Constitution. Equality before law is a negative concept, equal protection of laws is a positive one. The former declares that every one is equal before law, that no one can claim special privileges and that all classes are equally subjected to the ordinary law of the land ; the latter postulates an equal protection of all alike in the same situation and under like circumstances. No discrimination can be made either in the privileges conferred or in the liabilities imposed. It has also been held—for without that apparently just laws may in their application be so abused as to subvert the fundamental concept of equality before law—that the law should be applied by public authority without arbitrariness or discrimination. The law which though apparently fair contains inherent possibilities for discrimination and arbitrary action, is in itself bad. But these propositions conceived in the interests of the public, if logically stretched too far, may not achieve the high purpose behind them. In a society of unequal basic structure it is well nigh impossible to make laws suitable in their application to all the persons alike. So a reasonable classification is not only permitted but is necessary if society should progress. But such a classification cannot be arbitrary but must be based upon differences pertinent to the subject in respect of, and the purpose for which it is made."

To this I will add the statement of Professor Willis that

"If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed and that one, who assails a classification, must carry the burden of showing that it does not rest upon any reasonable basis."

The question, therefore, is whether the classification adopted in this case is arbitrary and is not based upon the differences pertinent to the subject, or in respect of and the purpose for which it is made. In my view, the discrimination made between a litigant in an ordinary court of law and before the Tribunal can easily be justified on the basis of reasonable classification. The object of the constitution of labour tribunals was to have an expeditious and just settlement of disputes between the employers and employees in the interests of industrial peace. It was also apparently intended as a convenient device to avoid costly and prolonged litigation in courts of law and to place the two categories of disputants, *i.e.*, the employees and employers with obvious disparity in wealth and influence, as far as possible on an equal level. To achieve this object labour tribunals are constituted. The makers of the law might have thought that an unrestricted right to be represented by an advocate would defeat the aforesaid purpose. Such restrictions on the right of a party to be represented by an advocate before tribunals are not unknown in other parts of the world. In Poolard's Administrative Tribunals at work" the following passage occurs at page *xix* of the Introduction :

"Lawyers as a whole have never understood the reasons for the growth of administrative tribunal and in many cases have opposed or tried to limit them . . . . . The doctrine of precedents would be introduced, the law of evidence would hamper it and its procedure become cumbersome, slow and costly. It is partly their freedom from rules of procedure and customs in advocacy which makes administrative tribunals adaptable to changing social needs and gives parties before them an ease and confidence never known in law Courts. It is for lawyers to adapt themselves to administrative tribunals but not try to twist the growth of these bodies into the pattern of the ordinary Courts.

At page 32 the learned author proceeded to state :

"If the propertied side were legally represented and the other party not, as has been in many county Courts the Chairman would feel it incumbent on him to conduct the unaided man's case for him. If the professional advocate is admitted, there is the question of expense. Property can always command good brains versed in traditional law. The penniless man or wage-earner needs an advocate versed in human values, in the poor man's budget, in voluntary unenforceable industrial agreements, in the point of view of trade union and shop committee, and in the acts and orders regulating factories, mines, etc."

1. Since reported in (1953) 1 M.L.J. 306.

Similar considerations might have weighed with the legislature in enacting the aforesaid provision prohibiting a party to be represented by an advocate unless with the consent of the presiding officer and the opposite party. The consent of the opposite party prevents one party from engaging an advocate unless the other party is also in a position to do so. The Tribunal in exercise of its jurisdiction, subject to the consent of the other side, may allow an advocate to appear in cases where it thinks the assistance is necessary to elucidate the questions of fact or law. But the rule is intended to prevent one party taking advantage of the other party's weakness and also to prevent the unnecessary prolongation of an amicable settlement between the parties.

This is a problematical solution for the avoidance of the apprehended evils. It has always been my experience that a trained lawyer is of immense help in the disposal of cases. It is true that among advocates, just like in other classes of society, there are and will always be a few misfits who would obstruct rather than help the court; but the remedy is not, on that account, to cut off the trained legal element from assisting the administrative tribunals, but appoint competent officers who could be expected and safely relied upon not to play into the hands of those few misguided ones. But the Parliament in its wisdom thought otherwise and it is entitled to have its view and to reflect the same in the laws made. The classification is therefore not arbitrary but is based upon the nature of the tribunal and the purpose for which it is constituted.

Learned counsel then argued that the provisions of the section, if enforced, would offend the principles of natural justice. He would say that no person's rights can be affected unless a reasonable opportunity is given to him to show cause against the action proposed to be taken, and if a person is deprived of his right to be represented by an advocate, in a complicated dispute before the Industrial Tribunal it will be depriving him of such an opportunity. Tribunals cannot be equated to courts of law. They can have their own procedure so long as the principles of natural justice are not violated. It is a common place axiom that no man can be deprived of his rights unless a reasonable opportunity is give to him to show cause before the Tribunal. What is a reasonable opportunity depends upon the content of the right, the nature of the tribunal, the scope of the enquiry, the object of the legislature and similar other things. The cases cited at the Bar afford illustrations of the elastic term "reasonable opportunity."

In *Cooke* v. *United States*[1], the Supreme Court of America held that in a contempt case, before a person can be punished an opportunity should be given to him to show cause against his conviction. The nature of the opportunity is defined a page 774. Mr. Chief Justice Taft observed :

> "Due process of law, therefore, in the prosecution of contempt, except of that committed in open Court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defence or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offence and in mitigation of the penalty to be imposed."

In *Ozie Powell* v. *State of Albama*[2], it was ruled that the right of one charged with crime to be represented by counsel included a fair opportunity to secure counsel of his own choice. The Supreme Court held that the failure to give reasonable time and opportunity to secure counsel prior to trial, to ignorant and illiterate youth, away from their families and friends, charged with a crime punishable with death, against whom popular hostility was so aroused that it was necessary to keep them closely confined and under military guard, infringed the due process clause of the fourteenth amendment. The aforesaid two decisions deal with the proceedings in courts of law. The second judgment deals with a case of homicide and the first with contempt proceedings in the nature of criminal proceedings. But the same rules have never been applied to administrative tribunals. In *Board of Edu-*

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1. 69 L.Ed. 767. 2 79 L.Ed. 158.

cation v. *Rice*[1], the facts were : a local education authority refused to pay salaries to teachers in a non-provided school at the same rate as it paid the teachers in provided schools. The managers of the non-provided school complained, and the Board of Education directed an inquiry. The Board purported to give its decision in a document which failed to deal with the matters in issue. In dealing with the nature of enquiry, Lord Loreburn, L.C., observed at page 182 as follows :

"Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law . . . . . . I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. Provided this is done, there is no appeal from the determination of the Board. . . . ."

In *Local Government Board* v. *Arlidge*[2], Viscount Haldane, L.C., in his instructive speech made the following observations at page 132 :

"My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a Court of law tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what that procedure is to be in detail must depend on the nature of the tribunal. In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary Court, to authorities whose functions are administrative and not in the ordinary sense judicial. Such a body as the local Government Board has the duty of enforcing obligations on the individual which are imposed in the interest of the community . . . . When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the abesnce of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently."

The aforesaid decisions clearly bring out the distinction between the procedure before courts and that before administrative tribunals. The fundamental principle, namely, a reasonable opportunity for explanation, should be given before a person is condemned or his rights are affected applies to courts as well as tribunals. But the scope of that opportunity varies with the character of the forum, the object of the legislature in creating the forum and the nature of the rights decided in that forum. The Industrial Disputes Act, as I have already stated, was enacted for bringing industrial peace as expeditiously as possible. To effectuate that intention, the Parliament provided a machinery for giving a reasonable opportunity to the parties affected to represent their cases, under the Act the Government refers an industrial dispute to a Tribunal duly constituted thereunder. Invariably, the person appointed to the Tribunal is a retired Judicial officer. The Tribunal proceeds with the enquiry in the prescribed manner. It has the same powers as are vested in a civil court under the Code of Civil Procedure in respect of summoning and examining witnesses, compelling the production of documents, and issuing commissions. The parties file statements, issues are clarified, documents are filed, arguments are heard and the Tribunal submits its report on the material placed before it. Parties have the right to be heard personally or through their representatives. It is true a party cannot insist as of right to be represented by an advocate, but under section 36 subject to the conditions laid down therein he may be allowed to be represented by an advocate. I cannot say that the opportunity given to a party under the Act and the rules framed thereunder are not reasonable. Nor can I find that the procedure prescribed is contrary to the principles of natural justice. I, therefore, for the aforesaid reasons hold that section 36 (4) of the Industrial Disputes Act is constitutionally valid. The petition fails and is dismissed with costs. Advocate's fee Rs. 100.

K.S. — *Petition dismissed.*

1. (1911) A.C. 179.
2. (1915) A.C. 120.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Mundlamudi Penchalamma .. *Petitioner**

v.

Kopparthi Subbaramiah and others .. *Respondents.*

**Provincial Small Cause Courts Act* (*IX of* 1887), *section* 15 *and Schedule II—Suit of a small cause nature—Test.*

A suit by a vendor to recover the purchase money or any balance alleged to be due on a sale of immoveable property falls within the category of a suit for specific performance. Hence it is not of a small cause nature. *Subramanian Chettiar* v. *Arunachalam Chettiar*, (1943) 2 M.L.J. 424 (F.B.), relied on.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of Small Causes, Nellore, dated 19th January, 1950, in S. C. S. No. 571 of 1949.

R. Venkatasubba Rao for Petitioner.

K. Subbaramiah, V. Sreeramulu and *K. Subramaniam* for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner is the first defendant who bought some lands from the plaintiff in 1947 for a sum of Rs. 2,000. The plaintiff's case was that Rs. 100 still remained unpaid by the first defendant and he sued to recover the balance alleged to be due. This was not a straightforward claim for the money due. There was an agreement that the first defendant should discharge all the plaintiff's debts which included a decree in a Munsiff's Court suit. Though the first defendant paid up the debts of the plaintiff this decree was not satisfied but was transferred in the name of the second defendant. The learned Small Cause Judge rejected the plea taken that he had no jurisdiction to try this suit, went into the merits and gave the plaintiff a decree against the first defendant only. The decision in *Veerasalingam* v. *Suthapally Sathirasu*[1], was placed before him but he did not think that in point. That was a suit for recovery of a sum of money due to the plaintiff under a contract for the transfer of some pattahs for Rs. 60. The plaintiff sued to recover Rs. 60. It was held that the suit was for specific performance of contract between the plaintiff and the defendant and therefore, the Small Cause Court had no jurisdiction to entertain it. The present suit is not on all fours in the sense that it is not so clearly a suit for specific performance of a contract. The learned advocate for the petitioner, respondents being unrepresented and making no appearance, invoked the support of the decision in *Subramanian Chettiar* v. *Arunachalam Chettiar*[2], a Full Bench decision of our High Court which held that a suit by the vendor for the recovery of the purchase consideration is a suit for specific performance within the meaning of Chapter II of the Specific Relief Act. Though that was not a suit which decided any question of jurisdiction of the Small Cause Court to entertain such a suit, it is clearly authority for the position that generally speaking a suit by a vendor to recover the purchase money or any balance alleged to be due on a sale of immoveable property falls within the category of a suit for specific performance. The nature of the present suit is also such that it is not even one to recover a specific unpaid amount but raises generally the question of how a specific contract of sale has been performed. I am clearly of opinion that this suit is one which is not of a small cause nature and that the decree passed was accordingly without jurisdiction. It is set aside. The plaint will be returned for presentation to the proper Court for disposal. Costs of this petition will abide the result and be provided for by the trial Court.

R.M. *Petition allowed.*

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* C.R.P. No. 513 of 1951. 5th December, 1952.

1. (1909) 19 M.L.J. 220.
2. (1943) 2 M.L.J. 424 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GOVINDA MENON.

S. Duraiswami Nadar .. *Petitioner**

v.

V. M. Nataraja Nadar and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 6, rule 17—Amendment of plaint—When permissible.

An amendment of a plaint by adding a prayer to the effect that a plaintiff sues not only on his own behalf but also on behalf of the entire body of creditors of the defendant can be allowed.

Seth Nandaramdas Atmaram v. *Zulika Bibi* (1943) 2 M.L.J. 1, followed and *Madina Bibi* v. *Ismail Durga Association*, (1940) 1 M.L.J. 872 : I.L.R. (1940) Mad. 808, distinguished.

Petitions under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Tuticorin, dated 23rd July, 1952, in I. A. Nos. 435 and 436 of 1952, in O. S. Nos. 155 and 156 of 1951 respectively.

C. S. Rajappa for Petitioner.

T. Balakrishna Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The order of the lower Court refusing the plaintiff's application for amendment of the plaint by the addition of a prayer to the effect that he sues not only on his own behalf but also on behalf of the entire body of creditors of the defendant is unsustainable. In *Seth Nandaramdas Atmaram* v. *Zulika Bibi*[1], this Court has laid down that when a suit is originally laid under Order 21, rule 63, Civil Procedure Code, an application by the plaintiff for amending the plaint so as to bring it in conformity with the requirements of section 53 of the Transfer of Property Act should be allowed. The learned Judges discussed the entire case law on the point and came to that conclusion. That decision is binding on me and it is unnecessary to discuss this aspect of the case any further. It is interesting to note that in *Madina Bibi* v. *Ismail Durga Association*[2], the learned Judges refused to allow an amendment in the High Court on the ground that the request was not made at the earliest possible opportunity. When the defendant in that case raised the question that the suit was not filed in a representative capacity the plaintiff resisted that contention and having failed in that attempt requested the High Court at the very last stage to allow the amendment. It was under those exceptional circumstances that this Court held that the amendment should not be allowed. In my opinion this is eminently a fit case in which the lower Court should have allowed the amendment. The order of the lower Court is, therefore, set aside and the plaint is directed to be amended as prayed for. If by making the amendment it becomes necessary to add other averments in the plaint to make it clear that the suit is on behalf of the entire body of creditors, the plaintiff will be allowed to add such further averments in the plaint. The respondent will pay the costs of the revision petition. One set only.

R.M. *Petition allowed.*

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* C. R. Ps. Nos. 1225 and 1226 of 1952. 12th December, 1952.

1. (1943) 2 M.L.J. 1. 2. (1940) 1 M.L.J. 872: I.L.R. 1940 Mad. 808.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE RAJAGOPALAN.

S.S.K. Haja Allauddin Maracair, Ammapatnam .. *Appellant**

v.

The Commissioner of Income-tax, Excess Profits Tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922)—Father converting his business into a partnership consisting of himself and his major sons by the first wife—Circumstances indicating genuineness—Proper approach to the question.

The cumulative effect of all the circumstances should be considered in arriving at the conclusion whether a partnership was real or not. It is not a proper approach to the question to take each circumstance by itself and reject it on the ground that each by itself was not conclusive.

The fact that the partnership deed was attested by a Notary Public is proof of its existence on the date on which it purports to have come into existence. The circumstance that the partnership was registered by the Authorities in Ceylon under the Ceylon Business Ordinance is a circumstance in favour of the real nature of the partnership. Further the terms of the deed indicating an intention of the father to make a distribution of his assets amongst his sons and providing for devolution of his share in the event of his death on his minor sons by his second wife are all circumstances indicating the genuineness of the partnership.

Case referred to the High Court by the Income-tax Appellate Tribunal, Bombay, under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922), as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939) in 66 R.A. Nos. 552 and 553 of 1949-50 (Madras Bench) with file.

T. V. Viswanatha Iyer for Appellant.

C. S. Rama Rao Saheb for Respondent.

The Judgment of the Court was delivered by

Satyanarayana Rao, J.—The following question has been referred to us by the Income-tax Appellate Tribunal under section 66 (1) of the Indian Income-tax Act :

"Whether there was evidence to hold that the partnership constituted by the deed dated 13th January, 1944, was not genuine."

One S. S. K. Haja Allauddin Maracair carried on business in piece goods at Colombo from the year 1935 under the name and style of S. S. K. Haja Allauddin & Sons. Up to the accounting year ending with 31st December, 1943, his income was assessed in the status of an individual. During the assessment year 1945-46, however, it was claimed by the assessee that the business ceased to be owned by the individual Haja Allauddin Maracair and that had become the business of a partnership which came into existence on 1st January, 1944, evidenced by a deed of partnership of 13th January, 1944. The accounting year of the assessee is the calendar year 1944, the assessment year being 1945-46. Under the Business Names Ordinance obtaining in Ceylon this partnership was registered on Haja Allauddin swearing to an affidavit dated 11th February, 1944, in which he pleaded that the partnership was real and genuine. The partners in this partnership were the three major sons of the first wife of Haja Allauddin. He has also minor sons by the second wife but they are not made parties. On an examination of the various clauses of the deed of partnership the revenue authorities and the Appellate Tribunal found that the partnership was not real and therefore assessed Haja Allauddin as an individual during the assessment year. It has been represented to us on behalf of the assessee by Mr. Viswanatha Iyer that there was also an application to register the partnership under section 26-A of the Act and that application is kept pending till this reference has been answered by us.

The point for consideration therefore is whether the view taken by the Appellate Tribunal that this partnership was not real is supported by any evidence in the case. Apart from the circumstance that this firm was registered under the Ceylon Business Names Ordinance, the only other material on which the conclusion of the authorities was based was the deed of partnership. Though the partnership

* Case Referred No. 28 of 1950. 25th March, 1952.

commenced on 1st January, 1944, the deed was entered into on the 13th January, 1944 and was attested by a Notary Public in Ceylon. The father and the three adult sons by the first wife became partners under this deed, their shares being 30 shares in 100 to Haja Allauddin, 25 shares to Mahomed Owudhu, 25 shares to Mahomed Lebbe and 20 shares to Shaik Muhammad Bukari. The style of the firm remained the same, *viz.*, S. S. K. Haja Allauddin & Sons. Clause 5 provides that the capital of the partnership shall consist of the net value of the stock in trade, book debts and other assets of the said business carried on till then solely by the father less the outstanding liabilities of that business which were estimated to be about Rs. 40,000. In substance and in effect the father during his lifetime was admitting these three major sons as sharers in the business and but for this partnership deed the sons would not have any interest in the business. From the point of view of the father, therefore, the recitals in the document are undoubtedly against his pecuniary interest. The net capital, it was perhaps contemplated, could be known only after the Income-tax up to the end of 1943 was paid by all the partners in equal shares out of the said capital as provided by clause 6 of the deed of the partnership. Under clause 7, provision was made for raising additional capital if it was found necessary or expedient for the efficient carrying on of the business and that it should be contributed by the partners in the shares in which they held the interest in the partnership, is also provided by the said clause. No term was fixed for the duration of the partnership but it would be terminated by three months' notice by a partner. Death, retirement or expulsion of any partner would not have the effect of terminating or dissolving the partnership. The partners were permitted to draw during the continuance of partnership every month Rs. 50 by the father, Rs. 40 each by his first and second sons and Rs. 25 by the third son. The importance of this provision is that the father is not treated as the sole owner of the capital and the profits and was not given absolute discretion to draw any amount he liked from the funds of the partnership, but his right was restricted along with the sons to a particular amount per month. This is undoubtedly a curtailment and a restriction on his proprietary rights in the business. The father being aged was undoubtedly given an important position in the management of the affairs of the business but as rightly pointed out by the Appellate Tribunal such control over the sons by the father is not at all inconsistent with the existence of a real partnership. The sons were required to attend to the business at Colombo and most senior of them in age including the father should be termed the managing partner and in that capacity was entitled to draw every month Rs. 25 in addition to the drawings permitted under the previous clause. The father however was at liberty to stay outside Ceylon for a longer period than the sons in whose case the period was only three months per year. There are also the other usual clauses found in any deed of partnership specifying the duties and the rights of the partners *inter se* which it is unnecessary to refer or enumerate in the course of this judgment. To ensure due obedience of the sons the father is given the liberty to dissolve the partnership in case of gross ingratitude or misbehaviour or neglect or disobedience on the part of the sons but in such an event the partner who is sent out would be entitled to receive his share of the capital and the profits. The power to dissolve, though specifically mentioned in clause 22 of the deed, does not take away the right of the sons to dissolve the partnership if they so choose by giving three months' notice as required by clause 1 of the deed. In the event of the death of the father it was provided that his minor sons by the second wife should be entitled to the share capital and the profits of the father to the exclusion of the major sons, *i.e.*, modifying the law of inheritance applicable to the parties, *viz.*, the Muhammadan Law. A perusal of these provisions does not throw any doubt on the fact that this partnership was real and was not merely a make-believe affair.

It is said by the Appellate Tribunal that the document gave no indication as to why the father preferred the major sons by the first wife to the minor sons of the second wife. It is not usual in a deed of partnership to give reasons for entering into a partnership. It is not as if the father ignored the interests of the minor sons by the second wife as he provided that they should be entitled exclusively

to the share capital and the profits of the business belonging to the father in the event of his death. It may be that the father wanted to make a distribution of an available asset belonging to him, *viz.*, the business even during his lifetime so as to avoid future difficulties.

Much was made of the fact that no share capital was distributed nor was it contributed by the sons at the time the partnership came into existence. It must be remembered that the sons had no independent property of their own to make the contribution from their own resources to the partnership. They were entirely dependent upon the father and it is the father that admitted each of them to a share in the business. That is the reason why it was provided that the capital of the partnership should consist of the net value of the stock in trade, book debts and other assets of the business less of course of the outstanding liabilities which were estimated to be about Rs. 40,000. This distribution could not be immediately done as income-tax up to the end of the year 1943 was not assessed till October, 1945 and it was thereafter that the net capital could be ascertained and could be distributed between the sons in the accounts. It is not disputed and it has been adverted to by the Appellate Tribunal itself that the profits of each year were distributed to the sons though it was said that the circumstance was not conclusive. Of course the way in which the Appellate Tribunal and the Income-tax Authority treated the matter was to take each circumstance by itself then reject it on the ground that each by itself was not conclusive. This method of approaching the question in our opinion is not proper. The cumulative effect of all the circumstances should have been considered in arriving at the conclusion whether this partnership was real or not. We have the undoubted fact and a strong circumstance in favour of the assessee that the partnership was recognised immediately by the Ceylon Authorities when it was registered under the Ceylon Business Ordinance. It was not as if they did it as a matter of course. They obtained an affidavit from the father himself to support the statements in the deed of partnership. It is on that information that they acted and registered the partnership deed. The next circumstance is that the deed itself was attested by the Notary Public and therefore no doubt can be cast upon the existence of the deed on the date on which it purports to have come into existence. As regards the reality of the partnership as pointed out above, there are very many circumstances pointing to the conclusion that the father intended that this partnership should be real and should benefit his children by the first wife as well as the second wife. It would be open to any of the sons if there were disputes to claim under this document their shares of the capital and the profits in the business. Even if it should happen that the father should die, they would not be entitled to claim any portion of the father's share so that the father bound himself by this document to recognise the interest of his sons in the manner and to the extent indicated in the deed and the sons *inter se* have agreed to share the profits of this business and its capital in the manner which it has been agreed to under this deed. We think therefore that the conclusion of the Appellate Tribunal was not warranted by the evidence on record. The question referred to us therefore must be answered in favour of the assessee and we hold that the partnership is real. As the assessee has succeeded he is entitled to his costs which we fix at Rs. 250.

In view of our finding we think that the partnership will be registered as the assessee has already applied for registration of the same under section 26 of the Income-tax Act.

K.S. *Reference answered in favour of the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

P. R. Joseph and others ... *Accused.**

Criminal Procedure Code (V of 1898), section 562—Second or Third Class Magistrate convicting some of the accused but feeling that the rest must be treated under section 562 (1-A)—If bound to send up to superior Magistrate all the accused in the case—Sections 349 and 380—Applicability and distinction in scope of.

The fundamental difference between sections 349 and 380, Criminal Procedure Code, is that in the former case, the Magistrate does not convict the accused, but is of opinion only that he is guilty and the records are sent only with that opinion ; whereas in the latter case, the superior Magistrate receives the records after the Second or Third class Magistrate convicts the accused of the offence with which he is charged, so that the superior Magistrate cannot acquit him after receiving the records under section 380, Criminal Procedure Code. In a reference under section 349, Criminal Procedure Code, a superior Magistrate can pass any judgment, sentence or order as he thinks fit and according to law. The cases of those who have to be dealt with under section 562, Criminal Procedure Code, fall under section 380, Criminal Procedure Code and not section 349, Criminal Procedure Code. Section 349 (1-A) has no application to the procedure under section 562. Dealing with an accused under section 562 (1) or 562 (1-A) is not a punishment. It is not necessary that all the accused must be sent up. Only the case of those, who in the opinion of the Second Class Magistrate trying the case are to be treated under section 562 (1-A) should be sent up.

Case-law discussed.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the Sessions Judge of South Malabar in his letter, dated 20th March, 1952.

The Assistant Public Prosecutor (*A. C. Muthanna*) on behalf of the State.

G. Gopalaswamy amicus curiæ.

The Court made the following

ORDER.—This is a reference by the learned Sessions Judge of South Malabar under the following circumstances : The four accused were tried by the Second Class Magistrate, Fort Cochin, for an offence under section 323, Indian Penal Code. The Magistrate found all of them guilty of the offence under section 323, Indian Penal Code and sentenced accused 1 to a fine of Rs. 50, in default to two months' rigorous imprisonment. In respect of the other accused, *i.e.*, accused 2 to 4, he was of opinion that they should be dealt with under section 562 (1-A), Criminal Procedure Code and as he was not empowered to pass orders under the above section, he sent up the records to the Sub-Divisional Magistrate, Fort Cochin, for action. The Sub-Divisional Magistrate, Fort Cochin, let off the accused with an admonition under clause (1-A) of section 562 of the Criminal Procedure Code. Accused 2 to 4, who were thus let off with an admonition, then preferred an appeal in C.A. No. 10 of 1952 to the Sessions Court, South Malabar. At the time of the hearing of the appeal, the Local Public Prosecutor raised an objection that the Second Class Magistrate was not competent to send to the Sub-Divisional Magistrate the case relating to accused 2 to 4 alone and that the entire records including the case of accused 1 should have been sent to the Sub-Divisional Magistrate. This objection was apparently based on a decision of this Court in *Emperor* v. *Narayanaswami Naidu*[1]. The learned Sessions Judge agreeing with the contention of the Public Prosecutor has made a reference to this Court under section 438, clause (1), Criminal Procedure Code and has asked for appropriate orders to be passed. In his letter of reference, he refers to two other decisions of this Court, which are reported in *Piramanayagapandaram* v. *Emperor*[2], and *In re Muniswami*[3] and points out the conflict in authority.

The question now is whether in the circumstances of this case all the accused should have been sent up or only the case of those, who in the opinion of the Second Class Magistrate are to be treated under section 562, clause 1-A, Criminal Procedure Code, should be sent up. The argument that all the accused must be sent up is

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* Cr. R. C. No. 489 of 1952. 14th November, 1952.
(Case Referred No. 19 of 1952.)

1. (1936) M.W.N. 1351.
2. (1943) 1 M.L.J. 126.
3. (1947) 1 M.L.J. 17 : I.L.R. (1947) Mad. 714.

based on the provisions of clauses (1) and (1-A) of section 349, Criminal Procedure Code, which are as follows :

"349 (1). Whenever a Magistrate of the second or third class, having jurisdiction, is of opinion after hearing the evidence for the prosecution and the accused, that the accused is guilty and that, he ought to receive a punishment different in kind from, or more severe than that, which such Magistrate is empowered to inflict, or that he ought to be required to execute a bond under section 106, he may record the opinion and submit his proceedings and forward the accused to the District Magistrate or Sub-Divisional Magistrate to whom he is subordinate.

(1-A) When more accused than one are being tried together and the Magistrate considers it necessary to proceed under sub-section (1) in regard to any of such accused, he shall forward all the accused who are in his opinion guilty to the District Magistrate or Sub-Divisional Magistrate.

This section has been interpreted by Pandrang Row, J., in *Emperor* v. *Narayanaswami Naidu*[1] to apply to cases like the present one that is to say, that in such cases all the accused should be sent up. In that case, two accused were tried, the first for an offence under sections 498 and 379, Indian Penal Code and the second for an offence under section 379, Indian Penal Code. Both were found guilty, but the first accused was sentenced to three months' rigorous imprisonment and the case of the second accused was sent up to the Sub-Divisional Magistrate for being dealt with under section 562, clause (1). Pandrang Row, J., held that the procedure followed is opposed to the express provisions of the law contained in section 349 (1-A), Criminal Procedure Code. The convictions of both the accused were set aside and the Magistrate was asked to forward both the accused to the Sub-Divisional Magistrate, if he still thought that the second accused should be dealt with under section 562, Criminal Procedure Code. A contrary view is expressed by Byers, J., in *Piramanayagapandaram* v. *Emperor*[2]. In the above case, forty-one persons were convicted by the Second Class Magistrate, and of them twenty-eight were sentenced to three months' rigorous imprisonment and the rest were sent up to the Sub-Divisional Magistrate for being dealt with under section 562 (1), Criminal Procedure Code. The Sub-Divisional Magistrate took the view relying on the decision in *Emperor* v. *Narayanaswami Naidu*[1], that all the accused should have been sent up. He therefore asked the District Magistrate to make a reference to the High Court. In the reference made by the District Magistrate, who did not agree with the view taken by the Sub-Divisional Magistrate, Byers, J., held that section 349 (1-A), Criminal Procedure Code, has no application to the procedure under section 562, Criminal Procedure Code and the order of the Second Class Magistrate was upheld.

The other decision referred to by the learned Sessions Judge In re *Muniswami*[3] is a decision by Yahya Ali, J. This does not touch the point in question as it is a case in which the Second Class Magistrate tried two persons for the offence of theft and receipt of stolen property and convicted both of them ; and though he was of the view that one of them should be dealt with under section 562, Criminal Procedure Code, he sent up the case of both the accused to the Sub-Divisional Magistrate. Yahya Ali, J., therein held that section 562, Criminal Procedure Code, read with section 380, Criminal Procedure Code, does not prohibit sending up both the accused to the Sub-Divisional Magistrate.

On a consideration of all the authorities and the relevant sections in the Criminal Procedure Code, I am of opinion that the view taken by Byers, J., is the correct one. Section 349 (1-A), Criminal Procedure Code, will apply only to cases which fall under clause (1) of section 349, Criminal Procedure Code. Clause (1) of section 349, Criminal Procedure Code, will apply only to cases where the Magistrate is of opinion that the accused is guilty and that he ought to receive a *punishment different in kind* (italics are mine) or more severe than that which the Magistrate is empowered to inflict. The two circumstances, therefore, under which he may send up the records are (1) the punishment to be inflicted must be different in kind from that which he is empowered to inflict, (2) the punishment must be more severe than that which he can inflict. In no other circumstances can he send up the records under section 349, Criminal Procedure Code.

1. 1936 M.W.N. 1351.
2. (1943) 1 M.L.J. 126.
3. (1947) 1 M.L.J. 17 : I.L.R. (1947) Mad. 714.

This leads us to a consideration of the question as to what exactly the punishments are, which can be inflicted by the Second and Third Class Magistrates and what are the other punishments, which, in the opinion of the Magistrate, the accused must receive, but which he cannot inflict. The punishments to which the offenders are liable under the provisions of the Indian Penal Code are contained in section 53, Indian Penal Code, which are (1) death, (2) transportation, (3) imprisonment, (rigorous or simple), (4) forfeiture of property, and (5) fine. To this must be added whipping which has been introduced by the Whipping Act (Act IV of 1909) and sending young persons, youthful offenders and children, all under the Madras Children Act to the various schools mentioned therein. Of the above punishments, those which the various Magistrates can inflict are contained in section 32, Criminal Procedure Code. Under the above section a sentence of whipping can be passed, only by the Presidency Magistrates and First Class Magistrates. Similarly under the Madras Children Act, among Magistrates, only the Magistrates mentioned in section 4 of the Act can exercise the powers conferred by the Act. A Magistrate with the second or third class powers cannot inflict whipping, nor can a First Class or Second Class Magistrate unless specially empowered exercise the powers under the Madras Children Act. Whipping is a punishment different in kind from imprisonment or fine ; so is sending young persons, youthful offenders or children to the various schools mentioned in the Madras Children Act. If the Second or Third Class Magistrate not competent to inflict the above punishments is of opinion that any accused should receive the sentence of whipping in accordance with the provisions of the Whipping Act or should be sent to one of the schools mentioned in the Madras Children Act, then clause (1) of section 349 will apply and when there are more accused than one, clause (1-A) of the section will apply. It is only to such cases that section 349, Criminal Procedure Code applies, in addition, of course, to cases where more severe punishment is to be inflicted.

Dealing with the accused under the provisions of section 562, clause (1) or clause (1-A) is not a punishment. Section 562, Criminal Procedure Code itself says that the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peaec and be of good behaviour. Similarly in clause (1-A) of section 562, Criminal Procedure Code, the Court may, instead of sentencing him to any punishment, release him after due admonition. It is clear, therefore, that no sentence is passed when the accused is dealt with under the provisions of clause (1) or clause (1-A) of section 562, Criminal Procedure Code. The order to be passed under section 562, Criminal Procedure Code, is therefore not a punishment and the question of punishment different in kind does not arise in such a case. I may refer to a decision of the Nagpur High Court in *Baba* v. *Emperor*[1] ; which takes the same view that an order under section 562, Criminal Procedure Code, cannot be said to be a punishment. The decisions in *Emperor* v. *Ghasite*[2] and *Emperor* v. *Hira Lal*[3] also lend support to this view.

Apart from this, as pointed out by Byers, J., section 562, Criminal Procedure Code itself prescribes the procedure to be followed by the Second and Third Class Magistrates, in whose opinion the provisions of section 562, Criminal Procedure Code, have to be applied to any accused. In such cases section 380, Criminal Procedure Code applies.

The fundamental difference between sections 349 and 380, Criminal Procedure Code is that in the former case, the Magistrate does not convict the accused, but is of opinion only that he is guilty and the records are sent only with that opinion ; whereas in the latter case, the superior Magistrate receives the records after the Second or Third Class Magistrate convicts the accused of the offence with which he is charged, so that the superior Magistrate cannot acquit him after receiving the records under section 380, Criminal Procedure Code. *Vide* the decision in *Venki-*

1. A.I.R. 1924 Nag. 37.
2. (1914) I.L.R. 37 All. 31.
3. (1924) I.L.R. 46 All. 828.

Kandaswami Naicken v. *Emperor*[1]. In a reference under section 349, Criminal Procedure Code, a superior Magistrate can pass any judgment, sentence or order as he thinks fit and according to law. The cases of those who have to be dealt with under section 562, Criminal Procedure Code, fall under section 380, Criminal Procedure Code and not section 349, Criminal Procedure Code.

The result is that the procedure followed by the Second Class Magistrate is correct. There is nothing irregular or illegal in the order passed by the Sub-Divisional Magistrate regarding accused 2 to 4. The objection raised by the Public Prosecutor, South Malabar, fails and the appeal by the accused in C.A. No. 10 of 1952 will be taken on file by the learned Sessions Judge and disposed of according to law treating the procedure followed by the Second Class Magistrate, Fort Cochin, as a proper one.

I am indebted to Mr. G. Gopalaswamy for the assistance he rendered me in the case.

K.S. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAJAGOPALAN.

Sriramulu Naidu .. *Appellant**

v.

Jambulingam Pillai and another .. *Respondents.*

Limitation Act (IX of 1908), Article 83—Applicability—Subsequent mortgagee undertaking to discharge prior mortgage—Failure to discharge—Prior mortgagee bringing the property to sale in execution of the mortgage decree obtained by him—Suit by mortgagor against subsequent mortgagee for damages for breach of covenant undertaking to redeem the prior mortgage—Limitation.

Where a subsequent mortgagee undertook to discharge a prior encumbrance on a property of the plaintiff but failed to do so as a result of which the property was sold by the prior mortgagee and the plaintiff filed a suit for damages;

Held, that Article 83 of the Limitation Act applies to such cases and the period should be computed from the date on which the sale was confirmed, thus finally extinguishing the right of the plaintiff, as well as the defendant to redeem the mortgage. The damage sustained by the plaintiff was on the final extinction of the right to redeem the mortgage and the extinction is on the date of the confirmation of the sale.

Appeal against the order of the Court of the Subordinate Judge, Tiruchirapalli, dated 14th October, 1950, in A.S. No. 327 of 1949 (O.S. No. 357 of 1946, District Munsif's Court, Tiruchirapalli.)

A. Balasubramania Aiyar for Appellant.

K. V. Ramachandra Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff executed a deed of simple mortgage in favour of one Kandaswami Pillai for Rs. 500 on 12th October, 1922. The money due under that deed was payable at the end of three years. On 6th May, 1925, the plaintiff executed Exhibit A-1, a deed of usufructuary mortgage, in favour of the first defendant. As part of the purchase price, the defendant was directed to pay off the money due to Kandaswami Pillai under the first mortgage. It was common ground that the defendant never paid this amount. Kandaswami filed a suit to enforce the mortgage and obtained a decree, Exhibit A-2, on 30th August, 1938. In execution of that decree the hypotheca was brought to sale on 3rd March, 1943. The sale was confirmed on 10th April, 1943. The plaintiff instituted the suit, out of which this Civil Miscellaneous Appeal arose, on 1st April, 1946, claiming damages for the breach of the contract between the plaintiff and the first defendant evidenced by Exhibit A-1, under which the first defendant had undertaken to redeem the mortgage effected by the plaintiff in favour of Kandaswami.

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1. (1942) 2 M.L.J. 277.

* A. A. O. No. 299 of 1951. 25th November, 1952.

The learned Munsif held that the plaintiff's claim was barred by limitation. Hence the plaintiff's suit was dismissed. On appeal, the learned Subordinate Judge held that Article 83 of the Limitation Act applied, and that the period should be computed from 10th April, 1943, on which date the sale was confirmed, thus finally extinguishing the right of the plaintiff as well as the first defendant to redeem the mortgage which had been effected in favour of Kandaswami. The learned Subordinate Judge further held that, as the learned Munsif had not decided specifically either the liability of the defendant to pay the damages claimed by the plaintiff, or the quantum of those damages, the suit would have to be remanded for determination of those issues in accordance with the directions given in the appellate judgment. There was also the claim that the first defendant, as an agriculturist, was entitled to the benefits of Madras Act IV of 1938.

The second defendant, one of the legal representatives of the first defendant, preferred this appeal against the order of remand by the learned Subordinate Judge.

Learned counsel for the appellant urged that, since the liability of the defendant to pay the amount due to Kandaswami under the mortgage effected in his favour arose on 12th October, 1925, that is three years after the date of mortgage in favour of Kandaswami, the present suit filed in 1946 was barred by limitation. Learned counsel relied on *Doraisinga Thevar* v. *Arunachalam Chetti*[1]. All that could be held, on the basis of that case, is that in such a contingency the plaintiff could, at any time after 12th October, 1925, have filed a suit claiming damages for breach of contract occasioned by the failure of the vendee to discharge his obligations to pay a portion or the whole of the purchase money to clear off a pre-existing encumbrance. *Doraisinga Thevar* v. *Arunachala Chetti*[1] is not an authority for the position, for which learned counsel for the appellant contends now, that the vendor, *i.e.*, the plaintiff in this case, had no other remedy open to him. The learned Subordinate Judge rightly came to the conclusion, that the damage sustained by the plaintiff in this case was on the final extinction of the right to redeem the mortgage in favour of Kandaswami, and that that exinction was on 10th April, 1943. I see no reason to differ from the learned Subordinate Judge. On that finding the learned Judge was right in holding that Article 83 of the Limitation Act applied and that the suit filed on 1st April, 1946, was in time.

The next contention of the learned counsel for the appellant was that there was no necessity for a remand at all. The plaintiff's claim was for an ascertained sum based upon the amount which the defendant had failed to pay to Kandaswami with interest thereon. But the learned Subordinate Judge rightly pointed out that that may not be the only basis for ascertaining the damages which the plaintiff claimed he sustained by the breach of contract by the defendant. The market value of the property could give a fair basis for ascertaining the actual loss sustained by the plaintiff. As the learned Subordinate Judge pointed out, it may even eventually mean that the plaintiff suffered no damages at all. Since there was no evidence on the market value of the property and since the trial court did not assess the quantum of damages on any basis, the learned Subordinate Judge had no option but to remand the suit for ascertaining the correct basis for assessing the damages to which the plaintiff would be entitled. There is also, as I have pointed out earlier the question whether the defendant would be entitled to any relief under Act IV of 1938.

The order of the lower Court is confirmed and the appeal is dismissed with costs.

Leave to appeal is refused.

R.M. *Appeal dismissed.*

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1. (1899) I.L.R. 23 Mad. 441.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CHANDRA REDDI.

Kakara Someswara Rao .. *Petitioner**

v.

Kalidindi Ramakrishna Raju and others .. *Respondents.*

Madras Village Panchayat Act (X of 1950), section 19—Applicability.

Section 19 of the Madras Village Panchayat Act (X of 1950) comes into play only when there is disqualification under section 13, 15, 16 or 17 of the Act. The jurisdiction conferred by section 19, on the prescribed judicial authority is restricted to cases arising under the four sections mentioned therein.

Quaere.: Whether the procedure laid down in section 19 is retrospective.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in O.P. No. 41 of 1951, Court of the District Munsif, Tanuku, and quash the order, dated 22nd April, 1952, therein.

K. Bhimasankaram and *T. Narayanachari* for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*), *E. Venkatesam*, *V. V. Raghavan* and *M. Ramachandra Raju* for Respondents.

The Court made the following

ORDER.—This is a petition for the issue of a Writ of *certiorari* to quash the proceedings in O.P. No. 41 of 1951. The petitioner was elected a member of the Panchayat Board, Polamur, Tanuku taluk, West Godavari district, in the year 1939 under the provisions of the Madras Local Boards Act (XIV of 1920) and continued to be as such, as there were no fresh elections subsequent to that. He was also elected as Vice-President of the Board in that year. The first respondent herein filed a petition under section 19 (1) of Act X of 1950 (hereinafter referred to as the Act) before the District Munsif of Tanuku alleging that the petitioner ceased to be a member of the Panchayat Board by reason of non-attendance of three consecutive meetings of the Board. That petition was necessitated by the fact that the petitioner disputed the disqualification and the first respondent was directed by the Inspector of Local Boards to agitate the matter before the appropriate judicial authority.

That petition was contested by the petitioner herein not only by denying the allegations regarding his absence at three consecutive meetings for which he had notice but also by contending that the District Munsif has no jurisdiction to entertain the petition for the reason that section 19 (1) of the Act had no application to the facts of this case. It was the case of the petitioner that section 19 (1) did not govern this case as the alleged disqualification had not arisen under Act X of 1950. The District Munsif overruling the objections of the petitioner herein decided that he had jurisdiction to go into the matter, and that on merits he found that the petitioner ceased to be a member, as he absented himself from three consecutive meetings held between 13th November, 1950 to 30th January, 1951.

Being aggrieved by this decision, the petitioner has presented this writ petition for the reliefs mentioned above.

The main ground of attack against the order of the learned District Munsif is want of jurisdiction in the District Munsif to declare that the petitioner has become disqualified. Mr. Bhimasankaram urged that as the disqualification had arisen before the Act came into force, the provisions of section 19 of the Act were not applicable to the case on hand and therefore the District Munsif, who was the prescribed authority appointed under the rules framed under the Act, was not competent to go into the matter. Before the Act X of 1950 came into force, the provision applicable to disqualifications arising out of the absence of a member

* Writ Petition No. 408 of 1952. 21st November, 1952.

of a Panchayat Board from three consecutive meetings was section 56 of the Madras Local Boards Act. Section 56 of the Madras Local Boards Act provided that:

"Subject to the provisions of section 57, a member of a local board shall cease to hold his office, if he . . . . . .

(*h*) absents himself from the meetings of the local board for a period of three consecutive months reckoned from the date of the commencement of his term of office, or of the last meeting which he attended, or of his restoration to office as member under sub-section (4), as the case may be, or if within the said period, less than two meetings have been held, absents himself from two consecutive meetings held after the said date. . . . ."

Section 57 runs thus:

"57. (1) Whenever it is alleged that any person who has been elected as member of a local board is disqualified under sub-section (1) of section 54, section 55, section 56 or section 59 and such person does not admit the allegation, or whenever any member is himself in doubt whether or not he has become disqualified for office under section 56 or section 59 such member or any other member may, and the president (Executive authority—*vide* correction slip under Madras Act XIX of 1943) at the request of the local board shall apply to the District Judge of the district in which the area of the local board is situated."

In 1950 the Legislature of the Madras State passed Act X of 1950 to make better provision in a separate enactment for the administration of village affairs of panchayats. Under sub-section 3 of section 1 of the Act it was directed to come into force on such date as the Government might, by notification in the *Fort St. George Gazette*, appoint; by a notification issued in pursuance of this sub-section, the Government of the State of Madras directed that the Act should come into force on 1st April, 1951. Under the new Act the provision relating to disqualification arising out of absence from the meetings is enacted in section 17 which runs as follows:

"17. Subject to the provisions of section 19, a member shall cease to hold office as such if he . . .

(*k*) absents himself from the meetings of the panchayat for a period of three consecutive meetings reckoned from the date of the commencement of his term of office, or of the last meeting which he attended, or of his restoration to office as member under section 18, sub-section (1), as the case may be, or if within the said period, less than three meetings have been held, absents himself from three consecutive meetings held after the said date."

The provision corresponding to section 57 of the Madras Local Boards Act is contained in section 19 of the new Act. Section 19 runs thus:

"19. (1) Whenever it is alleged that any person who has been elected as a member of a panchayat is not qualified or has become disqualified under section 13, 15, 16 or 17 and such person does not admit the allegation or whenever any member is himself in doubt whether or not he is not qualified or has become disqualified under section 15, 16 or 17, such member or any other member may, and the executive authority shall, on the direction of the panchayat or of the Inspector, apply to the prescribed judicial authority whose decision shall be final."

As has been stated above, the State Government had appointed the District Munsif of the area within whose jurisdiction the panchayat is situated as the prescribed judicial authority under section 19 (1) of the Act.

The chief point for consideration in this case is whether the provisions of section 19 (1) are applicable to the present case. Admittedly, the petition was filed after the Act came into force. It is also conceded that the disqualification alleged in this case does not come within the purview of section 17 as the alleged absence from three consecutive meetings was before the Act came into fore. It is also significant that the expression used in section 17 (*k*) is "absents himself" and not "absents himself or had absented himself". It is unnecessary for me to go into the question whether the disqualification in this case falls outside the scope of section 17 of the Act or not, as it is conceded by Mr. Venkatesam that the petitioner was disqualified under section 56 of the Madras Local Boards Act and that the provisions of section 17 (*k*) of the Act are not attracted by the facts of this case.

What I have therefore to consider is whether section 19 can be made applicable to this case. It will be seen that section 19 specifically says that in order to enable either a member of the panchayat or the Executive authority to apply to the prescribed judicial authority, the dispute should relate to a disqualification arising under section 13, 15, 16 or 17. So the prescribed judicial authority appointed

under section 19 can take cognizance of petitions founded on section 13, 15, 16 or 17 only.

Mr. Venkatesam appearing for the first respondent tries to get over this difficulty by referring to section 131 of the Act. Section 131 enacts :

> "131. (1) In regard to the first reconstitution, in accordance with the provisions of this Act, of panchayats in existence at the commencement thereof, and otherwise in first giving effect to the said provisions, they shall be read subject to the rules in Schedule III."

The rule relied upon by Mr. Venkatesam as helping him in the consideration of section 19 is rule 4 which states :

> "4. (1) The members of a panchayat holding office at the commencement of this Act, (other than its president and any village headman) shall be deemed to be the elected members of the panchayat under this Act and such members shall continue to hold office upto such date as the Government may, by notification, fix in this behalf, or in case no such date is fixed upto the date on which their term of office would have expired if this Act had not come into force."

Mr. Venkatesam argues that section 19 read with this rule enables the prescribed judicial authority mentioned in section 19 to adjudicate on questions arising under section 56 of the Madras Local Boards Act. I do not see what bearing rule 4 of Schedule III has on the construction of section 19 of the Act. Rule 4 only enables members holding office at the commencement of the Act to continue to be members upto such date as the Government may fix, etc. It does not confer any jurisdiction upon the District Munsif to go into the questions arising under the Madras Local Boards Act. The very basis of the application under section 19 in this case is that the petitioner ceased to hold office as a member of the panchayat long before the Act came into force. According to the first respondent, the petitioner was not a member at the commencement of the Act. So I fail to see how rule 4 can come into play at all in this case.

Mr. Venkatesam next urges that section 19 lays down only the procedure to be adopted in adjudicating upon the alleged disqualification and has therefore retrospective operation. He relies for this purpose upon a passage in Halsbury's Laws of England by Hailsham (2nd Edn.), Vol. 31, at page 508 :

> "It is a question of construction whether a statute directly, or by necessary implication, takes away a right of procedure by substituting another, or leaves the former right co-existing with the latter. This question may be tested by inquiring whether the substituted procedure is a complete one, and whether it gives the parties interested in invoking it the same rights of being heard as they formerly possessed."

He also cited to me a passage from Craies on Statute Law (4th Edn.) at page 337 :

> "It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. But there is an exception to this rule, namely, where enactments merely affect procedure, and do not extend to rights of action. For it is perfectly settled that if the Legislature forms a new procedure, that, instead of proceeding in this form or that, you should proceed in another and a different way, clearly there bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be."

No doubt when enactments merely affect the procedure they are retrospective and the rights of the parties have to be enforced in accordance with the procedure laid down by the new Act. This proposition cannot be contested. But the point in this case is not whether the procedure laid down in section 19 is retrospective or not. Section 19 comes into play only when there is disqualification under section 13, 15, 16 or 17. That being so, the jurisdiction conferred by section 19 on the prescribed judicial authority is restricted to cases arising under the four sections mentioned above. It would have been a different matter if instead of mentioning section 17, a disqualification consequent upon the absence from three meetings was stated generally. On the other hand, the section in so many terms refers only to disqualifications under section 17. Thus the jurisdiction conferred on the prescribed authority is a special one applicable to disqualifications under the sections mentioned therein and is controlled by section 19. It looks to me that the reasonable construction that could be placed on section 19 giving a plain meaning

to the words of the section is that it is only in a case where it is alleged that a member has become disqualified under one or other of the sections referred to therein, and that is disputed by that member; that the prescribed judicial authority gets the jurisdiction to adjudicate on the disqualification. Since in this case the disqualification alleged does not fall under section 17 of the Act, section 19 of the Act cannot have any application. In my judgment the District Munsif who is the prescribed judicial authority under the new Act is competent to decide questions of disqualification only in cases arising under section 19 of the Act. It follows that the District Munsif was not competent to entertain the application filed by the first respondent. This result is reached by me on a careful consideration of the relevant provisions of the Act. It is not necessary to consider in this case whether the petition could be presented to the District Judge under section 57 of the Madras Local Boards Act and whether the first respondent should be directed to file that application before the District Judge in view of the fact that the new Village Panchayats are going to come into being very shortly.

For these reasons the writ petition is allowed, but having regard to the circumstances of this case, I direct the parties to bear their own costs.

R.M. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMASWAMI.

Puthiya Purayil Ammad Kunhi Moideen .. *Appellant.**

Malabar Law—Othidar—Right of pre-emption—Price at which othidar can exercise right—Reasonable price or price offered by a stranger.

An othidar is entitled to a right of pre-emption by paying a reasonable price to the mortgagee and he need not pay the same price which is offered by a stranger.

Appeal against the decree of the Court of the Subordinate Judge, Tellicherry in A.S. No. 91 of 1951 preferred against the decree of the Court of the District Munsif, Taliparamba in O.S. No. 125 of 1946.

D. A. Krishna Variar and *P. V. Raman Variar* for Appellant.

The Court delivered the following

JUDGMENT.—Both the lower Courts found that the othidar in this case was entitled to a right of pre-emption by paying a reasonable price to the mortgagor selling the properties and that the price need not be the price which is offered by a stranger.

In support of his contention that this raises a point of law and that the price which the mortgagor ought to receive is the price which is offered by a stranger, the learned advocate for the appellant relied upon five decisions. The first decision is *Cheria Krishnan* v. *Vishnu*[1], decided by Kernan and Kindersley, JJ. In this decision it was held that

"an otti mortgagee, if he avails himself of his right of pre-emption, must pay whatever sum is *bona fide* offered to the jenmi for his equity of redemption; but the ottiholder is entitled to be fully informed as to the circumstances and amount of the offer before electing to buy; public notice of, and the option of bidding at, a court-sale of the jenmi's right do not constitute a valid offer of pre-emption so as to deprive the ottiholder of his right of pre-emption, if he does not purchase the jenmi's rights."

This is based on the principle that the ottiholder should not be driven to give any fancy price at an auction and that he is entitled to the advantage which his position gives him. In other words, the price contemplated under this decision is reasonable price and not competitive price.

The next decision is *Vasudevan* v. *Keshavan*[2]. In this decision a jenmi (mortgagor) having conveyed certain land upon tenure (mortgage, of which the right of

* S. A. No. 1986 of 1952. 2nd December, 1952.
1. (1882) I.L.R. 5 Mad. 198. 2. (1884) I.L.R. 7 Mad. 309.

pre-emption and the option of making further advances are incidents) created a further charge on the land, without giving the veppuholder the option of making the advance required. In execution of a decree against the jenmi a judgment-creditor brought to sale the right of the jenmi in the land subject to the further charge. In a suit brought by the veppuholder to set aside the auction sale on the ground that his right of pre-emption was injured thereby, it was held that the suit would not lie. There is no observation in the judgment of Turner, C.J., throwing any light whether the veppuholder is entitled to pay a reasonable price or competitive price.

The third decision is *Ammotti Haji* v. *Kunhayan Kutti*[1], decided by Muttuswami Aiyar and Best, JJ. In this decision an othidar in Malabar was held to lose his rights of pre-emption if he refuses to bid at a court-sale of the land comprised in his otti, held in execution of a decree against the karnavan and senior anandravan of the tarwad, in which the jenm right is vested, after having been specially invited to attend and exercise that right, and makes no offer to take the property for a long time after the court-sale. The decision turned upon the simple point that the right of the othidar for pre-emption is a case of election and the court-sale created necessity for the appellant's election either to buy or not to buy and after once electing not to buy he cannot be permitted to change his mind and asert his right for pre-emption. There is no decision regarding the othidar having to pay either a reasonable price or a competitive price.

The fourth decision in *Bhairon Singh* v. *Lalman*[2], is irrelevant for the purpose of this case apart from the fact that we do not know the scope of the right of pre-emption in the case which was under consideration in the Allahabad High Court. That was a case where the plaintiff in a suit to enforce the right of pre-emption alleged that the true consideration for the sale was less than the amount stated in the sale deed. It was found that he made no communication to the vendor after he became aware that a sale was being negotiated nor did he make it known to him that while he stood upon his pre-emptive right he declined to pay the price stated in the deed, because it was not the consideration agreed on between the vendor and the vendee (unreasonable as opposed to reasonable price). It was held that the plaintiff was bound, instead of remaining silent, to communicate to the vendor that he was prepared to purchase at the price within a reasonable time and not having done so he must be taken to have countenanced the completion of the bargain with the vendee and to have waived his right of pre-emption.

The fifth decision is *Mammali* v. *Kunhipai Haji*[3] in which at page 70 it is pointed out as follows :

> "We mention that in some of the cases, *viz.*, in *Cheria Krishnan* v. *Vishnu*[4], *Vasudevan* v. *Keshavan*[5], and *Ammoti Haji* v. *Kunhayan Kutti*[1], language is used which might imply that the right of pre-emption consists in a right to have an offer made by the owner of the property to sell the property to the othidar for the same price for which he has contracted to sell to a third person. We might have some hesitation in saying that this is an accurate definition of the nature of the right, because such a definition if strictly pursued to its logical conclusions might lead to difficulties and complications. We however refrain from pronouncing any definite opinion on that point as the learned Advocate-General says that if it be found that his client had knowledge of the sale more than six years before the institution of the suit he would not be prepared to contend in the facts of this case that the suit would still be within time, because no offer was made to him by the owner of the property before the auction sale."

The decision also does not support the contention of the appellant.

On the other hand, both the lower courts have relied upom the observations of Mr. Justice Sundara Aiyar in his commentary on Malabar and Aliyasanthana Law (1922 Edn.), paragraph 186, wherein it is stated :

> "The point is left open whether the right of ottidar is to purchase at the same price as is offered by the stranger, or at a reasonable price, the inclination of their Lordships' opinion being in favour of the latter view. It was so laid down by Mr. Holloway as Sub-Judge in A. S. No. 64 of 1859 (Tellicherry)."

1. (1892) I.L.R. 15 Mad. 480.
2. (1884) I.L.R. 7 All. 23.
3. (1912) 23 M.L.J. 607 : I.L.R. 38 Mad. 67.
4. (1882) I.L.R. 5 Mad. 198.
5. (1884) I.L.R. 7 Mad. 309.

There is no other decision contrary to the conclusion arrived at by both the lower Courts.

There is no point of law and this second appeal is dismissed.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Havildar Venkatachallam .. *Petitioner**.

v.

Sappar Palayam and another .. *Respondents.*

Criminal Procedure Code (V of 1898), section 144—Application under—Dispute relating to land—Decisions of Civil Court as to title and possession—Duty of Magistrate to maintain.

Title to a piece of land had already been declared by Civil Courts to be in the petitioner who obtained delivery of possession in execution of the Civil Court decree. The counter-petitioners subsequently after again attempting to disturb the possession of the petitioners gave an undertaking to the Magistrate that they would not interfere with possession of the petitioner. Years later, the counter-petitioners again attempted to disturb the possession of the petitioner. Thereupon the petitioner filed a civil suit and obtained a permanent injunction against the counter-petitioners from interfering with the possession of the petitioner. The counter-petitioners then clandestinely obtained the patta for the land. The petitioner moved the higher authorities and had the patta cancelled and the land re-transferred. When the counter-petitioners again started giving trouble, the Magistrate declared the counter-petitioners to be in possession of the property. On revision,

Held, it is the duty of the Magistrate in cases like this to support the decisions of the Civil Courts and see, as far as possible, that the decrees of the Civil Courts are maintained. Otherwise, it would only amount to putting a premium upon the highhanded and unlawful activities of the other side. Accordingly, the petitioner must be declared to be in possession of the property and the counter-petitioners must be restrained from interfering with the possession of the petitioner.

Petitions under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the orders of the Additional First Class Magistrate's Court, Saidapet, dated 10th May, 1951, in M.C. Nos. 18 of 1951 and 19 of 1951 respectively.

A. Dorairaj for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) for the State.

Respondents not represented.

The Court made the following

ORDER : *Crl.R.C. No.* 647 *of* 1951.—This is a revision filed by the petitioner in the lower Court against the order passed under section 145, Criminal Procedure Code, in M.C. No. 18 of 1951 on the file of the Additional First Class Magistrate, Saidapet, in which the counter-petitioners (respondents herein) were declared to be in possession of the disputed land. This is one of those cases where the petitioner after going to Civil Courts several times obtaining an order in his favour is frustrated in his attempts to be in possession by the highhanded action of the counter-petitioners. The land was assigned to the petitioner on 29th August, 1924. On account of the trouble given by the counter-petitioners and their attempts to disturb the possession of the petitioners herein, a suit was filed by the petitioner in O. S. No. 449 of 1926 on the file of the District Munsiff's Court, Poonamallee. The title was declared to be in favour of the petitioner and possession was directed to be given to him. He filed E. P. No. 1083 of 1927 and obtained delivery of possession on 24th January, 1927. The appeal against the decree and judgment of the District Munsiff filed by the counter-petitioners in A. S. No. 310 of 1927, District Court, Chingleput, was dismissed on 3rd May, 1929. Subsequently after two years, the counter-petitioners again attempted to disturb the possession of the petitioner herein. The petitioner filed C. C. No. 1132 of 1929 before the Stationary Sub-

* Crl. R. C. Nos. 647 and 648 of 1951. 6th November, 1952.
(Crl. R.P. Nos. 641 and 642 of 1951).

Magistrate, Saidapet, and there the counter-petitioners gave an undertaking that they would not interfere with the possession of the petitioner herein. Things went on smoothly till 1941 and again the counter-petitioner attempted to disturb the possession of the petitioner. Thereupon, the petitioner filed O. S. No. 144 of 1941 on the file of the District Munsif's Court, Poonamallee, for an injunction restraining the counter-petitioners from interfering with his possession and enjoyment and the suit was finally disposed of on 15th August, 1941, giving a permanent injunction against the counter-petitioners from interfering with the possession of the petitioner. Having failed in their attempts the counter-petitioner clandestinely in league with the village munsiff, who happened to be on their side, obtained patta for the land. Thereafter on representations being made by the petitioner to the higher authorities, the patta was cancelled and retransfer was ordered on 12th March, 1948. In spite of this, the counter-petitioners again started giving trouble and the Magistrate under these circumstances instead of declaring the petitioner to be in possession of the properties has put a premium upon the unlawful activities of the counter-petitioners and declared the counter-petitioners to be in possession of the property. It is the duty of the Magistrate in cases like this to support the decisions of the Civil Courts and see, as far as possible, that the decrees of the Civil Courts are maintained. Otherwise it would only amount to putting a premium upon the highhanded and unlawful activities of the other side. In the circumstances, I declare the petitioner to be in possession of the property and forbid and restrain the counter-petitioners (respondents) herein from interfering with the possession of the petitioner.

In Crl R. C. No. 648 of 1951, the petitioner has purchased a portion of the property from the petitioner in Crl. R. C. No. 647 of 1951 and he should therefore be declared to be in possession of the portion of the property which he has purchased. The counter-petitioners are also restrained from interfering with the possession of the petitioner in Crl. R. C. No. 648 of 1951.

The petitions are allowed.

K.S. —————— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Sista Venkatachalam .. *Appellant**

v.

Bhamidipalli Saramma .. *Respondent.*

Hindu Law—Widow succeeding to husband's estate—Policy of insurance assigned in favour of widow—Limited or absolute estate—Premia on the policy of insurance paid out of the provident fund account of the husband—If amount payable under the insurance becomes part of provident fund.

Madras Local Boards Act (XIV of 1920)*—Provident Fund Rules, rule* 10*—Provident Funds Act (XIX of* 1925)*—Scope.*

The amount paid under a policy of insurance cannot be viewed as an increment accruing on the subscription to a provident fund of the insured despite the fact that the premia towards the policy was paid out of the provident fund account of the insured.

Where a Hindu widow succeeds to the estate of her husband, which consisted of a policy of insurance, assigned in her favour, she gets only a limited estate and the fact that the premia on the policy was paid out of the provident fund account of the husband, for which she was the nominee, cannot make the policy of insurance part of the provident fund amount so as to give her an absolute estate in the same.

Appeal against the decree of the Court of the Subordinate Judge of Amalapuram in A. S. No. 17 of 1948, preferred against the decree of the Court of the District Munsiff of Amalapuram in O. S. No. 210 of 1946.

M. S. Ramachandra Rao and *M. Krishna Rao* for Appellant.

D. Narasaraju for Respondent.

* S. A. No. 17 of 1949. 3rd November, 1952.

The Court delivered the following

JUDGMENT.—The plaintiff-respondent in second appeal is the mother of the late Venkatanarayana who died without issue on 21st November, 1937. Subhadramma was the widow of Venkatanarayana. On his death, she succeeded to his separate properties which consisted of (1) the amount payable under an insurance policy which Venkatanarayana had taken out, and (2) the amount lying to the credit of Venkatanarayana in his provident fund account. Subhadramma acquired two items of immoveable properties. The finding of the lower appellate Court was that item 1 of the two items shown in the schedule to the plaint was acquired by Subhadramma with the money she got from the insurance company and that item 2 was purchased with the monies drawn from the provident fund. Before Subhadramma died she executed the will under which the defendants-appellants in the second appeal claimed the properties. On the death of Subhadramma Venkatanarayana's mother as the reversioner to the estate of Venkatanarayana sued the defendants for recovery of possession of these properties. Both Courts held that the will was a genuine document. But the learned District Munsiff dismissed the plaintiff's claim holding that the two items of properties should be treated as the absolute properties of Subhadramma. On appeal, the learned Subordinate Judge held that, while the amount in the provident fund of the late Venkatanarayana had become the absolute property of Subhadramma when it came to her, she had only a widow's estate in the amount paid under the policy of insurance. Since it was with that amount that item 1 had been purchased, the learned Subordinate Judge held that the plaintiff was entitled to recover possession of item 1 as reversioner to the estate of the late Venkatanarayana after the death of Subhadramma. The defendants preferred the second appeal.

The only question for determination in this second appeal is whether the learned Subordinate Judge was right in holding that the amount paid under the insurance policy had not become the absolute property of Subhadramma which she could dispose of by her will.

Venkatanarayana was in the service of the District Board as a school teacher. He contributed to the provident fund. He took out a policy No. 24706 in the Lakshmi Insurance Co. It was common ground that contributions to their policy were made out of the amounts lying to the credit of Venkatanarayana in his provident fund. Venkatanarayana assigned this policy to the President, District Board, East Godavari :

> "as security for payment of all sums which under the Local Board's Provident Fund Rules, I may hereafter become liable to pay that fund." Ex. B (1) (a).

On the death of Venkatanarayana, the President of the District Board assigned the policy to Venkatanarayana's heir and widow Subhadramma under Ex. B-1 (b) which ran :

> "I, President, District Board, Rajahmundry, the assignee of the within policy, hereby assign all the benefits of the within policy to Bhammidipalli Subhadrammagaru . . . ."

Rule 10 (1) of the Provident Fund Rules framed by the Government under section 71 (g) and section 199 (2) (a) of the Madras Local Boards Act, 1920, ran :

> "At the request in writing of any subscriber, and with the consent of the District Board, any portion or whole of subscriptions with interest thereon may be invested by the District Board in a policy of life assurance in such office and for such amount and on such terms as may be mutually agree upon in writing between such subscriber and the District Board."

It was under this rule that the premia for the policy taken out by Venkatanarayana were paid out of the amount to his credit in his provident fund. Clause 2 of rule 10 ran :

> "Such policy so arranged shall be effected in the name of the subscriber, who shall assign the same in favour of the President, District Board, it shall be held and unless re-assigned over as provided for in clause (c) or clause (d) of the proviso, shall be realised by the District Board and the net proceed on realisation shall be credited to the account of each subscriber."

Clause (*c*) of the proviso did not apply, it provided for the contingency of retirement of the subscriber from service; Venkatanarayana died while still in service. Clause (*d*) of the proviso to rule 10 ran:—

"On the death of a subscriber while in service, the policy effected on his life shall be re-assigned to the nominee appointed by him under rule 5 or to all the nominees appointed by him under that rule jointly specifying the shares to which each of the nominees is entitled."

It was common ground that Subhadramma was the nominee. It was under clause (*d*) of the proviso to rule 10 that the President, District Board, executed Ex. B-1 (*b*) assigning the policy and the benefits accruing thereunder to Subhadramma.

The real question is, did the money payable under the policy become part of the provident fund of Venkatanarayana? If that question is to be answered in the affirmative, Subhadramma as the nominee would be absolutely entitled to all the amounts that had been credited to the provident fund of Venkatanarayana. If however the question is answered in the negative, the amount collected under the policy of insurance will have to be treated as an item of the estate of the late Venkatanarayana distinct from the amount which lay to his credit in his provident fund, and the nomination under the Rules of the Provident Fund would not govern a devolution of interest in this part of the estate of Venkatanarayana, that is, the amount paid under the policy of insurance.

Sub-clause (2) of rule 10 provides for the realisation of the amount payable under the policy of insurance by the assignee, that is, by the President, District Board and for that amount being credited to the provident fund of the subscriber, that is, Venkatanarayana. The amount payable under the insurance policy was not collected in fact by the President of the District Board, nor was it credited to the provident fund account of Venkatanarayana. It should be remembered that sub-clause (2) of rule 10 is also subject to the proviso. Cl. (1) (*d*) of the proviso specifically provided for the contingency of the subscriber dying in service. In that contingency which happened when Venkatanarayana died, all that the President of the District Board could have done was to reassign the policy to the nominee of Venkatanarayana who would be entitled to get all the amounts that stood to the credit of Venkatanarayana in his provident fund account. I am unable to accept the contention, that the effect of the reassignment under clause (*d*) of the proviso to rule 10 was to make the amount realised under the insurance policy by the assignee Subhadramma part of the provident fund amount of Venkatanarayana. As I have already pointed out, in fact, at no time was the amount realised under the insurance policy credited to the provident fund account of Venkatanarayana. The mere fact that Subhadramma was the nominee entitled to the whole of the amount that stood to the credit of Venkatanarayana in his provident fund account, is not enough to convert the money realised by Subhadramma on a reassignment of the policy under the provisions of clause (*d*) of the proviso to rule 10 as part of the provident fund amount, it was certainly money that belonged to the estate of Venkatanarayana which Subhadramma was entitled to inherit but she succeeded only to a widow's estate therein and no more. The definition of " Provident Fund " in the Provident Funds Act, 1925, clause 2 (*e*) cannot help the defendants. The amount paid under the insurance policy cannot be viewed as " increment accruing on such subscriptions " within the meaning of clause 2 (*e*) despite the fact that the premia towards that policy were paid out of the provident fund of Venkatanarayana.

The view taken by the lower appellate Court that the plaintiff was entitled to succeed to item 1 after the death of Subhadramma is correct.

The second appeal fails and is dismissed with costs.

R.M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Avaran Kutti (minor) by next friend Kalathingal Ithalukki .. *Appellant**

v.

Cheriyakkan and others .. *Respondents.*

Limitation Act (IX of 1908), Articles 36 and 116—Suit against mortgagees for damages for having cut and removed trees on mortgaged property—Limitation—Suit if one in tort or contract.

A suit by a mortgagor against the mortgagees for recovery of amounts towards damages for having cut trees standing on the mortgaged property in their possession is not *ex contractu* but *ex delicto* and so is governed by Article 36 and not Article 116 of the Limitation Act. If such a suit is filed after two years from the act of tort it will be barred.

A condition in the kaichit that the mortgagees will take proper care of the trees will not cover a case of vandalism on their part and will not convert the duty not to cut away the trees arising independently of the contract, into a contractual liability.

Appeals against the decrees of the District Court of South Malabar in A. S. Nos. 501, 504 and 509 of 1947, respectively, preferred against the decrees of the Court of the District Munsiff of Parappanangudi in O. S. Nos. 640, 639 and 638 of 1945, respectively.

N. R. Sesha Aiyar for Appellant.

N. Sundara Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—These appeals raise a question of limitation. One Avarankutti by next friend Ithalukki filed three suits, O. S. Nos. 638, 639 and 640 of 1945 on the file of the Court of the District Munsiff of Parappanangudi against the defendants-mortgagees for recovery of amounts towards damages for having cut the trees in the mortgaged property in their possession and for removing the same. The suits were filed more than two years after the alleged cutting of the trees. The learned District Munsiff, and on appeal, the learned District Judge, held that the suits were barred by limitation under Article 36 of the Limitation Act. The plaintiff preferred the aforesaid three appeals.

Learned counsel for the appellant contended that the learned Judge was wrong in holding that the suits are governed by Article 36 of the Limitation Act. He would say that the appropriate article is Article 116 of the Act. Before proceeding to consider the facts of the instant case it may be convenient at this stage to consider the scope of Articles 36 and 116 of the Limitation Act.

Article 36 :

For compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein specially provided for.	Two years.	When the malfeasance, misfeasance or non-feasance takes place.

Article 116 :

For compensation for the breach of a contract in writing registered.	Six years.	When the period of limitation would begin to run against a suit brought on a similar contract not registered.

Article 36 applies to actions *ex delicto*, whereas Article 116 applies to actions *ex contractu*. If an action is founded on tort of one or other of the three kinds mentioned in Article 36, the suit for damages in respect thereof should be filed within two years when the wrong was committed. The words "malfeasance," "misfeasance" or "non-feasance" are well-known species of torts. In Rustomji's Law of Limitation at page 657 they are described as follows :

"These torts are often considered as of three kinds, *viz.*, non-feasance, or the omission of some act which a man is by law bound to do; misfeasance, being the improper performance of some lawful act, or malfeasance, being the commission of some act which is in itself unlawful."

* S. A. Nos. 503, 504 and 505 of 1949. 11th December, 1952.

These three tortious acts to come within the provisions of Article 36 should be independent of a contract. The question therefore is, what is the meaning of the words "independent of contract" in Article 36. The meaning of the words has been felicitously brought out by Greer, L.J., in *Jervis* v. *Moy, Davies, Smith, Vandervell and Co.*[1]. There the plaintiff sued the defendants, a firm of stock-brokers, claiming damages for breach of his instructions as to the purchase of certain shares whereby he sustained a loss. For the purpose of ascertaining the scale of fees it was necessary to decide whether the action was founded on contract or on tort. The Court of Appeal held that the action was founded on contract. At page 405, Greer, L.J., said :

> "The distinction in the modern view, for this purpose, between contract and tort may be put thus. Where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract it is tort, and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract."

The question, therefore, is whether the present suits are based on breach of duty arising independent of the contract, or whether they are suits for recovery of damages for breach of a term of the contract. In the former case, Article 36 would apply ; in the latter case Article 116 would govern the case.

The three plaints practically contain similar allegations. The allegations in the plaint in O. S. No. 640 of 1945 may be taken as a sample. In paragraph 4 it is stated :

> "Without the knowledge and consent of the plaintiff and also contrary to the terms of the kaichit, defendants 1 and 2 have cut and removed one mango tree, of the value of about Rs. 10, 28 cashewnut trees of the value of Rs. 3 each, 19 puduvanni trees of the value of Rs. 2 each and some other Kuzhikkoors from and out of the Kuzhikkoors standing on the schedule paramba under the kaichit described in paragraph 3 (2) above and belonging to the plaintiff . . . ."

Paragraph 6 reads :

> "As it has been expressly stipulated in the kaichit and also under the assignment deed set out in paragraph 3 above, that if the Kuzhikkoors belonging to the jenmi are damaged, the tenant is liable for such amount of damages, defendants 1 and 2 are bound to pay the amount of damages in respect of the Kuzhikkoors, and the plaintiff is entitled to get the same and he should also get the same. Hence this suit."

Paragraph 8 says :

> "The cutting of the Kuzhikkoors set out above by defendants 1 and 2 without the knowledge and consent of the plaintiff is an offence under the criminal law and is also punishable. This suit is not therefore maintainable in the Court of Small Causes and it is filed in this Court."

The kaichit in the above suit, Ex. D-6 contains similar allegations as the kaichits in the other suits. The material portion of Ex. D-6 reads :

> "In the event of the Kuzhikkoors belonging to the Kammal are destroyed or caused to be ruined on account of *want of proper care on our part*, the losses incurred in connection therewith, and the arrears of pattam and interest thereon, etc., are always liable to our mortgage right herein."

Under the aforesaid condition in the kaichit the defendants are under an obligation to take proper care of the trees. It was obviously not intended to cover a case of vandalism on the part of the mortgagees. The duty not to cut away the trees arises independently of the contract. It is not an obligation undertaken under the contract. Therefore, Article 36 directly applies to the present suits filed by the appellant for the recovery of damages from the defendants on the ground that they had cut and removed the trees put in their possession. The Courts below are therefore right in holding that the action is not *ex contractu* but *ex delicto* and, therefore, having been filed more than two years after the cause of action accrued, would be barred by limitation. The appeals fail and are dismissed with costs in S. A. No. 503 of 1949. No leave.

K.S. — *Appeals dismissed.*

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1. (1936) 1 K.B. 399.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Thirunageswaram Janopakara Saswatha Nidhi, Ltd., by its voluntary liquidator, K. N. Rajaratna Chettiar ... *Appellant**

v.

P. K. Doraiswami Mudaliar and another ... *Respondents.*

Companies Act (VII of 1913), *section* 229—*Effect—Friendly society—Voluntary liquidation—Amount due from fund to a subscriber maturing by payment of all the instalments due by subscriber—If can be set off against debt due by the subscriber on a mortgage.*

Where a friendly society has gone into voluntary liquidation the amount due from the fund and which has become payable long ago as all the instalments had been paid by the subscriber can be set off against the amount due from the subscriber to the fund on a mortgage. In view of section 229 of the Indian Companies Act which attracts the provision in section 46 of the Provincial Insolvency Act, the mortgagor has got the right to claim a set off of the amount due to him from the fund in respect of the matured claim as against the amount due from him under the mortgage.

Mylapore Permanent Fund, Ltd. v. *Arogiaswami Pillai,* (1917) 32 M.L.J. 528 : I.L.R. 40 Mad. 1004, distinguished and relied on.

Appeal against the decree of the Court of the Subordinate Judge, Chingleput, in A. S. No. 90 of 1948, preferred against the decree of the District Munsiff Court, Poonamallee, in O. S. No. 630 of 1945.

S. V. Rama Aiyangar and *K. V. Rajagopalan* for Appellant.

M. S. Venkatarama Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The amount due from the fund became payable long ago as all the instalments have been paid by the mortgagor. If, as pointed out in the *Mylapore Permanent Fund, Ltd.* v. *Arogiaswami Pillai*[1], after the calls have matured at the end of the 84th month, the balance becomes due and there is a statement of account, there is nothing to prevent the adjustment of the two claims at the end of the 84th month. In that case what happened was that the period of maturity had not arrived and therefore the adjustment could not be availed of. In view of section 229 of the Indian Companies Act which attracts the provision in section 46 of the Provincial Insolvency Act, the mortgagor has got the right to claim a set off of the amount due to him from the fund in respect of the matured claim as against the amount due from him under the mortgage. This is not like a case of a contributory in a limited company who, as a creditor of the company, cannot, in winding up, set off his debt against a call made on him by the liquidator, until the creditors have been paid in full. There is no question of the mortgagor being a contributory. The amount due to him became payable under a contract with the fund by which he had to keep up the payment of the instalments for a period of 84 months at the end of which the fund in its turn promised to pay to the person who entered into the contract not only the amount he paid but also some bonus and this amount undoubtedly became payable at the end of the 84th month. That amount is a debt due to the mortgagor from the fund. The fund is now claiming an amount due to it under a mortgage. These two amounts can be set off and I see no objection for adjusting the one against the other as pointed out by the decision in the *Mylapore Permanent Fund, Ltd.* v. *Arogiaswami Pillai*[1]. The view taken therefore by the lower Court is correct and the second appeal is dismissed with costs.

Leave to appeal is refused.

K.S. *Appeal dismissed.*

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* Second Appeal No. 703 of 1949. 9th December, 1952.

1. (1917) 32 M.L.J. 528 : I.L.R. 40 Mad. 1004 at 1006.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE RAJAGOPALAN.

D. Chakravarthi Iyengar .. *Appellant**

v.

Gangadara Mudaliar (died) and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 33, rule 10—Suit in forma pauperis—Compromise decree—Court-fee due to Government—First charge—Sale by Government through Court—Sale subject to encumbrances—Prior encumbrancer—If should be given opportunity to redeem the first charge.

Under the Code, the charge in favour of the Government for the court-fee payable in pauper suits would be a first charge, whether mentioned in the decree or not.

If the Government sells any property through Court for realising the court-fee the sale will only be subject to the encumbrances and not free from encumbrances.

Quaere.—Whether a sale under rule 14 of Order 33, Civil Procedure Code, introduced by the Madras High Court Amendment of 1942 enabling the Government to realise the unpaid court-fee in pauper suits by bringing the property to sale as if it were an arrear of land revenue, would attract also all the provisions of the Revenue Recovery Act including the section which annuls the prior encumbrances?

An encumbrancer can, if he is so minded, redeem the first charge created by the statute in favour of the Government. But he cannot be allowed to redeem the auction-purchaser after the sale has taken place in pursuance of the first charge.

Appeal against the decree of the Court of the District Judge, Chingleput, dated 19th April, 1948, in A. S. No. 183 of 1947, preferred against the decree of the District Munsiff's Court, Conjeevaram, in O. S. No. 445 of 1945.

R. Gopalaswami Aiyangar for Appellant.

Messrs. Subrahmanyam and Rajagopal for Respondents.

The Judgment of the Court was delivered by

Satyanarayana Rao, J.—The plaintiff is the appellant in this second appeal. The only question that falls to be decided in this second appeal is, whether the title of the fourth defendant who claims the suit properties should prevail over the title of the plaintiff. The first and second defendants in the action are brothers. The second defendant mortgaged his undivided half share in the family properties to his brother, the first defendant. As the second defendant did not pay the mortgage amount, the first defendant as plaintiff instituted a suit *in forma pauperis* (O.S. No. 361 of 1948) on the file of the Chingleput District Munsiff's Court for enforcing the mortgage. There was a compromise decree in that suit on 18th March, 1939. Under the compromise the parties agreed to a decree for Rs. 1,545 with subsequent interest to be paid by the first defendant to the plaintiff. As the suit was instituted *in forma pauperis*, the compromise provided also for the payment of the court-fee due to the Government. Under clause (6) of the decree, it was provided that :

" the plaintiff do pay Rs. 41-3-9 and the defendant do pay Rs. 123-11-3 to the Government on account of court-fee due to them and that the respective shares of the parties in the suit properties do stand a charge for the court-fee due to the Government."

The suit properties are described in two schedules which were attached to the plaint and also to the decree. The suit property was, according to schedules, the undivided half share of the defendant in the survey numbers whose particulars were given in the two schedules. Under this decree, however, the mortgagee's right to bring the properties to sale was restricted to a few items which are described in detail in Schedule IV attached to the decree. The plaintiff in that action, *i.e.*, the present first defendant paid the court-fee due to the Government. But the present second defendant who was the sole defendant in that action did not pay his share of Rs. 123-11-3. The Government, therefore, brought to sale the interest of the present second defendant in 3 items of property which constituted items 4, 6

* S. A. No. 2038 of 1948. 6th November, 1952.

and 7 of the Schedule II attached to the decree in O. S. No. 361 of 1938. The items sold were Survey No. 238/2 (17 cents), Survey No. 213/2 (36 cents), Survey No. 214/1 (35 cents), in all 88 cents and the fourth defendant in the present suit purchased them on 22nd March, 1941. The sale by the Government was through Court and was not a revenue sale. The mortgagee, *i.e.*, the present first defendant, executed his decree for sale and the hypotheca which was permitted to be sold under the compromise decree was purchased by the decree-holder himself on the 26th November, 1941. The present first defendant who was the decree-holder in his turn conveyed the property so purchased by him to the present plaintiff under Ex. P-6 dated 10th May, 1943. The first defendant who owned the other undivided half in all the properties in his turn sold away his interest in the properties on 6th October, 1939, under Ex. D-2 to the third defendant. The plaintiff who became the ultimate purchaser of the interest of the second defendant in the items which were directed to be sold under the compromise decree instituted the present suit for partition and separate possession of the properties impleading as parties to the action the two brothers the first and the second defendants, the mortgagee and the mortgagor and the third defendant who purchased the interest of the first defendant and the fourth defendant who purchased the three items in the sale brought about by the Government to recover the court-fee.

The plaintiff obtained a decree for partition and separate possession of all the items except the three items which the fourth defendant purchased in the sale by the Government. The Courts below held that the title of the fourth defendant to these three items should prevail over that of the plaintiff.

The correctness of this decision was vigorously canvassed before us by Mr. Gopalaswami Aiyangar, the learned advocate for the appellant, on various grounds. In the first place, he raised the question that in view of the language of the decree in O. S. No. 361 of 1938 the charge in favour of the Government has no priority because the decree did not expressly state so. It is no doubt true that the decree is silent regarding the priority of the charge in favour of the Government. But under the Code, the charge in favour of the Government is declared to be the first charge on the subject-matter of the suit. We must, therefore, take it that notwithstanding this omission in the decree, the charge in favour of Government for the court-fee payable by the second defendant would undoubtedly be a first charge and would have a priority over the mortgage in favour of the first defendant. The language of the decree which refers to the respective shares of the parties in the suit properties and creates a charge for the amount apportioned between the two brothers, no doubt creates some little difficulty because in the suit property which is only the undivided half share of the second defendant the present first defendant who was the plaintiff in the action had no share or interest. He was the owner of the other undivided half which was not the subject-matter of the suit. It was contended on behalf of the respondent that we should interpret the word "shares" as really meaning the "interest", of the respective parties in the hypotheca, *i.e.*, the interest of the plaintiff as mortgagee and the interest of the defendant as mortgagor. We think that it would be inapt to describe the intention of the mortgagee in the properties as a share in the property and, therefore, it is difficult to accept the contention urged on behalf of the respondent. The intention under the decree which is a compromise decree is clearly to create a charge on the undivided half share of the defendant in all the items of properties described in the two schedules and that charge, in view of the language of Order 33, rule 10, Civil Procedure Code, would undoubtedly have priority over the mortgage in favour of the present first defendant.

The next question is, whether the sale was free of encumbrance or could only be subject to the mortgage in favour of the present first defendant. The sale in the present case was through Court and was not a revenue sale. In 1942 this Court amended Order 33 by introducing rule 14 enabling the Government to realise the unpaid court-fee in pauper suits by bringing the property to sale as if it were an arrear of land revenue. If there was of course a revenue sale, the further question

whether, by virtue of the language that the liability should be enforced as if it were an arrear of land revenue, it would attract also all the provisions of the Revenue Recovery Act, including the section which annul the prior encumbrances may have to be considered. But that question does not arise in this case, as the sale was in 1941 before the amendment was introduced in 1942. The sale must, therefore, be taken to be subject to the encumbrances and not free from encumbrances. This position was not disputed by the respondent.

The only other question is as between the two purchasers, whether the prior purchase by the fourth defendant should prevail over that of the plaintiff's predecessor in title. On the principle of the Full Bench decision in *Nagendra Chettiar* v. *Lakshmi-amma*[1], the title of the fourth defendant should undoubtedly prevail. But the learned Judges in that case stated that the principle would apply, only if there is no complication of *lis pendens*. Taking advantage of this observation, an argument was founded in this case, that the sale in favour of the fourth defendant was subject to *lis pendens*, as the mortgage decree in favour of the present first defendant in the earlier suit was not satisfied by that date. This contention, however, cannot be accepted, as there is no question of any *lis pendens* in this case as the rights of both parties flow from sales which have been brought about under the provisions of the compromise decree. There was no independent proceeding which was initiated by the plaintiff's predecessor during the pendency of which the sale in favour of the fourth defendant took place. When the properties were brought to sale in pursuance of the same decree, it is difficult to apply any principle of *lis pendens* to the earlier sale.

It was then claimed by Mr. Gopalaswami Aiyangar, the learned advocate for the appellant, that his client should at least be given an opportunity to redeem the first charge and recover possession of the property for, according to him no such opportunity was ever given to him in the proceedings for the sale of the properties by the Government. This argument also cannot be accepted The necessity for the charge was the pauperism of plaintiff's predecessor-in-title, the first defendant, who was mainly liable to pay the court-fee to the Government. But by compromise there was an apportionment of that liability. It is the compromise decree that created the charge on the undivided half share of the second defendant in all items of the property covered by the two schedules attached to the decree for the portion of the liability which was thrown on the second defendant under the said compromise. The plaintiff, the present first defendant, did not provide for himself any right of redemption and he was aware throughout that under the decree and in view of the provisions of the Civil Procedure Code contained in Order 33, rules 10 and 12 in enforcement of the charge in favour of the Government, the property of the second defendant could be sold in default of payment by him and it was up to him to have claimed the right of redemption if he was so minded and not to wait until after the sale had taken place and then claim it in the present action. He had ample opportunity from the beginning to pay the Government the sum of Rs. 123 and odd for which a charge was created and he never availed himself of that opportunity, but allowed the properties to be sold in pursuance of this very decree. He cannot, therefore, be given a further opportunity to redeem the fourth defendant, the auction purchaser, in pursuance of the charge decree in favour of the Government.

For all these reasons, we think that the decision of the lower Court is correct and the second appeal is dismissed with costs.

R.M. *Appeal dismissed.*

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1. (1933) 65 M.L.J. 108 : I.L.R. 56 Mad. 843 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AYYAR.

B. N. Viswanathan and another .. *Appellants**

v.

Tiffin's Barytes, Asbestos and Paints, Ltd., by their Agents and Secretaries, The Indian Trades and Investments, Ltd., and others .. *Respondents.*

Company Law—General body of a company—Power to elect directors—Inherent powers—Delegation to the board of directors—Validity and scope—Delegation when lapses—Shareholder—Individual wrong—If could be agitated by other shareholders—Voting by proxy—Not a common law right—' By proxy or by attorney '—If synonymous—Restriction on the right of voting—Validity—Meeting of a company—Power of chairman to adjourn meeting—Limits—Who can complain about wrongful adjournment.

The General Body of a company has inherent powers to take all steps to ensure its proper working and that, of course, includes the power to appoint directors. It can delegate this power to appoint directors to the board of directors and such delegation will be binding upon it ; but if there is no legally constituted board which could function or if there is a board, but that is unable or unwilling to act, then the authority delegated to the board lapses and the members can exercise the right inherent in them of appointing directors.

Isle of Wight Railway Company v. *Thourin*, (1883) 25 Ch.D. 320 ; *Baron* v. *Potter* : *Potter* v. *Berry*, (1914) 1 Ch. 895 ; *Foster* v. *Foster*, (1916) 1 Ch. 532 and *Munster* v. *Cammell Company*, (1882) 21 Ch.D. 183, followed.

The articles of a company may be such as to amount to a delegation to the directors of the power of appointing additional directors as to preclude the company in a general meeting from appointing such directors.

Blair Open Hearth Furnace Co., Ltd. v. *Reigart*, (1913) 108 L.T. 665, doubted. *Worcester Corsetry* v. *Witting*, (1936) Ch.D. 640, *Ram Kissondoss* v. *Satyacharan*, A.I.R. 1950 P.C. 81 : L.R. 77 I.A. 128 (P.C.), followed.

The power of the General Body of a company at its meeting to increase or reduce the number of directors as provided in Regulation 83 in Table ' A ' of Schedule I of the Companies Act, 1913, must be read as part of the articles of the company, unless there is anything to the contrary expressed in the articles.

Where the shareholders of a company were not as such parties to a proceeding any order passed therein will not bind them.

Where a wrong complained of is individual to a shareholder he is the person who is entitled to maintain an action and not other shareholders on behalf of themselves and others.

Pulbrook v. *Richmond Consolidated Mining Company*, (1878) 9 Ch.D. 610, relied on.

Where an article of a company makes any restrictive provision regarding the right to vote of the shareholders, such an article, if opposed to section 79 (1) of the Companies Act, is illegal.

The relationship between a shareholder and his proxy is that of a principal and an agent. But where the articles of a company authorise voting ' by proxy or by attorney ' they cannot be held to be synonymous. Proxies which could not be used at a meeting for want of advance notice cannot be used at an adjourned meeting as the adjourned meeting is only a continuation of the original meeting.

It is well settled that the right of a member of a company to vote by proxy is not a common law right and that it is determined solely by the company's articles which constitute a contract between him and the company. *Harben* v. *Phillips*, (1882) 23 Ch.D. 14 and *Maclaren* v. *Thompson*, (1917) 2 Ch. 41.

The Chairman at a meeting of a company can adjourn the meeting where he is so empowered by the articles of the company. A person who himself pressed for an adjournment of a meeting of a company cannot be heard to object to such adjournment later. *Burt* v. *The British Nation Life Assurance Association*, (1859) 45 E.R. 62.

Appeal against the judgment and decree of the Hon'ble Mr. Justice Balakrishna Aiyar dated 18th October, 1951 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 132 of 1951.

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* O. S. A. No. 56 of 1952. 16th October, 1952.

K. Rajah Aiyar, V. Seshadri and *K. S. Ramamurthi* for Appellants in O. S. A. No. 56 of 1952.

O. Radhakrishnan, G. Vasantha Pai, S. Mohan Kumaramangalam, and *V. Venkataraman* for Respondents in O. S. A. No. 56 of 1952.

G. Vasantha Pai and *O. Radhakrishnan* for Appellants in O. S. A. No. 66 of 1952.

K. Rajah Aiyar and *P. C. Parthasarathy Aiyangar* for Respondents in O. S. A. No. 66 of 1952.

The Judgment of the Court was delivered by

Venkatarama Aiyar, J.—The question that arises for determination in this appeal is the validity of the election of the respondents as directors of a company called "Tiffin's Barytes, Asbestos and Paints, Limited", at a meeting of the general body held on 26th Feruary, 1951. The facts are not in dispute. The company was incorporated in 1945 and its first directors were five persons named in Article 49. One Veeramani was co-opted as a director and the strength of the directorate was thus raised to six. At the first annual meeting which was held on 24th June, 1946, all the directors retired as provided in Article 53 and were re-elected. Before the next general body meeting which was held on 27th August, 1947, three of the directors had resigned and a fourth resigned at that meeting with the result that the strength of the directorate became reduced to two. The next general body meeting was held on 30th December, 1948 and thereafter no annual meeting was called. It was in this state of affairs that one of the shareholders Mrs. Ananthalakshmi Ammal filed Application No. 3898 of 1950 under section 79 (3) of the Indian Companies Act for a direction that a general body meeting might be convened by a Commissioner and that an independent chairman might be appointed to preside over the meeting. On 27th November, 1950, Krishnaswami Nayudu, J., passed an order that the annual general body meeting be held on 28th January, 1951, in accordance with the articles of association of the company, Ex. P-1. He, however, refused the prayer for the appointment of an independent chairman to preside over the meeting and against this portion of the order Mrs. Ananthalakshmi Ammal preferred O. S. A. No. 118 of 1950. By the order which was passed in the said appeal on 11th January, 1951, an advocate Mr. Sanjeevi Naidu was appointed as chairman of the meeting with power to scrutinise the proxies. The company then took out an application, Application No. 139 of 1951, for postponing the meeting which had been fixed for 28th January, 1951, to a later date on the ground that the accounts were not ready. On 16th January, 1951, Krishnaswami Nayudu, J., passed an order directing the meeting to be held on 18th February, 1951. On that date the Commissioner proceeded to the premises of the company for the purpose of holding the meeting. The 1st plaintiff moved that the meeting be adjourned. The register of members, the share transfer books of the company and the proxies were in the possession of Veeramani who had been functioning as a director and he refused to hand them over to the chairman with the result that it became impossible for the chairman to proceed with the meeting. He accordingly adjourned it to 26th February, 1951, and applied to the Court for directions in the matter. On 22nd February, 1951, Mack, J., passed an order directing the company to produce all the books at the meeting on 26th February, 1951. On that date the books of the company were produced; the meeting was actually held and at that meeting defendants 2 to 7 were elected as directors. The plaintiffs then filed Application No. 1135 of 1951 for setting aside the election on various grounds. On 27th March, 1951, Krishnaswami Nayudu, J., dismissed this application and referred the petitioners to a suit. The present suit has accordingly been filed by the plaintiffs who are two shareholders of the company on behalf of themselves and other shareholders of the company for a declaration that the election of defendants 2 to 7 as directors at the meeting held on 26th February, 1951, was void on the several grounds set out in the plaint. Balakrishna Ayyar, J., who heard the suit disagreed with the contentions put forward on behalf

of the plaintiffs and dismissed the suit with costs. Against that decision the plaintiffs have preferred this appeal.

Several contentions were urged by Mr. K. Rajah Ayyar in support of this appeal. It was firstly argued that the power which the general body has under the articles of the company is only to appoint directors in place of those who retire at the annual meeting; only one director actually retired at the meeting held on 26th February, 1951, and that therefore the election of six directors was beyond the competence of the meeting; that there was no proper notice that six directors were to be elected at the meeting and that there was not even a resolution to that effect. Hence, it is urged, the election of defendants 2 to 7 is void. The complaint that there was not clear notice to the members that six directors were going to be elected is without substance. Ex. P.-6 is the notice of the meeting to be held on 18th February, 1951 and item 2 therein is as follows:

"To elect directors. Mr. A. S. Padmanabhan retires at the meeting."

It was argued that read as a whole Ex. P.-6 would mean that a director is to be appointed in place of A. S. Padmanabhan who was to retire and that it would not convey the meaning that six directors were to be elected. We are unable to agree with this contention. The retirement of A. S. Padmanabhan is stated as a fact and the notice does not state as is usual "to elect a director in place of Padmanabhan who retires." The business to be transacted under item No. 2 is generally to elect directors and not to elect a director. This objection is, therefore, overruled.

A more substantial objection to the validity of the election of the defendants is that the power of the general body is limited to electing a director in the place of one who retires at the annual meeting under Article 53, that the power to appoint other directors vests under Article 58 exclusively with the Board of Directors and that in consequence the general body could appoint only one director in the place of A. S. Padmanabhan who retired at the meeting. The Articles of the company material for the purpose of this contention are 47, 53 and 58. They are as follows:

"*Article* 47.—'The number of directors inclusive of the Director (Ex-Officio) shall not exceed 10 nor be less than 3. The quorum for a directors' meeting is 3. The quorum of a committee meeting shall be determined by the directors'.

Article 53.—'The directors nominated by the Agents and secretaries shall be Ex-Officio directors of the company and shall not be subject to retirement by rotation nor shall the clause relating to directors' share qualifications be applicable to him. The first directors of the company (except the Ex-Officio directors) shall hold office till the annual general meeting in 1946 when the whole of the directors shall retire from office and in every subsequent year one-third of the directors for the time being or if their number is not three or a multiple of three, then the number nearest to one-third shall retire from office. The directors to retire in every year shall be those who have been longest in office since their last election but as between persons who became directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot. A retiring director shall be eligible for re-election'.

Article 58.—'If there be any vacancy in the directorate or if it is found necessary to increase the directorate so as not to exceed the maximum number the board may from time to time fill such vacancies by co-opting others as directors'."

On these articles it is argued for the appellants that the power to appoint directors had been delegated to the board of directors under article 58 subject only to article 53 and that the exercise of that power by the general body was in contravention of the articles and was therefore void. Reliance is placed on the decision in *Blair Open Hearth Furnace Company, Ltd.* v. *Reigart*[1]. In that case, at an extraordinary meeting of the company, resolutions were passed increasing the number of directors and electing two additional directors. The company filed a suit for a declaration that under the articles of the association the general body had no power to appoint the two additional directors, and that the election of the defendants was, therefore, illegal. Article 82 of the Company's articles

1. (1913) 108 L.T. 665.

provided that the number of directors shall not be less than two or more than seven. Article 85 provided that at the ordinary meeting every year one director shall retire and the meeting at which any director shall retire shall fill up hi place. Article 93 provided

> "Any casual vacancy in the office of director may at all times be filled up by the board by the appointment of a director. The directors may from time to time appoint additional directors but so that the total number of directors shall not exceed the prescribed maximum."

On a construction of these articles it was held that the company had delegated its power of appointment of directors to the board and that it could not itself exercise it. The ground for the decision is thus stated by Eve, J. :

> "I think the express power contained in article 93 excludes the possibility of implying a concurrent power under Article 82 and in my opinion the company has by its constitution delegated to those of its members who for the moment constitute the board the sole right of appointing additional directors and that is so whether such additional directors are necessary to make up the number of the maximum number fixed by the original article or to any other number which the company may from time to time determine on as the maximum. As a matter of construction, therefore, I think that the plaintiffs are right and that it was not within the power of the company to do that which it purports to have done at the meeting of the 14th March and on this ground alone the relief sought on the motion must in my opinion, be granted."

Articles 82, 85 and 93 which were construed in *Blair Open Hearth Furnace Company, Ltd.* v. *Reigart*[1], are substantially identical with Articles 47, 53, and 58 in the present case and the appellants accordingly argued that the reasoning and the decision in *Blair Open Hearth Furnace Company, Ltd.* v. *Reigart*[1], would directly apply to the instant case.

Now it is doubtful how far the decision in *Blair Open Hearth Furnace Company, Ltd.* v. *Reigart*[1], can still be considered to be good law. Its correctness was doubted in *Worcester Corsetry* v. *Witting*[2], in which the articles were similar to those in *Blair Open Hearth Furnace Company, Ltd.* v. *Reigart*[1], with the difference that the company had also adopted Articles 83 and 85 in table A in the Companies Act of 1908.

Article 83 runs as follows :

> "The company may from time to time in general meeting increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office."

Article 85 provided that

> "The directors shall have power at any time, and from time to time, to appoint a person as an additional director who shall retire from office at the next following ordinary general meeting, but shall be eligible for election by the company at that meeting as an additional director."

On these articles the question arose whether the appointment of two more directors at an extraordinary meeting of the general body was *ultra vires* of the powers of the general body. Farwell, J., held, following the decision in *Blair Open Hearth Furnace Company, Ltd.* v. *Reigart*[1], that the general body had no power to appoint the additional directors. On appeal this decision was reversed on the ground that in *Blair Open Hearth Furnace Company, Ltd.*, v. *Reigart*[1], there was nothing in the articles corresponding to Article 83 in table A and that that article conferred on the general body a general power to elect additional directors. In this view it became unnecessary to pronounce on the correctness of the decision in *Blair Open Hearth Furnace Company Ltd.* v. *Reigart*[1]. But Lord Hanworth, M.R., remarked

> "I am bound to say that I find some little difficulty in seeing that the power must be either in the one or in the other ; but be that as it may, we have to interpret the articles of association as we find them."

Lawrence, L.J., observed :

> "This Court is not concerned upon the present occasion to say whether the construction put upon the articles in the *Blair case*[1], by Eve, J. was right or not ; we have here to see what is the true meaning of the articles of the plaintiff company".

1. (1913) 108 L.T. page 665.
2. (1936) Ch. 640.

In *Ram Kissendas* v. *Satya Charan*[1], the general body passed a resolution appointing seven new directors in addition to the existing four. The validity of this resolution was disputed in an action by the shareholders. Articles 109, 111 and 128 of the company were in substance similar to Articles 82 and 93 which were considered in *Blair case*[2]. There was also an additional Article No. 126 corresponding to Article 83 in Table A which had been adopted by the company in *Worcester Corsetry* v. *Witting*[3]. The Privy Council held on a construction of the articles that the election of new directors by the general body was valid. The decision in *Blair Open Hearth-Furnace Company, Ltd.* v. *Reigart*[2], does not appear to have been cited before the Board but in view of the fact that the articles in *Ram Kissendas* v. *Satya Charan*[1], are similar to those in *Worcester Corsetry* v. *Witting*[3] and that *Blair Open Hearth Furnace Company, Ltd.* v. *Reigart*[2], differed from both in not having anything corresponding to Article 83 of Table A in *Worcester Corsetry* v. *Witting*[3] or Article 126 in *Ram Kissendas* v. *Satya Charan*[1], it is not possible to hold that *Blair Open Hearth Furnace Company, Ltd.* v. *Reigart*[2] is opposed to the decision in *Ram Kissen Das* v. *Satya Charan*[1].

In Palmer's Company Precedents (16th Edn., page 573) it is stated that

"The articles may, however, be so expressed as to relegate the power of appointing new directors to the exclusion of a general meeting".

and the *Blair case*[2], is quoted as authority for this position with a note that the correctness of the decision had been doubted in *Worcester Corsetry* v. *Witting*[3]. In Buckley on Companies Act (12th Edn., page 885) the position is thus stated :—

"It is has been held that an article in similar form amounts (in the absence of an article corresponding to Article 94 ante) to such a delegation to the directors of the power of appointing additional directors as to preclude the company in general meeting from appointing such direcors".

The authority quoted again is the decision in *Blair Open Hearth Furnace Company, Ltd.*, v. *Reigart*[2], but the decision in *Worcester Corsetry* v. *Witting*[3], is noted against it. Article 94 referred to in the above quotation corresponds to Article 83 in Table A. The position therefore, is that the decision in *Blair Open Hearth Furnace Company, Ltd.* v. *Reigart*[2] is of doubtful authority though it has not been over-ruled.

In this case it has to be noted that the articles of the company provide that

"the regulations of Table A of schedule I of the Indian Companies Act of 1913 shall apply to this company except in so far as otherwise provided for hereunder."

Regulation 83 in Table A of schedule I runs as follows :—

"Subject to the provisions of sections 83-A and 83-B of the Indian Companies Act, 1913 the company may from time to time in general meeting increase or reduce the number of directors and may also determine in what rotation the increased or reduced number is to go out of office".

This regulation, must, therefore, be read as part of the articles of the company. In *Worcester Corsetry* v. *Witting*[3] it was the existence of this article which was held to distinguish it from the decision in *Blair open Hearth Furnace Company, Ltd.* v. *Reigart*[2] where there was no such article. In *Ram Kissendas* v. *Satya Charan*[1] also there was an Article 126 corresponding to regulation 83 and the power of the general body to elect additional directors was confirmed. The decisions in *Worcester Corsetry* v. *Witting*[3] and *Ram Kissendas* v. *Satya Charan*[1] rather than the decision in *Blair open Hearth Furnace Company, Ltd.* v. *Reigart*[2] will apply to the present case.

It was further argued by Mr. Vasantha Pai on behalf of the respondents that even if the power to appoint additional directors is exclusively vested in the board of directors under Regulation 58 the resolution of the general body appointing defendants 2 to 7 as directors should be upheld because there was at the time of the meeting no board of directors which could validly function under the article and the general body had inherent power, which it could then exercise, to appoint

1. (1949) L.R. 77 I.A. 128: A.I.R. 1950 P.C. 81 (P.C.).
2. (1913) 108 L.T. 665.
3. 1936 Ch. 640.

directors for enabling the company to function. In support of this contention he cited the decision in *Isle of Weight Railway Co.* v. *Tahourdin*[1], *Barron* v. *Potter, Potter* v. *Berry*[2], *Foster* v. *Foster*[3] and *Munster* v. *Cammell Company*[4]. *In Isle of Wight Railway Co.* v. *Tahourdin*[1] the shareholders of a company sent a requisition for the convening of a general body meeting to remove the directors and to appoint fresh directors in the vacancies. 89th section corresponding to Article 58 in the present case conferred on the directors the power to fill up vacancies in the directorate. The question was whether this power could be exercised by the members of the company at its general meeting. In answering it in the affirmative Cotton, L.J. observed :—

"Then it is said that there is no power in the meeting of shareholders to elect new directors for that under the 89th section the power would be in the remaining directors. The remaining directors would, no doubt, have that power if there was a quorum left. But suppose the meeting were to remove so many directors that a quorum was not left, what then follows ? It has been argued that in that case, there being no board which could act, there would be no power of filling up the board so as to enable it to work. In my opinion that is utterly wrong. A power is given by the 89th section to the remaining directors 'if they think proper so to do, to elect persons to fill up the vacancies'. I do not see how it is possible for a non-existent body to think proper to fill up vacancies. In such a case a general meeting duly summoned for the purpose must have power to elect a new board so as not to let the business of the company be at a deadlock".

With this opinion Lindley, L.J. agreed. Fry, L.J. observed :—

"In my judgment it is quite impossible to read the 89th section as the only section relating to the filling up of vacancies in the office of directors. That applies only where there are remaining directors, and those remaining directors think proper to exercise their powers. That does not in my judgment deprive the general meeting of the power to elect directors, where there are no directors or where the directors do not think fit to exercise their powers".

In *Barron* v. *Potter, Potter* v. *Berry*[2] The facts were that the board of directors of a company consisted of two persons, Mr. Potter and Mr. Barron. Owing to their differences no meeting of the Board could be held and nothing transacted. Then at an extraordinary meeting of the shareholders two additional directors were appointed. The question was whether this was valid. The articles of the company provided that the number of directors should be not less than two and not more than ten and that the directors should have the power to appoint additional directors but there was no article corresponding to Article 83 conferring on the company a power to increase or decrease the number of directors. In this respect the articles of this company were similar to those in *Blair Open Hearth Furnace Company, Ltd.* v. *Reigart*[5]. It was accordingly contended on the strength of that decision that the general body had no authority to appoint additional directors. This contention was over-ruled and it was held that as there was a deadlock in the administration resulting from the fact that the directors were unwilling to exercise their powers the company had the inherent power to take necessary steps to ensure the working of the company and to appoint additional directors for that purpose. Warrington, J. observed :—

"The argument against the validity of the appointment is that the articles of association of the company gave to the board of directors the power of appointing additional directors, that the company has accordingly surrendered the power, and that the directors alone can exercise it. It is true that the general point was so decided by Eve, J. in *Blair Open Hearth Furnace Co. Ltd.* v. *Reigart*[5] and I am not concerned to say that in ordinary cases where there is a board ready and willing to act it would be competent for the company to override the power conferred on the directors by the articles except by way of special resolution for the purpose of altering the articles. But the case which I have to deal with is a different one. For practical purposes there is no board of directors at all. The only directors are two persons, one of whom refuses to act with the other and the question is, what is to be done under these circumstances? . . . . If directors having certain powers are unable or unwilling to exercise them—are in fact a non-existent body for the purpose there must be some power in the company to do itself that which under other circumstances would be otherwise done. The directors in the present case being unwilling to appoint additional directors under the power conferred on them

1. (1883) 25 Ch. D. 320.
2. (1914) 1 Ch. 895.
3. (1916) 1 Ch. 532.
4. (1882) 21 Ch. D. 183.
5. (1913) 108 L.T. 665.

by the articles, in my opinion, the company in general meeting has power to make the appointment. The company has passed a resolution for that purpose ".

This decision was followed in *Foster* v. *Foster*[1] where the general body had appointed a managing director which power was vested under Article 99 in the board of directors. The Court found that there were only two persons who could be appointed as managing directors and owing to disagreement between them the board had been

" reduced to the position that it was unable owing to internal friction and faction to appoint anybody as managing director ".

Following the decision in *Barron* v. *Potter, Potter* v. *Berry*[2] the Court held that the question relating to the appointment of the managing director was one with which the general meeting of the company could deal and that having regard to the circumstances recourse must be had to the general meeting and the appointment by the general body must accordingly be upheld. In *Munster* v. *Cammell Company*[3] certain vacancies which had occurred in the directorate before the annual general meeting were filled by the directors after that meeting and this appointment was attacked as illegal on the ground that the power of the board to fill vacancies could be exercised only before the next annual meeting and if not so exercised it lapsed and became incapable of exercise thereafter. Article 80 of the company corresponding to Article 53 in the present case provided that the general meeting should have the power to fill vacancies arising by reason of the annual retirement of directors and Article 84 conferred on the board power to fill vacancies. On a construction of these articles it was held that the appointment of directors by the general body was valid. The decision by itself, therefore, has no bearing on this point. But the following observations of Fry, J., are relied on in support of the position that the company has a general and inherent power to appoint directors. He observed

" I am far from saying that a general meeting might not have filled up the casual vacancy, although, as I have pointed out the 80th clause only requires the general meeting to fill up the vacancies created by the retirement in rotation but nevertheless the general powers of a general meeting are so large that I certainly do not mean to determine that if they had been so minded, they might not have filled up the casual vacancy ".

In this connection the following observations of Lawrence, L.J. in *Worcester Corsetry Ltd.* v. *Witting*[4] might also be quoted

" The company has an inherent power to nominate and appoint its own directors unless that is in any way restricted by the contract contained in the articles of association. Unless you can find that that inherent power has been handed over by the company to the directors, I think they retain that power as a natural result of their having the power to increase their board of directors ".

According to Buckley on Companies Act, page 885, the result of the authorities is that the decision in *Blair Open Hearth Furnace Company. Ltd.* v. *Reigart*[5] will not apply

" if owing to a deadlock or otherwise there is no board capable of making the necessary appointments ".

In Palmer's Company Precedents (page 573) it is stated that the company has the power to appoint additional directors

" where owing to differences between the directors no board meeting could be held for the purpose ".

The principles laid down in the authorities discussed above may be summed up thus :—A company has inherent power to take all steps to ensure its proper working and that, of course, includes the power to appoint directors. It can delegate this power to appoint directors to the board of directors and such delegation will be binding upon it but if there is no legally constituted board which could function or if there is a board but that is unable or unwilling to act then the authority delegated to the board lapses and the members can exercise the right inherent in them of appointing directors.

1. (1916) 1 Ch. 532.
2. (1914) 1 Ch. 895.
3. (1882) 21 Ch. D. 183.
4. (1936) 1 Ch. 640.
5. (1913) 108 L.T. 665.

In this view the question arises whether at the time of the annual meeting there was legally in existence a board of directors who could act. The appellants contend that there was, while the respondents deny it. The facts material for this contention may now be stated. It has already been mentioned that the first directors of the company were five persons named in Article 49 which number was raised to six by the co-option of Veeramani under that article, that all of them retired at the annual meeting held on 24th June, 1946 and were re-elected. Under Article 53 a third of the directors had to retire at every annual meeting. Before the next annual meeting which was held on 27th August, 1947 three of them had resigned. Of the remaining three two directors Padmanabhan and Veeramani retired at that meeting and were re-elected. The third director resigned at that meeting and thus the strength of the directorate became reduced to two. Section 83-A of the Companies Act is as follows :—

" Every company shall have at least three directors ".

Article 47 provides that the number of directors inclusive of the Director (ex-officio) shall not be less than three and that was also the number prescribed as quorum for a meeting of the directors. Thus after 27th August, 1947, there was no board which could act except for the purpose of filling up vacancies under Article 62. Admittedly no directors were co-opted in 1948 and the position on 30th December, 1948, when the last annual meeting was held was that there were only two directors ; both of them had been elected at the annual meeting held on 27th August, 1947 and one of them had to retire at that meeting. Veeramani retired at that meeting and was re-elected. Thereafter there was no annual meeting.

The plaintiffs contended that on 30th December, 1949, one Dakshinamurthy was co-opted as a director, Ex. P-9, that he resigned on 18th June, 1950, Ex. P-10 and that on 12th August, 1950, one Muragappa Chettiar was co-opted in his place, Ex. P-11 and that there were thus three directors, Padmanabhan, Veeramani and Murugappa Chettiar who could act at the time of the annual meeting in 1951. But if the annual meeting had been convened in 1949 as it should have been Padmanabhan would have been bound to retire under Article 53. But it is argued on behalf of the appellants firstly that Article 53 contemplates the existence of at least three directors and it could not apply when their number fell below that minimum. The decision in *David Moseley and Sons, Ltd.*[1] was quoted in support of this position. There Article 94 provided that

" At every succeeding ordinary general meeting one-third of the directors or if their number i not a multiple of three, then the numer nearest to but not exceeding one-third, shall retire from office".

The strength of the directorate became reduced to two and the question was whether either of them ceased to be a director under this article. In holding that neither of them vacated the office Simons, J. observed

" The article in my judgment does not provide for the retirement of a director unless one of two conditions is satisfied : either there must be a number which is one-third of the directors, or there must be a number which is nearest to but does not exceed one-third. Here it is clear that neither of those conditions is satisfied. There are two directors and therefore, you cannot find a number which is one-third. There are two directors and therefore you cannot find a number which is nearest to but does not exceed one-third ".

It will be seen that this decision was based on the words " but not exceeding one-third " and in the absence of similar language in Article 53 it must be held that even one of the two directors should have retired at the meeting. It is next argued that as no meeting was actually held in 1949 Article 53 would not apply and Padmanabhan would continue to be a director. The respondents contend on the other hand that the directors could not take advantage of their own default and continue in office beyond the period when they would have retired, if they had done their duty and called for a meeting in accordance with Article 29. This contention is supported

1. 1939 Ch. 719.

by the decision in Re *Consolidated Nickel Mines, Ltd.*[1]; *Srinivasan* v. *Watrap Subramania Iyer*[2], *Kansseen* v. *Rialto*[3] and *Morris* v. *Kanssen*[4]. These decisions were followed by this Court in O.S.A. No. 120 of 1951 and 15 of 1952 in *Ananthalakshmi Ammal and another* v. *The Indian Trades and Investments, Ltd. and another*[5]. It must accordingly be held that Padmanabhan ceased to be a director at the end of year 1949. On the same reasoning it must also be held that Veeramani ceased to be a director by the end of 1950. This conclusion furnishes also the answer to a contention of the appellants that at least Veeramani was in office as director on 26th February, 1951, and there could have been an election at the most of only five directors.

Then there is the case of Murugappa Chettiar who is put forward as the third director. It is stated that Dakshinamurthy was co-opted on 30th December, 1949, but it does not appear in whose place he was co-opted and as four directors who retired in 1946 and 1947 had all been elected at the annual meeting held on 24th June, 1946, their term of office would have expired under Article 53 during the year 1949 and Dakshinamurthy whose co-option must have been in their place could not hold office beyond 1949. At any rate as he resigned on 18th June, 1950, his rights do not merit any further consideration. It would follow from this that the co-option of Muragappa Chettiar in the place of Dakshinamurthy on 12th August, 1950, must be held to be inoperative because the vacancy in which Dakshinamurthy could have been co-opted had itself come to an end under Article 53. It is unnecessary to refer to the various infirmities in the appointment of Muruagappa Chettiar as a director which are referred to in the judgment of Balakrishna Iyer, J. We agree with him that Murugappa Chettiar was never validly co-opted as director, and it was not merely a case of defective appointment as director but of no appointment at all. We must accordingly hold that there was at the time of the annual meeting on 26th February, 1951, no director validly in office and on the principle laid down in *Isle of Wight Railway Co.* v. *Tahourdin*[6] and *Barron* v. *Potter, Potter* v. *Berry*[7] the members had the right to elect the directors at the annual meeting.

One other contention relating to this part of the case remains to be considered. It was contended that by the time the annual meeting was held on 26th February, 1951, the place of Murugappa Chettiar as a director was no longer vacant and therefore the election of six directors was invalid. The argument of the appellants may thus be stated :—The general meeting was convened for 18th February, 1951. On that day it was adjourned to 26th February, 1951. Article 43 provides that if at any meeting at which an election is to take place, the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week at the same time and place and if at the adjourned meeting the places of the vacating directors are not filled up the vacating directors or such of them as have not had their places filled shall be deemed to have been re-elected at the adjourned meeting. The contention is that under this article the meeting should have been adjourned from 18th February, 1951 to 25th February, 1951 and if on that date there was no election the vacating directors must be deemed to have been re-elected; therefore on 25th February, 1951 Murugappa Chettiar became re-elected as director. We do not agree with this contention. Article 43 will apply only when there is a meeting held and as none was held before 26th February, 1951, it has no application. Moreover in the view we have taken that there was no director who was in office on the date of the meeting there is no scope for applying Article 43.

It was also urged that regulation 50 in Table A of Schedule I of the Companies Act provides that the election of directors other than those who retire, that is under Article 53, must be by a special resolution, there was none such in this case and that, therefore, the election is illegal. But under Article 33 of the Articles of the Com-

1. (1914) 1 Ch. 883.
2. (1951) 61 M.L.J. 724.
3. 1944 Ch. 346.
4. (1946) A.C. 459.
5. Since reported in (1953) 1 M.L.J. 275.
6. (1883) 25 Ch. D. 320.
7. (1914) 1 Ch. 895.

pany, which prevails over Regulation 50 no special resolution is required for election of directors. In the result we hold that the election of defendants 2 to 7 as directors is valid and not open to any objection.

It is next contended that members who were entitled to vote at the meeting had been excluded from exercising their right and that, therefore, the proceedings are illegal. In Application No. 139 of 1951, as part of the order adjourning the meeting originally fixed for 28th January, 1951 to 18th February, 1951, Krishnaswami Nayudu, J., gave the following directions :—

"But I consider that if it is made clear that the register as on 28th November, 1950, will be the register that will be taken into consideration for the purpose of finding out the members who are entitled to vote or to be reckoned in a quorum, the apprehension on behalf of the respondent will disappear. To this course the company could have no objection." (Exhibit P-4)

It was in pursuance of this direction that the chairman declined to permit members who were not on the register of the company on 28th November, 1950, to vote at the meeting. The contention of the appellants is that this direction is opposed to section 79 (1) (e) of the Companies Act which provides :

"any shareholder whose name is entered in the register of shareholders of the company shall enjoy the same rights and be subject to the same liabilities as all other shareholders of the same class."

Article 46 of the Articles of the Company runs as follows :—

"No member shall be entitled to vote nor be reckoned in a quorum when his name has not been in the register for a continuous period of two months immediately preceding the date of the meeting."

The direction made in Exhibit P-4 is obviously in accordance with this article. But section 79 (1) provides that the provision contained therein shall have effect

"notwithstanding any provision made in the articles of the company in this behalf",

and the contention of the appellants that Article 46 is illegal must be accepted. It is contended on behalf of the respondents that the order in Application No. 139 of 1951 was made at the instance of the company and that the order has become final and that, therefore, its validity cannot now be questioned. The appellants reply that the shareholders were not as such parties to this application and that their rights could not be concluded by an order to which they were not parties. We are inclined to agree with this contention. But the question is whether this contention is open to the plaintiffs. They were on the register of the company on 28th November, 1950 and they were allowed to exercise their right of voting. Therefore they are not persons adversely affected by the direction contained in Exhibit P-4. Their complaint is that two members Srinivasa Pillai and Narasimham whose names had been placed on the register after 28th November, 1950, had sent their proxies on 25th January, 1951 and that those proxies had been wrongly rejected. Assuming that Srinivasa Pillai and Narasimham had validly been admitted as members, a point on which Balakrishna Iyer, J., had held against them—it is obvious that when their proxies were rejected they were the persons who were wronged and that, therefore, they are the only persons who can make a complaint of it and not other shareholders. In *Pulbrook* v. *Richmond Consolidated Mining Company*[1], the plaintiff who had been elected as a director complained that he had been excluded by the company from taking part in the management and sued for an injunction. The company contended that the action was not maintainable except in the name of the company. Overruling this contention Jessel, M. R., held that when the wrong complained against is individual to the shareholder he was the person who was entitled to maintain the action and observed

"But in a case of an individual wrong, another shareholder cannot, on behalf of himself and others, not being the individuals to whom the wrong is done, maintain an action for that wrong."

That is precisely what the plaintiffs seek to do in this action. They are not themselves wronged and they seek to sue on behalf of themselves and others.

It may also be mentioned that even if the votes of Srinivasa Pillai and Narasimham are counted in favour of the plaintiffs' group and against defendants 2 to 7

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1. (1878) 9 Ch.D. 610.

the result of the election would not be affected and on this ground also this objection must be overruled.

Another contention pressed on behalf of the appellants is that at the general meeting held on 26th February, 1951, two persons Ramachandran and Narayanaswami who were not members were allowed to take part in the proceedings and record votes, on the strength of powers of attorney which they had obtained from two members Mrs. Ananthalakshmi Ammal and N. Sri Ram respectively and that the same was illegal and vitiated the entire proceedings. It is well settled that the right of a member of a company to vote by proxy is not a common law right and that it is determined solely by its articles which constitute a contract between him and the company.

In *Harben* v. *Phillips*[1], where the nature of the right which a member possessed to vote by proxy was discussed Cotton, L.J., observed :

"But the whole of Mr. Benjamin's argument really depended on this, that there was a right independently of contract to vote by proxy. I cannot accede to that."

Bowen, L.J., observed :

"that there is no common law right on the part of a member of a corporation to vote by proxy. We know, of course, that in many cases a man may do through another person what he may lawfully do himself . . . . . . But when persons agree to act together in the conduct of a business the way in which that business is to be carried on must depend in each case on the contract, express or implied which exists between them as to the way of carrying it on."

In *McLaren* v. *Thomson*[2], Astbury, J., observed :

"There is no inherent or equitable right in any shareholder to vote by proxy ; such right, if it exists, must be found in the contract binding the shareholders generally, that is, in the company's regulations or constitution and it then exists only in the form and subject to the limitations therein appearing." *Vide* Halsbury's Laws of England, Vol. 8 (2nd edn.), page 61, paragraph 108.

The question then simply is what do the articles say on this matter ? Article 38 is as follows :—

"On a demand of poll every member present in person or by proxy or by attorney shall have one vote."

Under section 79 (2) (*g*) of the Companies Act

"a proxy must be a member of the company",

and Article 44 in Table A provides :

"No person shall be appointed a proxy who is not a shareholder,"

and these provisions are applicable to the present case there being nothing in the articles of the company inconsistent therewith. Therefore, there is no doubt that a proxy can validly be given only to a member. But the respondents argue that Article 38 clearly recognises that a member can be present in person or by proxy or by attorney and that, therefore, the attorneys form a class distinct from proxies and as to them there is no limitation that they should be members. Mr. K. Rajah Ayyar contends on behalf of the appellants that in law the status of a proxy is only that of an agent, that no distinction can be made between a proxy and an attorney and that they are synonymous words. He refers to item 48 in Schedule I to the Stamp Act which deals with the powers of attorney not being a proxy and item No. 52 which deals with proxy and argues thas this is a recognition that proxies are only a form of power of attorney. He also relies on the observations of Lindley, J., in *In re English, Scottish and Australian Chartered Bank*[3] that a "proxy there means some agent properly appointed" and the decision of Satyanarayana Rao and Chandra Reddi, JJ., in *Narayanan Chettiar* v. *Kaleswara Mills*[4], where it was held that the relationship between a shareholder and a proxy is that of a principal and an agent. That undoubtedly is so but the question is what do the words "By proxy or by attorney"

1. (1883) 23 Ch. 14.
2. (1917) 2 Ch. 41.
3. (1893) 3 Ch. 385.
4. 64 L.W. 1072.

in Article 38 mean? Clearly they cannot be held to be synonymous because the words actually used are "By proxy or by attorney" and not "by proxy or attorney". The argument of the appellants involves the rejection of the words "by attorney" as meaningless surplusage. But it is unnecessary to pursue this matter further because there is a clear ground on which this contention of the appellants must fail. It appears from the voting list appended to the Commissioner's report that even excluding the votes cast by the two non-members Narayanaswami and Ramachandran the defendants get 10,120 votes as against 4,078 obtained by the plaintiffs' group. The result of the election has not been affected by this irregularity and therefore it cannot be set aside.

Objection is next taken to the inclusion of proxies which were deposited on the 14th and 15th of February, 1951. These proxies were cast in favour of the defendants. The contention is that as the meeting was originally fixed for 28th January, 1951, as per Exhibit P-3 the proxies should have been deposited under Article 68 in Table A at least 72 hours before the meeting and, therefore, those deposited on the 14th and 15th should be rejected. Article 42 of the company's articles provide that

"the instrument appointing proxy shall be deposited at the registered office of the company not less than 72 hours in advance of the meeting or the adjourned meeting; else it is invalid."

It is argued that this article is opposed to regulation 66 which is obligatory and therefore void. Reliance was also placed on the decision in *McLaren* v. *Thomson*[1], affirmed in appeal in *McLaren* v. *Thomson*[2] that an adjourned meeting was only a continuation of the original meeting and that proxies which could not be used at the date of the original meeting could not be used at the adjourned meeting. But the short answer to this contention is that though the date of the meeting was originally fixed for 28th January, 1951, it was not actually held on that date by reason of the order, dated 16th January, 1951, Exhibit P-3; that there was no notice even given of that meeting and that the meeting which was held on 18th February, 1951, can in no sense be said to be an adjourned meeting.

The contention that there had been no valid nomination of the defendants 2 to 7 as directors because it was not made seven days before the meeting is again based on the assumption that there was a meeting on 28th January, 1951 and that the meeting held on 18th February, 1951, is the continuance thereof. There was no meeting on 28th January, 1951 and therefore there can be no question of an adjourned meeting on 18th February, 1951. It is conceded that the nominations are in time if the date of the meeting is 18th February, 1951 and not 28th January, 1951.

It is finally contended that Sanjeevi Naidu the Commissioner who was appointed to preside over the meeting which was fixed for 18th February, 1951, had no authority to adjourn it to 26th February, 1951 and that, therefore, the proceedings of the meeting held on 26th February, 1951, are void.

In Halsbury's Laws of England, Vol. V, page 359, paragraph 588 (2nd edn.) the law is thus stated :—

"Except where empowered by the regulations of the company, the chairman cannot adjourn the meeting nor dissolve it while any of the business for which it was called remains untransacted."

In this case Article 35 provides that the chairman may with the consent of the meeting adjourn it from time to time. It is not now disputed that Mr. Sanjeevi Naidu obtained the consent of the meeting to adjourn it. It is suggested that the order appointing him does not confer upon him power to adjourn the meeting. But the meeting is to be conducted in accordance with the articles of association and the chairman had the authority to adjourn the meeting under Article 35. Moreover the plaintiffs themselves pressed for adjournment and it is not open to them to make a complaint of it. In *Burt* v. *The British Nation Life Assurance Association*[3], it was held that

1. (1917) 2 Ch. 41.
2. (1917) 2 Ch. 261.
3. (1859) 45 E.R. 62.

"a plaintiff who has a right to complain of an act done to a numerous society of which he is a member, is entitled to sue on behalf of himself and all others similarly interested though no other may wish to sue; so although there are a hundred who wish and are entitled to sue, still, if they sue by a plaintiff who is personally precluded from suing, the suit cannot proceed although other persons on whose behalf the suit was instituted might maintain the action as plaintiffs."

This principle was applied in this Court by Satyanarayana Rao and Panchapagesa Sastri, JJ., in *Nagappa Chettiar* v. *Madras Race Club*[1]. The plaintiffs having moved for an adjournment of the meeting cannot be heard to object to it. They do not even state that they have been prejudiced in any manner. This objection also must be overruled. In the result the appeal fails and is dismissed with costs.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AIYAR.

Vennamuddala Venkata Chellamma *alias* Venkata Lakshmamma .. *Appellant**

v.

Cheekati *alias* Guddam Subbarao and others .. *Respondents.*

Hindu Law—Dancing girls—Adoption of daughter—Validity and effect—Adopted girl's death—Rule of succession to her property.

So far as Madras is concerned an adoption of a daughter by a dancing girl, where it is not for the purpose of prostitution, is valid by custom and such adoption confers on the person adopted the status of an adopted daughter with all the civil rights flowing therefrom like inheritance to the adoptive mother's properties.

Members of the dancing girl community who adopt the Hindu faith and Hindu customs and manners, must be treated as persons governed by the ordinary Hindu Law, but on account of the special kinds of life led by them which is in important respects inconsistent with Hindu Dharma on which ultimately Hindu Law is based, they are governed largely by custom and usage often not in consonance with Hindu Law. Where there is no proof of a custom directly applicable to any particular case of disputed succession the General Rules of Hindu Law may be applied by analogy as rules of justice and equity. Hindu Law does not recognise the adoption of a daughter and the adopted daughter cannot be equated to an adopted son. In the absence of a custom it cannot be said that a girl adopted by a woman of the dancing community becomes entitled to all rights of collateral succession. Unless there is a custom pleaded and proved to that effect a collateral (a grandson of the brother) of the adopting mother is not entitled to succeed to the property of the adopted girl.

Case-law discussed.

Appeal under clause 15 of the Letters Patent against the decree and judgment of Panchapagesa Sastri, J., dated 23rd August, 1950, in S.A. No. 1501 of 1947 preferred against the decree of the Subordinate Judge's Court of Kurnool in A.S. No. 111 of 1946, preferred against the decree of the District Munsif's Court, Nandyal, in O.S. No. 343 of 1943.

M. S. Ramachandra Rao and *Ch. Ramakrishna Rao* for Appellant.

J. V. Srinivasa Rao for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—In this appeal filed under the Letters Patent against the judgment of Panchapagesa Sastri, J., in S.A. No. 1501 of 1947, the question relates to the succession to the properties of a dancing girl.

One Pullamma brought a suit for partition and possession of her half share of certain properties conveyed to her and her brother's daughter jointly in gift by a third person. When the suit was pending, Pullamma died. Thereupon the first respondent sought to come on record as her legal representative and continue the action. He claimed to be the grandson of the brother of one Nandamma who was alleged to have adopted Pullamma as her daughter. The brother's daughter who was the contesting defendant claimed to succeed to the properties of Pullamma as her nearest heir.

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1. (1949) 1 M.L.J. 662.

* Letters Patent Appeal No. 122 of 1950. 7th November, 1952.

It was common ground that both Nandamma and Pullamma belonged to the dancing girl caste and that Nandamma had adopted Pullamma as her daughter. It was further found that the first respondent was the brother's grandson of Nandamma. The trial Court decreed the suit. But on appeal the learned Subordinate Judge took the view that the first respondent was not the heir and that the appellant, the brother's daughter, was herself the heir. He therefore dismissed the suit. The first respondent filed the second appeal which was disposed of by Panchapagesa Sastri, J. The learned Judge held that when Pullamma was adopted to Nandamma her connection with her natural family came to an end and therefore the appellant who was the natural brother's daughter could not inherit. He also held that the first respondent succeeded to the properties of Pullamma as her bandhu, being her adoptive mother's brother's grandson. He therefore allowed the second appeal and restored the decree of the trial Court. The brother's daughter now appeals.

It must be now taken as well established that so far as Madras is concerned, an adoption of a daughter by a dancing girl when it is not for the purpose of prostitution is valid by custom and such adoption confers on the person adopted the status of an adopted daughter with all the civil rights flowing therefrom like inheritance to the adoptive mother's properties. (*Venku* v. *Mahalinga*[1], *Muthukannu* v. *Paramasami*[2] and *Veeranna* v. *Sarasiratnam*[3].) Mr. Ramachandra Rao, learned counsel for the appellant, did not therefore question the validity of the adoption of Pullamma by Nandamma. He however argued that the adoption does not sever all ties between the adopted daughter and her natural family. He relied on the analogy of *illatom* son-in-law and the decision in which it was held that an *illatom* son-in-law does not lose all his rights in the natural family. (Vide *Balarami* v. *Pera*[4], *Ramakrishna* v. *Subbakka*[5] and *Subbarao* v. *Mahalakshmamma*[6].) We do not think that this contention can be dealt with as a pure question of law. Hindu law as such does not recognise the adoption of a daughter. Such adoption is entirely the creation of custom. We must therefore find out whether it is one of the incidents of the custom which permits the adoption of a daughter by a dancing girl that such adopted daughter loses or retains her rights in her natural family. Learned counsel for the plaintiff-respondent referred us to the oral evidence in the cases which appears to support the conclusion that according to the custom of the community the adopted girl does not inherit in her natural family. There is no evidence contra. On the facts of this case it must therefore be held in the absence of any judicial authority on the point that when Pullamma was adopted by Nandamma her ties with her natural family were broken. The appellant as her natural brother's daughter would not therefore be her heir.

This finding however does not dispose of the case. The first respondent must succeed on the strength of his own title. It therefore becomes necessary to consider whether he is entitled to inherit to Pullamma. The answer to this question depends upon the rule of succession which applies to the property of a dancing girl. Panchapagesa Sastri, J., was of the opinion that the law of succession to a dancing girl's property must ordinarily be the Hindu law relating to stridhanam property of a woman or principles analogous to the same. We shall now refer to some of the decided cases dealing with the point to see if this rule is well established.

In *Muthukannu* v. *Paramasami*[2], the learned Judges (Muttuswami Ayyar and Parker, JJ.) observed as follows :

"We consider therefore that as a matter of private law it must be taken the class of dancing woman being recognised by Hindu law as a separate class having a legal status, that the usage of that class, in the absence of positive legislation to the contrary regulates rights of status and of inheritance, adoption and survivorship."

1. (1888) I.L.R. 11 Mad. 393.
2. (1889) I.L.R. 12 Mad. 214.
3. (1936) 71 M.L.J. 53.
4. (1883) I.L.R. 6 Mad. 267.
5. (1889) I.L.R. 12 Mad. 442.
6. (1930) 59 M.L.J. 558 : I.L.R. 54 Mad. 27 at 55.

In *Subbaratna Mudali* v. *Balakrishnaswami Naidu*[1] the rival claimants to the property of a deceased dancing girl were the mother's mother's father's brother's daughter and the mother's mother's father's brother's daughter's son. It was held that the former was the preferable heir. The learned Judges after pointing out that the ordinary Hindu law of inheritance which is based on a system of legal marriage and consequential relationship, cannot be applied at all or at least without any considerable modifications to the property of a woman of the dancing girl caste who except her own children can ordinarily have relations only through females, said :

"The rules as to stridhan obviously do not apply to such property and there is no other rule of succession laid down in the Smritis or by the commentators prescribing the devolution of the property of women of this caste except it be the general rule 'that to the nearest sapinda the inheritance next belongs'."

The Full Bench case in *Subramania Iyer* v. *Ratnavelu Chetti*[2] no doubt concerned the right of a putative father to succeed as heir to his illegitimate son. But Kumaraswami Sastri, J., made some observations in passing on the law of succession applicable to dancing girls and prostitutes on the basis of earlier decisions of this Court, namely, that in the absence of a positive rule of law to the contrary the custom of the caste and the analogies of Hindu law should be applied. In *Viswanatha Mudali* v. *Doraiswami Mudali*[3], it was held that the legitimate descendants of two sons of a Hindu dancing woman are entitled to succeed to each other. There is a long discussion of case by Devadoss, J., who delivered the leading judgment of the Bench. The learned Judge was of the opinion that the ordinary Hindu law would govern dancing girls who followed the Hindu faith and Hindu customs and manners. Wallace, J., approached the case from a slightly different aspect. He started by saying :

"The law first of all to be applied is the law founded on usage which governs inheritance to woman of the dancing girl caste, the paternity of whose children is unknown, and is not a fact for consideration at all."

But he held that the general principles of Hindu law can be applied unless such application would violate equity and good conscience and so long as a special custom to the contrary is not proved. The learned Judge said :

"I cannot see that such an analogous application of Hindu law to persons living as Hindus and following Hindu customs and usages can in any way offend the general principles of equity and good conscience."

In *Shanmugatammal* v. *Gomathiammal*[4], the plaintiff, a member of the dasi community, claimed to succeed to her deceased maternal aunt in preference to the three surviving sisters of the deceased on the ground that one of them had been adopted by another dancing girl and the other two had become married women. The material issue related to the custom set up by the plaintiff that among dancing women married women were excluded by a woman who continued to be a dasi. It was held by the learned Judge, differing from the lower Court, that the custom was established. King, J., who delivered the judgment of the Division Bench starts the discussion of the evidence with the following prefatory remarks :

"It is unnecessary, we think, to discuss in detail the various rulings of the Madras High Court which have been cited before us . . . . . . One proposition however is uniformly laid down in every decision which deals with the dasi caste and that is that its members are not governed by the ordinary Hindu law in matters of succession but by caste custom and usage."

In *Balasundaram* v. *Kamakshi Ammal*[5], Wadsworth, J., observed :

"There is remarkably little authority in the reported cases regarding the devolution of property through females of the dancing girl caste. It is of course quite settled that when a dancing girl practising the calling of her caste acquires property thereby it devolves more or less after the fashion of stridhanam, females taking in preference to males."

In *Veeranna* v. *Satyam*[6], the facts were : A person belonging to dancing girl community died leaving his widow and two daughters by her. Both these daughters

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1. (1917) 33 M.L.J. 207.
2. (1917) 33 M.L.J. 224 : I.L.R. 41 Mad. 44 (F.B.).
3. (1925) 49 M.L.J. 684 : I.L.R. 48 Mad. 944.
4. (1934) 67 M.L.J. 861.
5. (1936) 71 M.L.J. 785 : I.L.R. (1937) Mad. 257.
6. (1947) 1 M.L.J. 301.

lived the life of prostitutes and had children whose paternity were unknown. On the death of the widow and the two daughters a daughter's son claimed to be entitled to succeed to his maternal grandfather as against the daughter's daughters. It was held by Horwill, J., that his claim was unsustainable because an illegitimate son of a daughter could not be considered under the Hindu law as a daughter's son and would not be entitled to rights and privileges as such. In a community in which marriage is only casual and neither common nor customary, it appears anomalous to insist on legitimacy as a condition of the right to succeed. But the learned Judge was obviously faced with this difficulty, namely, that in the absence of custom he had to apply the general rules of Hindu law. Under the Hindu law *sapinda* relationship and propinquity were based on the legitimacy of the offspring.

The result of the authorities above cited appears to be this; that members of the dancing girl community who adopt the Hindu faith and Hindu customs and manners must be treated as persons governed by the ordinary Hindu law, but on account of the special kind of life led by them which is in important respects inconsistent with Hindu dharma on which ultimately Hindu law is based, they are governed largely by custom and usage often not in consonance with Hindu law. Where there is no proof of a custom directly applicable to any particular case of disputed succession the general rules of Hindu law may be applied by analogy as rules of justice and equity.

In the present case it is obvious that the plaintiff could have no right whatever under the general law to inherit to the deceased Pullamma. He is not related to her in any way; the basis of his claim is ultimately the adoption of Pullamma by Nandamma. Such an adoption is not contemplated by Hindu law. The validity of such adoption is therefore entirely dependent on custom and usage. The rights and status of a daughter adopted in accordance with the custom prevailing among the community must be determined by a clear proof of the incidents attaching to such adoption by custom. The evidence in the case carries us only so far, namely, that in this community a woman can take a girl in adoption as her daughter and in such cases the adopted mother's property is inherited by the adopted girl and *vice versa*. The decided cases also do not carry further (*vide* the latest case on the point *Veeranna* v. *Sarasiratnam*[1]).

In *Gangamma* v. *Kuppammal*[2], Wadsworth, J., discussed the scope of the custom of adoption of girls among the devadasi community. In that case the adopted daughter sued her adoptive mother for partition of the latter's properties on the ground that she and her mother constituted a joint family. The learned Judge negatived the claim. He held that though it was well established in Madras that an adopted daughter of a dancing girl inherits to her adoptive mother, yet there was no such thing as coparcenary between the mother and the daughter. The practice of adoption amongst the devadasis has nothing to do with religious benefit but was purely a custom arising out of the natural desire of the women to have a daughter to look after her in her old age and to receive her property on her death. The learned Judge therefore refused to concede to the adoptive daughter the status and rights of an adopted son under the Hindu law. He insisted on a specific plea of a custom and evidence in support of it that the adopted daughter became a coparcener with the adoptive mother.

When Pullamma was adopted by Nandamma she became entitled to inherit to Nandamma. Equally Nandamma would have had the right to inherit to Pullamma. But, did Pullamma become a *sapinda* of all the collateral relations of Nandamma. The analogy of Hindu law does not help us, because that law does not recognise the adoption of a daughter, and the adopted daughter cannot be equated to an adopted son. In our opinion, in the absence of a custom it cannot be said that a girl adopted by a woman of the dancing girl community becomes entitled to all rights of collateral succession unless there is a custom pleaded and

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1. (1936) 71 M.L.J. 53.

2. (1938) 2 M.L.J. 923 : I.L.R. (1938) Mad. 789.

proved to that effect. Instances are not unknown in which a person has been held entitled to succeed to the person's immediate ascendant or descendant without being entited to rights of collateral succession. One is the case of an *illatom* son-in-law who may succeed to his father-in-law as a son but cannot claim rights of collateral inheritance (*Muthala Reddiar* v. *Sankarappa Reddiar*[1]). Another is the case of an illegitimate son who can only inherit to his father and not to collaterals (*Subramania Iyer* v. *Ratnavelu Chetti*[2]).

It is a well-recognised legal principle that a custom cannot be enlarged by parity of reasoning. Attempts to rely upon analogous customs in support of an alleged custom have aways been repelled (vide *Palaniappa Chettiar* v. *Chockalingam Chetti*[3]). In *Machinagal Potte Veetu* v. *Machinagal Potte*[4], Madhavan Nair, J., dealing with a custom of adoption prevailing among the Nair community in Malabar observed :

> ". . . . the law applicable to the case being essentially a customary law, the question can be decided only by having recourse to evidence as to custom in the absence of texts or express decisions of this Court."

In the present case there is neither text nor decision to support the claim of the first respondent. Nor is there proof of custom. His claim must therefore fail.

The Letters Patent Appeal is allowed and the decree of the lower appellate Court is restored with costs here and before Panchapagesa Sastri, J.

R.M. —————— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

R. V. K. M. Surya Rao Bahadur Varu, Rajah of Pithapuram .. *Petitioner**

v.

The Board of Revenue (Settlement of Estates), Madras .. *Respondent.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), section 18—Scope of—Practice—Writ—The question of the jurisdiction of a Tribunal cannot be raised in a writ after submitting to it.

The provisions of section 18 of the Act make it clear that building includes the site as well as the premises occupied as an appurtenance thereto and that the entire building so defined must be used as an office. If any portion of that building was used immediately before the notified date for a purpose other than an office purpose, it would not vest in the Government. Where the finding of the Board of Revenue was that there were two separate buildings one of them being used as an office before the Act came into force and the other, a small one being used by visiting officers and the other guests,

Held, (*i*) the direction of the Board of Revenue that the value of the main building should be deducted from the compensation payable to the zamindar excluding the smaller building from the operation of the provisions of section 18, is correct, as a building may be called an outhouse, but may be used as a separate building, and (ii) the jurisdiction of the Board of Revenue to pass the order cannot be questioned in a writ as the petitioner had submitted to its jurisdiction.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in Ref. Set. No. 1304 of 1950 on the file of the Commissioner for the Settlement of Estates, the Board of Revenue, Madras, and to quash the order, dated 6th August, 1951 and made therein.

Ch. Ramakrishna Rao for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*) for Respondent.

The Court made the following

ORDER.—This is an application for issuing a writ of *certiorari* and for quashing the order of the Board of Revenue, dated 6th August, 1951.

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1. (1934) 67 M.L.J. 706.
2. (1917) 33 M.L.J. 224 : I.L.R. 41 Mad. 44 (F.B.).
3. (1929) 57 M.L.J. 817.
4. (1939) 2 M.L.J. 697.

* Writ Petition No. 796 of 1951. 5th February, 1952.

The building described in the schedule annexed to the affidavit filed in support of the petition is situated in Polavaram B Estate, East Godavari district. In March, 1950, the manager of the Pithapur and other allied estates filed a petition before the Estates Abolition Tribunal for having the value of the said building assessed. That application was referred to the District Collector, Eluru, for enquiry, who forwarded the same to the Board of Revenue. The Board of Revenue held that the said building constituted two separate buildings, one of them being used as an office before Act XXVI of 1948 came into force, and the other, a small one, being used by visiting officers and by other guests. The Board directed the value of the main building to be deducted from the compensation payable to the Zamindar, and excluded the smaller building from the operation of the provisions of section 18 of the Act. The present application is filed to quash that order.

Learned counsel for the petitioner raised before me three points :

(i) The Government has no jurisdiction to delegate its power under section 18 of the Act to the Revenue Board.

(ii) The building in question is not part of Polavaram B estate ; and

(iii) the main building along with the outhouse forms component parts of the same building, and the house not being used solely for office purposes the entire building will not fall within the scope of section 18.

The first two points were not raised before the Revenue Board and they raise a question of jurisdiction. The petitioner who has submitted to the jurisdiction of the Revenue Board is precluded from questioning the jurisdiction in a writ of *certiorari*.

To appreciate the third point raised, the relevant provisions of the Madras Estates (Abolition and Conversion into Ryotwari) Act, XXVI of 1948 are :

Section 18 : " Every building situate within the limits of an estate, which immediately before the notified date, belonged to any landholder thereof and was then being used, by him as an office in connexion with its administration and for no other purpose, shall vest in the Government, free from all encumbrances, with effect on and from the notified date."

(5) In this section ' building ' includes the site on which it stands and any adjacent premises occupied as an appurtenance thereto."

For the purpose of ascertaining the meaning of the word " building ", learned counsel for the petitioner relied upon the decisions in *Grosvenor* v. *The Hampstead Junction Ry. Co.*[1], and *King* v. *The Wycombe Ry.*[2] In the former case, the question was whether a railway company could acquire a land appurtenant to a building. It turned upon the meaning of the word " building " in section 92 of the Lands Clauses Consolidation Act (8 and 9 Vict. Ch. 18). If it was a part of the building, the entire building had to be taken. Lord Justice Turner laid down the following test to find out the meaning of that word at page 737 :

" The question, therefore, in my view, is what would pass under the conveyance of these houses? That, as I think, must be judged of by the particular position and circumstances of the property at the time . . . . . It is obvious that the intention was that the intervening land should constitute a garden to the houses, and was to be fenced off, according to the plan by an iron fence, separating it from the road."

The learned Judge, therefore held that the land formed part of the building. In the other case, a railway company under the compulsory powers of the Lands Clauses Consolidation Act attempted to take a portion of a garden and an orchard essential to the enjoyment of a mansion and premises. The mansion and the premises were surrounded by a brick wall, and the railway company took a portion of the garden and orchard, divided one part of the premises from another and destroyed all internal communications. It was held that the company was bound to take the whole estate. The Master of the Rolls observed :

" The act must be construed liberally, and not to the detriment of existing rights. . . . . The courts therefore have held, that the word ' house ' was intended to comprise such adjuncts as were within its circuit and necessary to its use and enjoyment."

1. (1857) 26 L.J. 731. 2. (1860) 29 L.J. 462.

Later on, he proceeded to say :

"Land held with a house does not necessarily pass under the word 'house' even although it was intended to pass ; but if it is part of the curtilage and within the circuit of the house, if it is necessary to the enjoyment of the house, if it forms part of that which is necessarily held and occupied with the house, and without which it cannot be enjoyed, then it does pass under the word 'house'."

These decisions only lay down the principle accepted and embodied in section 18 (5) of the Act. The provisions of section 18 of the Act make it clear that building includes the site as well as the premises occupied as an appurtenance thereto, and that the entire building so defined must have been used as an office. If any portion of that building was used immediately before the notified date for a purpose other than an office purpose, it would not vest in the Government.

The question therefore is whether the outhouse was occupied as an appurtenance to the main building. The Revenue Board found on the evidence that the outhouse was a separate building with a compound of its own and used for a different purpose. It therefore held that the main building and the outhouse could not be treated as a single unit. Indeed, the attempt made before the Revenue Board was to exclude the outhouse from the main building on the basis that it was a separate building. If the petitioner conceded before the Revenue Board that the outhouse was a part of the main building, they might have held that the outhouse was also used for office purposes providing lodging to the visiting officers. The petitioner cannot, therefore, in view of his earlier attitude and the finding of the Revenue Board take a contrary position and contend that the outhouse is a part of the building. The finding of the Revenue Board was based on the evidence, and is not vitiated by any error on the face of the record. A building may be called an outhouse, but may be used as in the present case, as a separate building.

The petition therefore fails and is dismissed with costs : Advocate's fee, Rs. 100.

V.P.S. — *Petition dismissed.*

[THE SUPREME COURT OF INDIA.]

(Civil Appellate Jurisdiction.)

PRESENT :—MEHRCHAND MAHAJAN, S. R. DAS, VIVIAN BOSE AND GHULAM HASAN, JJ.

Sha Mulchand & Co., Ltd. (in Liquidation), by the Official Receiver, High Court, Madras .. *Appellant**

v.

The Jawahar Mills, Ltd., Salem .. *Respondent.*

Companies—Forfeiture of shares—Right to challenge—Waiver and abandonment—When sufficient to disentitle the shareholder from challenging the validity of purported forfeiture—Company agreeing to allotment of other unissued shares in lieu of the forfeited shares which had been disposed of by the company—Objection to form of order—Unsustainable—Application—Limitation for—Limitation Act (IX of 1908), *Articles* 120, 181, 48 *and* 49.

Abandonment of right is much more than mere waiver, acquiescence or laches and is something akin to estoppel if not estoppel itself. Mere waiver, acquiescence or laches which is short of abandonment of rights or estoppel does not disentitle the holder of shares who has a vested interest in the shares from challenging the validity of the purported forfeiture of those shares. Where it is established that no case of waiver, acquiescence, laches or estoppel has been established it is impossible to hold that there is abandonment disentitling the holder of the shares to relief in the case.

Where in the trial Court the company has agreed to the form of the order, namely, to allot other unissued shares (as the forfeited shares had been disposed of and the new holders of the shares were not parties to the application) the company cannot on appeal attack the form of the order under section 38 of the Indian Companies Act.

A claim for rectification of the register *simpliciter* does not necessarily involve a claim for the return of the share scripts and where there is no such claim Articles 48 and 49 of the Limitation Act have no application. Article 181 of the Limitation Act governs only applications under the Code of Civil Procedure. Even if that article applies the application made within three years from the time "when the right to apply accrues" is within time. Though no further notice after the shares are

* Civil Appeal No. 3 of 1951. 9th December, 1952.

forfeited is necessary to complete the forfeiture of the shares a person whose shares are forfeited and whose name is struck out from the register cannot apply for rectification of the register until he comes to know of the forfeiture. If Article 181 does not apply then the only other article that can apply by analogy is Article 120 under which the same *terminus quo* is prescribed and the application is not barred by time.

Per *Bose, J.*—A man who has a vested interest and in whom the legal title lies does not, and cannot, lose that right by *mere* laches, or *mere* standing by or even by saying that he has abandoned his right, unless there is something more, namely, inducing another party by his words or conduct to believe the truth of that statement and to act upon it to his detriment, that is to say, unless there is an estoppel, pure and simple. It is only in such a case that the right can be lost by what is loosely called abandonment or waiver, but even then it is not the abandonment or waiver *as such* which deprives him of his title but the estoppel which prevents him from asserting that his interest in the shares has not been legally extinguished, that is to say, which prevents him from asserting that the legal forms which in law bring about the extinguishment of his interest and pass the title which resides in him to another, were not duly observed.

(1949) 2 M.L.J. 88, Reversed.

On Appeal from the Judgment and Order, dated the 11th March, 1949,† of the High Court of Judicature at Madras (Satyanarayana Rao and Viswanatha Sastri, JJ.) in Original Side Appeal No. 3 of 1947, arising out of the Judgment and Order, dated the 15th November, 1946, of the Hon'ble Mr. Justice Clark and made in exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 599 of 1946.

M. C. Setalvad, Attorney-General for India (*A. Balasubramanian*, Advocate, with him), for Appellant.

N. Rajagopala Iyengar, Advocate, for Respondent.

The Court delivered the following

JUDGMENTS : *Das, J.* (*Mukherjea, J.* and *Ghulam Hasan, J.*, concurring).—This appeal arises out of an application made by the Official Receiver representing Sha Mulchand and Company, Ltd. (in liquidation) under section 38 of the Indian Companies Act for rectification of the register of the Jawahar Mills, Ltd.

Sha Mulchand and Company, Ltd. (hereinafter referred to as " the Company") was incorporated in 1937 as a private limited company. At all material times it consisted of two members, T. V. T. Govindaraju Chettiar and K. N. Sundara Ayyar. The Jawahar Mills, Ltd. (hereinafter called " the Mills ") was also incorporated in 1937 with an authorised capital of Rs. 10,00,000 divided into one lac shares of Rs. 10 each. The Company was the managing agent of the Mills from its inception and applied for and was allotted 5,000 ten-rupee shares Nos. 15048 to 20047 on which Rs. 5 per share had been paid. The Company continued to act as the managing agent of the Mills till the 30th June, 1939, on which date it resigned the managing agency. Prior to the company's resignation the two members of the Company had entered into an agreement with one M. A. Palaniappa Chettiar, a partner of the incoming managing agency firm, upon certain terms which need not be referred to in greater detail.

Within two months after the change of managing agents, the Mills made two calls, namely, one on the 22nd August, 1939 for Rs. 2 per share payable on the 1st October, 1939, and the other on the 1st October, 1939, for Rs. 3 payable on the 1st December, 1939. The Company did not pay either of the calls. On the 23rd January, 1940, Govindaraju Chettiar was adjudged insolvent on the application of Sundara Ayyar. This insolvency of Govindaraju Chettiar was eventually annulled in 1944. During this period Govindaraju Chettiar, in law, ceased to be a director of the Company, although it is alleged that he nevertheless continued to take part in the management of the Company.

By a resolution of the Board of Directors of the Mills passed on the 12th August, 1940, the new managing agents were empowered to give notices to such persons as had not paid the allotment money and the call money within the date fixed and to intimate them that in default their shares would be forfeited. A notice was issued on the 16th September, 1940, and two copies thereof are said to have

† (1949) 2 M.L.J. 88.

been sent to Sundara Ayyar and Govindaraju Chettiar. No payment having been made, the 5,000 shares held by the Company were forfeited by a resolution of the Board of Directors of the Mills. The auditor of the Mills having pointed out that the purported forfeiture was irregular and illegal, this forfeiture was cancelled.

By a resolution passed by circulation on the 25th February, 1941, the Board of Directors of the Mills resolved that a notice be sent to the Company informing it that it was in arrears with calls to the extent of Rs. 25,000, that the amount must be paid on or before the 31st March, 1941, and that, in default, its shares would be forfeited. A notice dated the 15th March, 1941, was accordingly addressed to the Company and sent by registered post with acknowledgment due. It appears that the notice was actually posted on the 17th March, 1941, and was received by Govindaraju Chettiar on the 20th March, 1941. The Company did not pay the arrears of calls. On the 5th September, 1941, the Board of Directors of the Mills resolved that "the 5,000 shares Nos. 15048-20047 standing in the name of the Company have been forfeited." On the 10th September, 1941, the Mills wrote a letter to the Company informing the latter that the Directors of the Mills had at their meeting held on the 5th September, 1941, forfeited the 5,000 shares. There is no dispute that this letter which was sent by registered post was returned undelivered. On the 1st October, 1941, an entry was made in the share-ledger of the Mills recording that the 5,000 shares of the Company had been forfeited. On the 16th November, 1941, these 5,000 shares were reallotted to 14 different persons and on the 17th November, 1941, a letter was sent to the Company intimating that the forfeited shares had been reallotted and calling upon the Company to send back to the Mills all the documents relating to the original allotment of the 5,000 shares to the Company. In the meantime on the 26th August, 1941, by an order made by the Registrar of the Joint Stock Companies the Company was struck off the register of companies under section 247 of the Indian Companies Act. This order of the Registrar was published in the Official Gazette on the 9th September, 1941, *i.e.*, four days after the shares were forfeited and one day before the notice intimating the fact of forfeiture was sent in a registered cover which was, however, returned undelivered. Under section 247 (5) of the Indian Companies Act the Company stood dissolved on and from the date of such publication.

The Mills having come to know of the dissolution of the Company applied to the High Court (O.P. No. 10 of 1942) praying that the name of the Company be restored to the register of companies and that after such restoration was duly advertised the Company be wound up by the Court. A similar application was made on the 11th December, 1941, by the Income-tax authorities (O.P. No. 11 of 1942). On the 23rd February, 1942, Sundara Ayyar filed an affidavit contending, amongst other things, that the Directors of the Mills had no power to forfeit the shares. On the 2nd April, 1942, however, O.P. No. 10 of 1942 was compromised, and the Mills received Rs. 11,000 from Sundara Ayyar in full satisfaction of their claim against the Company. On the 25th June, 1942, O.P. No. 11 of 1942, was also compromised and Sundara Ayyar paid up the claim of the income-tax authorities. The two petitions for restoration of the Company were accordingly dropped.

On the 27th June, 1942, Sundara Ayyar filed a suit against the Mills and others including Palaniappa Chettiar claiming a declaration that the forfeiture by the Mills of the 5,000 shares was illegal and inoperative and directing the Mills to pay to the plaintiff and the third defendant representing the estate of Govindaraju Chettiar the value of the forfeited shares with dividend or interest thereon and directing Palaniappa Chettiar to pay the plaintiff and the third defendant the sum of Rs. 25,000. This suit was dismissed on the 17th November, 1943, on the ground that Sundara Ayyar, who was only a member of the dissolved Company, had no *locus standi* and could have no relief personally. Sundara Ayyar filed an appeal therefrom which was dismissed as against the Mills but the case was remanded to the trial Court for the trial of his claim as against the fourth defendant, Palaniappa Chettiar.

During the pendency of Sundara Ayyar's appeal he, on the 12th August, 1944, filed O.P. No. 199 of 1944 for the restoration of the Company. On that application an order was made on the 16th February, 1945, that the name of the Company be restored to the register of companies, that the Company be deemed to have continued in existence as if its name had never been struck off, that such restoration be advertised and that the Company be wound up by the Court and the Official Receiver do forthwith take charge of the assets and liabilities of the Company. It was further ordered that the Official Receiver do recognise that as between the Mills and the Company, the Mills should be regarded as having been duly paid only Rs. 11,000 out of the total debt of Rs. 25,550 due to the Mills. By an order made on the 21st January, 1946, leave was given to the Official Receiver to take appropriate steps regarding the 5,000 shares purported to have been forfeited by the Mills. Accordingly on the 5th March, 1946, the Official Receiver, in the name of the Company, took out the present summons calling upon all parties concerned to show cause why the share register of the Mills should not be rectified by restoring the name of the Company to the said register in respect of 5,000 shares numbering 15048-20047 and why such other alternative or consequential relief should not be granted to the applicant as might be just and necessary in the circumstances of the case.

The Mills contended, in opposition to that application, that the shares had been properly forfeited, that the Company was, on the principles of estoppel, acquiescence and laches, precluded from challenging the forfeiture, that the application was barred by limitation and that the shares having already been allotted to other persons, who had not been made parties to the application, no order for rectification of the register in respect of those shares could be made.

The summons came up for hearing before Mr. Justice Clark. The learned Judge, by his judgment, dated the 15th November, 1946, held that the notice dated the 15th March, 1941, which was posted on the 17th March, 1941, and delivered on the 20th March, 1941, and on which the resolution of forfeiture passed on the 5th September, 1941, was founded, was not in conformity with the provisions of Articles 29 and 30 of the Articles of Association of the Company which required 14 clear days' notice. The learned Judge further held that the plea of estoppel, acquiescence and laches was untenable, that Article 49 of the Limitation Act did not apply either expressly or by way of analogy to the present application and that Article 120, which prescribed a period of six years from the date when the right to sue accrued, would, by analogy, apply to the present proceedings and that so applied the present proceedings must be held to be within time. Having disposed of the controversy on the above points it remained to consider the form of the order which could properly be made on the application. It is quite clear that the specific shares having already been allotted to 14 different persons and those persons not being then before the Court, the Court could not then and there direct rectification of the register by restoring the name of the Company to the share register of the Mills in respect of those identical shares. There was nevertheless nothing to prevent the Court even at that stage to give notice of the application to the persons to whom the shares had been reallotted and/or those who were holding the shares at the time and after thus adding them as parties thereto to make the appropriate order of rectification and, if thought fit, to also award damages to the Company. There were, however, 16,000 shares of Rs. 10 each yet unissued. After discussing the matter with learned advocates on both sides to which discussion a reference will be made hereafter the learned Judge, in the belief that the Advocates for the parties had agreed as to the form of the order, directed that the Mills do rectify their register by inserting the name of the applicant Company as owner of 5,000 shares out of the unissued shares of Rs. 10 each and that on such insertion the Company do on or before the 15th January, 1947, pay to the Mills Rs. 25,000, being the amount of calls in arrears.

Pursuant to further directions given by the learned Judge on the 7th January 1947, the Mills on the 10th January, 1947, received Rs. 25,000 and allotted

5,0 00 shares. Although the Mills thus acted upon the order they, nevertheless, on the 6th February, 1947, filed an appeal against the order. That appeal came up for hearing before a Bench consisting of Satyanarayana Rao and Viswanatha Sastri, JJ. It was not disputed before the Appeal Court that the forfeiture was invalid, but the contentions urged were that by reason of the irregularity the forfeiture was only voidable and not void and that as the forfeiture was only voidable it was open to the Company to waive or abandon its right to dispute the validity of the forfeiture and that in fact, by its conduct, it had done so, that the claim to rectify the register was barred by limitation and that in any event rectification was impossible because the shares were not available *in specie*, the same having been reallotted to other persons. The learned Judges by their judgment dated the 11th March, 1949, held that the forfeiture was invalid, that the application was not barred by limitation, for it was covered by Article 120 of the Limitation Act. The learned Judges recognised that where a period of limitation was prescribed for a suit or a proceeding mere delay was no bar unless it was of such a character as would lead to an inference of abandonment of the right or unless it was established that the person against whom the action or proceeding was instituted was actually prejudiced by reason of such delay. The learned Judges agreed with the trial Court that no plea of acquiescence, waiver or estoppel had been established in the present case. The learned Judges, nevertheless, thought that the question of abandonment of the right and prejudice to the appellant by reason of the delay stood on a different footing. Then after referring to certain conduct on the part of Govindaraju Chettiar and Sundara Ayyar the learned Judges concluded that by reason of the long delay in reviving the Company and in taking proceedings under section 38 of the Indian Companies Act the Mills had been induced to put themselves in a situation in which it became impossible for them to restore the Company to the register in respect of those 5,000 shares and that in view of this conduct, if the applicants were Govindaraju Chettiar and Sundara Ayyar, it would have been a case in which relief would have been refused in the light of the principles which the learned Judges deduced from the judicial decisions referred to by them. Then referring to the decision in *Smith, Stone & Knight* v. *Birmingham Corporation*[1] and certain text-books the learned Judges took the view that it was too late in the day to adhere to the strict formalism laid down in *Solomon's case*[2] and that as the tendency of modern decisions was to lift the veil of corporate personality and disregard the corporate form the conduct of its only two members had dissentitled the Company from claiming the relief of rectification. The learned Judges further held that there was no legal basis on which the form of the order could be supported. On reading the judgment of the trial Judge and after hearing the senior advocate appearing for the Mills the learned Judges felt unable to agree that the learned advocate had agreed to the substitution of the 5000 out of the unissued shares for the 5000 forfeited shares. The result was that the appeal was allowed and the order of the trial Judge was set aside. The Company by its Official Receiver has now come up before this Court with leave granted by the High Court under sections 109 and 110 of the Code of Civil Procedure.

The Appeal Court, it will be observed, reversed the decision of the trial Judge and decided the appeal against the Company on two grounds only, namely, (1) that the Company had by the conduct of its two members abandoned its right to challenge the forfeiture, and (2) that the form of the order could not be supported as one validly made under section 38 of the Indian Companies Act. The learned Attorney-General, appearing in support of this appeal, has assailed the soundness of both these grounds. The learned Attorney-General, contends, not without considerable force, that having, in agreement with the trial Court, held that no plea of acquiescence, waiver or estoppel had been established in this case, the Appeal Court should not have allowed the Mills to raise the question of abandonment of right by the Company, inasmuch as no such plea of abandonment had been raised either in the Mills' affidavit in opposition to the Company's application

1. (1939) 4 A.E.R. 116. 2. L.R. 1897 A.C. 22.

or in the Mills' grounds of appeal before the High Court. Apart from this, the Appeal Court permitted the Mills to make out a plea of abandonment of right by the Company as distinct from the pleas of waiver, acquiescence and estoppel and sought to derive support for this new plea from the well-known cases of *Prendergast* v. *Turton*[1], *Clarke and Chapman* v. *Hart*[2] and *Jones* v. *North Vancouver and Land Improvement Co.*[3] A perusal of the relevant facts set out in the several reports and the respective judgments in the above cases will clearly indicate that apart from the fact that some of them related to collieries which were treated on a special footing, those cases were really cases relating to waiver or acquiescence or estoppel. Indeed in *Clarke's* case[2] while Lord Chelmsford referred to the decision in *Prendergast's* case[1] as a case of abandonment of right, Lord Wensleydale read it as an instance of acquiescence and estoppel. Unilateral act or conduct of a person, that is to say act or conduct of one person which is not relied upon by another person to his detriment is nothing more than mere waiver, acquiescence or laches while act or conduct of a person amounting to an abandonment of his right and inducing another person to change his position to his detriment certainly raises the bar of estoppel. Therefore, it is not intelligible how, having held that no plea of waiver, acquiescence or estoppel had been established in this case, the Appeal Court could, nevertheless, proceed to give relief to the Mills on the plea of abandonment by the Company of its rights. If the facts on record were not sufficient to sustain the plea of waiver, acquiescence or estoppel, as held by both the Courts, we are unable to see how a plea of abandonment of right which is an aggravated form of waiver, acquiescence or laches and akin to estoppel could be sustained on the self-same facts. Further, whatever be the effect of mere waiver, acquiescence or laches on the part of a person on his claim to equitable remedy to enforce his rights under an executory contract, it is quite clear, on the authorities, that mere waiver, acquiescence or laches which does not amount to an abandonment of his right or to an estoppel against him cannot disentitle that person from claiming relief in equity in respect of his executed and not merely executory interest. (*See* per Lord Chelmsford in *Clarke's* case[2] at p. 657.) Indeed, it has been held in *The Garden Gully United Quartz Mining Company* v. *Hugh McLister*[4], that mere laches does not disentitle the holder of shares to equitable relief against an invalid declaration of forfeiture. Sir Barnes Peacock in delivering the judgment of the Privy Council observed at pp. 56-57 as follows :—

> "There is no evidence sufficient to induce their Lordships to hold that the conduct of the plaintiff did amount to an abandonment of his shares, or of his interest therein, or estop him from averring that he continued to be the proprietor of them. There certainly is no evidence to justify such a conclusion with regard to his conduct subsequent to the advertisement of the 30th of May, 1869. In this case, as in that of *Prendergast* v. *Turton*[1], the plaintiff's interest was executed. In other words, he had a legal interest in his shares and did not require a declaration of trust or the assistance of a Court of Equity to create in him an interest in them. Mere laches would not, therefore, disentitle him to equitable relief: *Clarke and Chapman* v. *Hart*.[2] It was upon the ground of abandonment, and not upon that of mere laches, that *Prendergast* v. *Turton*[1], was decided.

Two things are thus clear, namely, (1) that abandonment of right is much more than mere waiver, acquiescence or laches and is something akin to estoppel if not estoppel itself and (2) that mere waiver, acquiescence or laches which is short of abandonment of right or estoppel does not disentitle the holder of shares who has a vested interest in the shares from challenging the validity of the purported forfeiture of those shares. In view of the decision of the Courts below that no case of waiver, acquiescence, laches or estoppel has been established in this case it is impossible to hold that the principles deducible from the judicial decisions relied upon by the Appeal Court have disentitled the company to relief in this case. The matter does not rest even here. Assuming, but not conceding, that the principle of piercing the veil of corporate personality referred to in *Smith, Stone & Knight* v. *The Birmingham Corporation*[5] can at all be applied to the facts of the present

1. (1841) 1 Y. & C.C.C. 111 : 62 E.R. 807.
2. (1858) 6. H.L.C. 632 : 10 E.R. 1443.
3. L.R. 1910 A.C. 317.
4. (1875) L.R. 1 A.C. 39.
5. (1939) 4 A.E.R. 116.

case so as to enable the Court to impute the acts or conduct of Govindaraju Chettiar and Sundara Ayyar to the Company, we have yet to inquire whether those acts or conduct do establish such abandonment of right as would, according to the decisions, disentitle the plaintiff from questioning the validity of the purported declaration of forfeiture. There can be no question that the abandonment, if any, must be inferred from acts or conduct of the Company as such or, on the above principles, of its two members subsequent to the date of the forfeiture, for it is the right to challenge the forfeiture that is said to have been abandoned. In order to give rise to an estoppel against the Company, such acts or conduct amounting to abandonment must be anterior to the Mills' changing its position to its detriment. The resolution for forfeiture was passed on the 5th September, 1941. The five-thousand forfeited shares were allotted to 14 persons on the 16th November, 1941, and it is such allotment that made it impossible for the Mills to give them back to the Company. In order, therefore, to sustain a plea of abandonment of right or estoppel, it must be shown that the Company or either of its two members had done some act and/or had been guilty of some conduct between the 5th September, 1941, and the 16th November, 1941. No such act or conduct during such period has been or can be pointed out. On being pressed advocate for the Mills refers us to the conduct of Sundara Ayyar in opposing O.P. No. 10 of 1942 filed by the Mills and O.P. No. 11 of 1942 by the Income-tax authorities for restoring the Company to the register of companies and it is submitted that such conduct indicates that Sundara Ayyar had accepted the validity of the forfeiture. This was long after the Mills had reallotted the forfeited shares. Further, a perusal of paragraph 9 of the affidavit in opposition filed by Sundara Ayyar in O. P. No. 10 of 1942 will clearly show that he not only did not accept the forfeiture as valid but actually repudiated such forfeiture as wholly beyond the competence of the Board of Directors of the Mills. The reason for opposing the restoration of the Company may well have been that Sundara Ayyar desired, at all cost, to avoid his eventual personal liability as a shareholder and director of the Company. In any case, Sundara Ayyar did make it clear that he challenged the validity of the purported forfeiture of shares by the Mills and in this respect this case falls clearly within the decision in *Clarke's case*[1] relied upon by the Appeal Court. The only other conduct of Sundara Ayyar relied on by learned advocate for the Mills in support of the Appeal Court's decision on this point is that Sundara Ayyar proceeded with his suit against Palaniappa Chettiar even after his suit as well as his appeal had been dismissed as against the Mills. In that suit Sundara Ayyar sued the Mills as well as Govindaraju Chettiar and the Official Receiver of Salem representing the latter's estate and Palaniappa Chettiar. In the plaint itself the validity of the forfeiture was challenged. The claim against Palaniappa Chettiar was, in the alternative and it was founded on the agreement of the 30th June, 1939. The suit was dismissed as against the Mills only on the technical ground that Sundara Ayyar had no *locus standi* to maintain the suit. The contention of the Company that the forfeiture was invalid and the claim for rectification of the share-register of the Mills by restoring the name of the Company cannot possibly have been affected by this decision. Sundara Ayyar's claim against Palaniappa Chettiar was based on the agreement of 1939 and it was formulated as an alternative personal claim. In view of the clear allegation in the plaint that the forfeiture was invalid and not binding on the Company, the continuation of the suit by Sundara Ayyar to enforce his personal claim against Palaniappa Chettiar cannot be regarded as an abandonment by Sundara Ayyar of the right of the Company. It must not be overlooked that the Company stood dissolved on that date and Sundara Ayyar had no authority to do anything on behalf of the Company. In our opinion there is no evidence of abandonment of the Company's right to challenge the validity of the purported forfeiture.

The second point on which the Appeal Court decided the appeal against the Company was that the form of the order made by the trial Court could not be

1. (1858) 6 H.L.C. 632 : 10 E.R. 1443.

supported as one validly made under section 38 of the Indian Companies Act. It will be recalled that having disposed of all the points of controversy against the Mills and in favour of the Company the trial Judge had to consider the form of the order which could properly be made in favour of the Company. In the summons the Company had asked for rectification of the register by restoring the name of the Company to the register in respect of 5000 shares numbering 15048 to 20047. It was agreed by learned advocates on both sides before the trial Court that it would, in the circumstances, be impossible to make an order for rectification with respect to those specific shares which, as already stated, had been reallotted to other persons who were not parties to the proceedings. The Mills had also reduced its capital by having the face value of the 84,000 shares which had been issued reduced by repaying to the shareholders Rs. 5 in respect of each of those shares. There were, however, 16,000 unissued shares of Rs. 10 each which were not affected by the reduction. While therefore, it was clearly impossible for the Court to direct that the Company should be replaced on the register in respect of its original shares, the Court could, under section 38, give notice to the persons to whom the shares had been reallotted or those claiming under them and make them parties to the proceedings and then make an appropriate order for rectification and, if necessary, also direct the Mills to pay damages under that section. This being the situation learned advocate for the Mills had to decide upon his course of action. What happened in Court will appear from the following extract from the judgment of the trial Court :—

"It is *agreed* by both parties that the proper order will be for the applicant Company to be placed on the register in respect of 5,000 of the unissued 10 rupees shares and I order accordingly. In this case as the parties *consent* to the matter being disposed of by allotting to the applicant unissued shares, there can, it seems to me, be no order for payment of the dividends. Counsel for the respondent Company leaves the solution of this difficulty to me.................The suggestion of the applicant Company is that it is prepared to forego any claim to the accrued dividends if it is not required to pay interest on the outstanding call money. This seems to me to be a very reasonable suggestion ...... I direct accordingly that on insertion on the name of the applicant Company as owner of 5,000 of the unissued shares the applicant Company shall pay to the respondent Company only Rs. 25,000 being the amount of cal s in arrears."

The Appeal Court, however, went behind this record of the proceedings that took place before the trial Court and heard the learned senior advocate as to what had happened in Court and after hearing the senior advocate for the Mills found itself unable to agree with the contention that the learned advocate for the Mills had agreed to the substitution of 5,000 unissued shares for the shares forfeited. No affidavit of the learned senior advocate was filed before the trial Court for the rectification of what is now alleged to have been wrongly recorded by the trial Judge as suggested by the Privy Council in *Madhu Sudan Chowdhri* v. *Musammat Chandrabati Chowdhrain*[1] and other cases referred to in *Timmalapalli Virabhadra Rao* v. *Sokalchand Chunilal and Others*[2]. While we do not consider it necessary or desirable to lay down any hard and fast rule, we certainly take the view that the course suggested by the Privy Council should ordinarily be taken. It appears that at the time when the application was made for leave to appeal to the Federal Court an affidavit sworn by G. Vasantha Pai, the junior advocate for the Mills was filed before the Court dealing with that application. Paragraph 5 of that affidavit runs as follows :—

"During the trial every question was argued on behalf of the Respondent company and no point was given up. This will be clear from the fact that till we reached the penultimate paragraph of the judgment beginning 'It now remains to consider, etc.' all the issues are dealt with by the learned Judge. The agreement was on the specific form of the order on the basis of His Lordships' judgment and without prejudice to the Respondent company's rights. What was agreed to was 'proper order' on the basis of His Lordship's judgment which by then had been dictated. The Respondent company no more consented to the order than the appellant consented to have his application dismissed when its counsel agreed that it was impossible to make an order in terms of the Judge's summons."

The Appeal Court understood the stand taken by the learned senior advocate as follows :—

1. (1917) 21 C.W.N. 897 (P.C.). 2. (1951) 1 M.L.J. 244.

"He seems to have agreed only as an alternative that if all his contentions were overruled and the learned Judge thought that notwithstanding the difficulty in the way of granting the relief for rectification the applicant company should be restored to the register, the only shares available being the 16,000 shares of Rs. 10 each unissued, the applicant company could be recognised as a shareholder in respect of 5000 out of those shares ...."

It is quite clear from the judgment of the trial Court, paragraph 5 of the junior advocate's affidavit and the statement of the learned senior advocate as recorded by the Appeal Court that the agreement was solely and simply as to the specific form of the order, without prejudice to the Mills' right to challenge the correctness of the findings of the trial Court on the material issues. In other words, all that learned advocate for the Mills desired to guard himself against was that the agreement should not preclude the Mills from preferring an appeal against the decision of the learned Judge on the merits. The reservation was as to the right of appeal challenging the findings on the merits and the agreement was only as to the form of the order. This limited agreement certainly implied that the Mills agreed to be bound by the order only if the Mills failed in their appeal on the merits. In short, the consent covered only the form of the order and nothing else so that if the Mills succeeded in their appeal the order would go, although advocate had agreed to its form but that if the Mills failed in their contention as to the correctness of the findings of the learned trial Court on the different questions on merits it would no longer be open to them to challenge the order only on the ground of the form of the order. In our judgment the Mills cannot attack the form of the order to which their counsel consented.

Learned advocate for the Mills has raised the question of limitation. He referred us to Articles 48 and 49 of the Limitation Act but did not strongly press his objection founded on those Articles. We agree with the trial Court and the Court of Appeal that those two Articles have no application to this case. A claim for the rectification of the register simpliciter does not necessarily involve a claim for the return of the share scrips and in this case there was, in fact, no prayer for the return of shares or the scrips and, therefore, these two Articles can have no application. Learned advocate, however, strongly relies on Article 181 of the Limitation Act. That Article has, in a long series of decisions of most, if not all, of the High Courts, been held to govern only applications under the Code of Civil Procedure. It may be that there may be divergence of opinion even within the same High Court but the preponderating view undoubtedly is that the Article applies only to applications under the Code. The following extract from the judgment of the Judicial Committee in *Hansraj Gupta* v. *Official Liquidators, Dehra Dun Mussoorie Electric Tramway Company*[1] is apposite :—

"It is common ground that the only Article in that schedule which could apply to such an application is Article 181 : but a series of authorities commencing with *Bai Manekbai* v. *Manekji Kavasji*[2], has taken the view that Article 181 only relates to applications under the Code of Civil Procedure, in which case no period of limitation has been prescribed for the application. But even if Article 181 does apply to it, the period of limitation prescribed by that Article is three years from the time when the right to apply accrued, which time would be not earlier than the date of the winding up order, March 26, 1926. The application of the Liquidators was made on 26th March, 1928, well within the three years. The result is that from either point of view the application by the liquidators, if otherwise properly made under and within the provisions of section 186 of the Indian Companies Act, is not one which must be dismissed by reason of section 3 of the Indian Limitation Act. It is either an application made within time, or it is an application made for which no period of limitation is prescribed. The case may be a *casus omissus*. If it be so, then it is for others than their Lordships to remedy the defect."

Learned advocate for the Mills, however, points out that the reason for holding that Article 181 was confined to applications under the Code was that the Article should be construed *ejusdem generis* and that, as all the Articles in the third division of the schedule to the Limitation Act related to applications under the Code, Article 181, which was the residuary Article, must be limited to applications under the Code. That reasoning, it is pointed out, is no longer applicable, because of the amendment of the Limitation Act by the introduction of the present Articles 158

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1. (1932) 64 M.L.J. 403 : L.R. 60 I.A. 13 at 20 : I.L.R. 54 All. 1067 (P.C.).
2. (1880) I.L.R. 7 Bom. 213.

and 178. These Articles are in the third division which governs applications but they do not relate to applications under the Code but to one under the Arbitration Act, and, therefore, the old reasoning can no longer hold good. It is urged that it was precisely in view of this altered circumstance that in *Asmatali Shariff* v. *Mujahir Ali Sardar*[1], a Special Bench of the Calcutta High Court expressed the opinion that an application for pre-emption by a non-notified co-sharer should be governed by Article 181 of the Limitation Act. A perusal of that case, however, will show that the Special Bench did not finally decide that question in that case. In *Hurdutrai Jagdish Prasad* v. *Official Assignee of Calcutta*[2], a Division Bench of the Calcutta High Court consisting of Chief Justice Harries and Mr. Justice Mukherjea who had delivered the judgment of the Special Bench clearly expressed the view that Article 181 of the Limitation Act applied only to applications under the Civil Procedure Code and did not apply to an application under section 36 of the Presidency Towns Insolvency Act. Mukherjea, J., who also delivered the judgment of the Division Bench explained the observations made by him in the Special Bench case by pointing out that the entire procedure for an application under section 26 (F) of the Bengal Tenancy Act was regulated by the Civil Procedure Code, and, therefore, an application for pre-emption was, as it were, an application made under the Civil Procedure Code. Subsequently in *Sarvamangala Dasi* v. *Paritosh Kumar Das*[3], G. N. Das, J., who was also a member of the Special Bench in the first mentioned case expressed the opinion, while sitting singly, that Article 181 was not confined to applications under the Code. His Lordship's attention does not appear to have been drawn to the case of *Hurdutrai Jagdish Prasad*[2] (supra). It does not appear to us quite convincing, without further argument, that the mere amendment of Articles 158 and 178 can *ipso facto* alter the meaning which, as a result of a long series of judicial decisions of the different High Courts in India, came to be attached to the language used in Article 181. This long catena of decisions may well be said to have, as it were, added the words "under the Code" in the first column of that Article. If those words had actually been used in that column, then a subsequent amendment of Articles 158 and 178 certainly would not have affected the meaning of that Article. If, however, as a result of judicial construction, those words have come to be read into the first column as if those words actually occurred therein, we are not of opinion, as at present advised, that the subsequent amendment of Articles 158 and 178 must necessarily and automatically have the effect of altering the long acquired meaning of Article 181 on the sole and simple ground that after the amendment the reason on which the old construction was founded is no longer available. We need not, however, on this occasion, pursue the matter further, for we are of the opinion that even if Article 181 does apply to the present application it may still be said to be within time. The period of limitation prescribed by that Article is three years from the time "when the right to apply accrues." It is true that a further notice, after the shares are forfeited, is not necessary to complete the forfeiture of the shares (see *Knight's case*[4]), but it is difficult to see how a person whose share is forfeited and whose name is struck out from the register can apply for rectification of the register until he comes to know of the forfeiture. The same *terminus a quo* is also prescribed in Article 120 of the Limitation Act. In *O. R. M. O. M. SP. Firm* v. *Nagappa Chettiar*[5], which was a suit to recover trust property from a person who had taken it, with notice of the trust, by a transaction which was a breach of trust, the Privy Council approved and applied the principles of the earlier Indian decisions referred to therein to the case before them and held that the time began to run under Article 120 after the plaintiff came to know of the transaction which gave him the right to sue. On the same reasoning we are prepared to extend that principle to the present application under Article 181. If Article 181 applies then time began to run after the Company came to know of its right to sue. It is not alleged that the Company had any knowledge of the forfeiture between the 5th September, 1941, when the resolution

1. (1948) 52 C.W.N. 64.
2. (1948) 52 C.W.N. 343.
3. A.I.R. 1952 Cal. 689.
4. (1867) L.R. 2 Ch. A. 321.
5. (1940) 1 M.L.J. 393 : L.R. 67 I.A. 448 ; I.L.R. (1941) Mad. 175 (P.C.).

of forfeiture was passed and the 9th September, 1941, when the Company became defunct. After the last mentioned date and up to the 16th February, 1945, the Company stood dissolved and no knowledge or notice can be imputed to the Company during this period. Therefore, the Company must be deemed to have come to know of its cause of action after it came to life again and the present application was certainly made well within three years after that event happened on the 16th February, 1945. If Article 181 does not apply then the only Article that can apply by analogy is Article 120 and the application is also within time. In either view this application cannot be thrown out as barred by limitation.

The result, therefore, is that this appeal must succeed. We set aside the judgment and decree of the High Court in appeal and restore the order of the trial Court. The appellant will be entitled to the costs of the appeal in the High Court as well as in this Court.

Bose, J.—I agree with the conclusions of my learned brothers and also with their reasoning generally but lest it be inferred that I am assenting to a far wider proposition than is actually the case, I deem it advisable to clarify my position about the abandonment and waiver. Though the usage of these words in cases of the present kind has the sanction of high authority, they are, in my opinion, inapt and misleading in this class of case. In order to appreciate this it will be necessary to hark back to first principles.

In the first place, waiver and abandonment are in their primary context unilateral acts. Waiver is the intentional relinquishment of a right or privilege. Abandonment is the voluntary giving up of one's rights and privileges or interest in property with the intention of never claiming them again. But except where statutory or other limitations intervene, unilateral acts never in themselves effect a change in legal status because it is fundamental that a man cannot by his unilateral action affect the rights and interests of another except on the basis of statutory or other authority. Rights and obligations are normally intertwined and a man cannot by abandonment *per se* of his rights and interests thereby rid himself of his own obligations or impose them on another. Thus, there can be no abandonment of a tenancy except on statutory grounds (as, for example, in the Central Provinces Tenancy Act, 1920), unless there is acceptance, express or implied, by the other side. It may, for example in a case of tenancy, be to the landlord's interest to keep the tenancy alive; and so also in the case of shares of a company. It may be to the interests of the company and the general body of shareholders to refrain from forfeiture if, for example, the value of unpaid calls exceeds the market value of the shares. Such a position was envisaged in *Garden Gully United Quartz Mining Co.* v. *Hugh McLister*[1]. So also with waiver. A long catena of illustrative cases will be found collected in B. B. Mitra's Indian Limitation Act Thirteenth Edition, pages 447 and 448.

This fundamental concept brings about another repercussion. Unless other circumstances intervene, there is a *locus poenitentiae* in which a unilateral abandonment or waiver can be recalled. It would be otherwise if the unilateral act of abandonment in itself, and without the supervention of other matters, effected a change in legal status. In point of fact, it is otherwise when, as in the statutory example I have quoted, the law intervenes and determines the tenancy. It is, therefore, in my opinion, fundamental that abandonment and waiver do not in themselves unilaterally bring about a change in legal status. Something else must intervene, either a statutory mandate or an act of acceptance, express or implied, by another person, or, as Lord Chelmsford put it in *Clarke & Chapman* v. *Hart*[2], acts which are equivalent to an agreement or a licence, or an estoppel in cases where an estoppel can be raised.

Next, there is, in my view, a fundamental difference between an executory interest and an executed one. In the former, it is necessary to resort to equitable reliefs to get enforced a right which is not at the date a vested right: cases of

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1. (1875) 1 A.C. 39 at 57. 2. (1858) 10 E.R. 1443 at 1452 and 1453.

specific performance and declaration of a trust are examples, so also a prayer for relief from forfeiture. In cases of this kind, conduct which would disentitle a person to equitable relief is relevant. No hard and fast rule can or should be laid down as to what such conduct should consist of but among the varieties of conduct which Courts have considered sufficient *in this class of case* is conduct which amounts to laches or where there has been a standing by or acquiescence or waiver or abandonment of a right, particularly when this would prejudicially affect third parties. This sort of distinction is brought out by Lord Chelmsford in *Clarke & Chapman* v. *Hart*[1].

The position is different when the interest is executed and the man has a vested interest in the right, that is to say, when he is the legal owner of the shares with the legal title to them residing in him. This legal title can only be destroyed in certain specified ways. It is in my view fundamental that the legal title to property, whether moveable or immoveable, cannot pass from one person to another except in legally recognised ways, and normally by the observance of certain recognised forms. Confining myself to the present case, one of the ways in which the title to shares can pass is by forfeiture; but in that case an exact procedure has to be followed. A second way is by transfer which imports agreement. There again there is a regular form of procedure which must be gone through. A third is by estoppel though, when the position is analysed, it will be found that it is not the estoppel as such which brings about the change. The expressions, abandonment, waiver and so forth, when used in a case like the present, are only synonyms for estoppel and despite hallowed usage to the contrary, I prefer to call a spade a spade and put the matter in its proper legal pigeon hole and call it by its proper legal name. These other terms are, in my view, loose and inaccurate and tend to confuse, when applied to cases of the present nature. A man who has a vested interest and in whom the legal title lies does not, and cannot, lose that title by *mere* laches or *mere* standing by or even by saying that he has abandoned his right, unless there is something more, namely inducing another party by his words or conduct to believe the truth of that statement and to act upon it to his detriment, that is to say, unless there is an estoppel, pure and simple. It is only in such a case that the right can be lost by what is loosely called abandonment or waiver, but even then, it is not the abandonment or waiver *as such* which deprives him of his title but the estoppel which prevents him from asserting that his interest in the shares has not been legally extinguished, that is to say, which prevents him from asserting that the legal forms which in law bring about the extinguishment of his interest and pass the title which resides in him to another, were not duly observed.

Fazl Ali, J. and I endeavoured to explain this in *Dhiyan Singh* v. *Jugal Kishore*[2]. What happens is this. The person estopped is not allowed to deny the existence of facts, namely the actings of the parties and so forth which would in law bring about the change in legal status, namely, the extinguishment of his own title and the transfer of it to another, for estoppel is no more than a rule of evidence which prevents a man from challenging the existence or non-existence of a fact. Once the facts are ascertained, or by a fiction of law are deemed to exist, then it is those facts which bring about the alteration in legal status; it is not the estoppel as such nor is it the abandonment or waiver *per se*. I prefer therefore to adhere to what I conceive is the proper legal nomenclature. As I understand it, estoppel was the basis of the decision in *Clarke & Chapman* v. *Hart*[1]. See Lord Wensleydale's judgment at page 1458 and the Lord Chancellor's at page 1453; so also in *Garden Gully United Quartz Mining Company* v. *Hugh McLister*[3].

That there is no sufficient ground for estoppel in this case is shown by the facts set out in the judgment of my learned brothers. I agree that the appeal must succeed.

Agent for Appellant : *S. Subramanian.*

Agent for Respondent : *M. S. K. Aiyengar.*

G.R./K.S. ——— *Appeal allowed.*

1. (1885) 10 E.R. 1443 at 1452 and 1453.
2. (1952) S.C.R. 478 at 485; 1952 S.C.J. 142.
3. (1875) 1 A.C. 39 at 56 and 57.

[THE SUPREME COURT OF INDIA.]

[Criminal Appellate Jurisdiction.]

PRESENT :—MEHRCHAND MAHAJAN, S. R. DAS AND N. H. BHAGWATI, JJ.

Ajmer Singh .. *Appellant**

v.

The State of Punjab .. *Respondent.*

Criminal Procedure Code (V of 1898), section 417—Appeal against order of acquittal—Power of High Court to review the evidence—Presumption of innocence of accused—Scope and effect—Section 342, Criminal Procedure Code (V of 1898)—Duty to examine accused in accordance with—Proper form of examining.

After an order of acquittal has been made the presumption of innocence is further reinforced by that order, and that being so, the trial Court's decision acquitting the accused can be reversed not on the ground that the accused had failed to explain the circumstances appearing against him but only for very substantial and compelling reasons.

The appellate Court cannot reverse the acquittal by holding that "when a strong *prima facie* case is made out against an accused person it is his duty to explain the circumstances appearing in evidence against him and he cannot take shelter behind the presumption of innocence and cannot state that the law entitles him to keep his lips sealed."

But in an appeal under section 417 of the Code of Criminal Procedure the High Court has full power to review the evidence upon which the order of acquittal was founded and come to its own conclusion.

When the Sessions Judge is required by section 342 of the Code of Criminal Procedure to make the examination of the accused, his duty is not discharged by merely reading over the questions and answers to the accused put in the committing magistrate's Court and by asking him whether he has to say anything about them. It is not sufficient compliance with the section to generally ask the accused that having regard to the prosecution evidence what he has to say about it. The accused must be questioned separately about each material circumstance which is intended to be used against him. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand.

Where, however, the defective procedure in not complying with section 342 has not occasioned any prejudice to the accused, the trial is not vitiated.

On appeal by Special Leave from the Judgment and Order, dated the 14th September, 1951, of the High Court of Judicature for the State of Punjab at Simla (Bhandari and Soni, JJ.) in Criminal Appeal No. 351 of 1950, arising out of Judgment and Order, dated the 13th May, 1950, of the Court of the Sessions Judge, Ferozepore, in Trial No. 28 of 1950 and Case No. 5 of 1950.

P. S. Safeer, Advocate, for Appellant.

Gopal Singh, Advocate, for Respondent.

The Judgment of the Court was delivered by

Mahajan, J. —Ajmer Singh, a young man of about 22 years of age, was tried for the murder of Bagher Singh, his first cousin, and was acquitted by the Sessions Judge of Ferozepore by his judgment dated 13th May, 1950. On appeal by the State Government, the order of acquittal was set aside by the High Court and the appellant was convicted under section 304, Indian Penal Code, and sentenced to ten years' rigorous imprisonment. This is an appeal by special leave against that decision.

One Nikka Singh had three sons, Bhagwan Singh, Lal Singh and Sunder Singh. Bhagwan Singh died issueless some years ago and disputes arose between Lal Singh and his brother Sunder Singh in regard to the division of the property of Bhagwan Singh. Sunder Singh was in possession of some of his landed properties and Lal Singh obtained a number of decrees against him but Sunder Singh declined to restore possession of the properties to his brother Lal Singh. In view of this litigation the relations between Lal Singh and Sunder Singh were considerably strained and it is said that for some time they were not even on speaking terms. Lal Singh is married to Mst. Dhan Kaur and from her he had two sons. One of them

* Crl. Appeal No. 67 of 1952. 10th December, 1952.

Bagher Singh was murdered and the other Arjan Singh, is P.W. 5. Accused Ajmer Singh is the son of Sunder Singh and Banta Singh is his real brother. Ajmer Singh is married to Jagir Kaur and Banta Singh to Kartar Kaur. It is alleged by the prosecution that on the evening of the 27th January, 1948, Jagir Kaur complained to her father-in-law that her husband had pawned her ear-rings in order to pay off his gambling debts. On the morning of the 28th Banta Singh inquired from Ajmer Singh about this matter and he replied that he had pawned the ear-rings to one Banta Singh Mazhbi. Soon after this Ajmer Singh, Banta Singh and one Teja Singh went to Banta Singh Mazhbi and asked him to return the ear-rings but the latter replied that no ornaments had been pawned with him and added that he would give a sum of Rs. 30 to them if Ajmer Singh took an oath that the ornaments had in fact been left with him. It is said that Lal Singh, was also present when this conversation took place and took up cudgels on behalf of Banta Singh Mazhbi and this led to an exchange of hot words between Lal Singh and the party of Sunder Singh's two sons and their companion Teja Singh. The parties, however, dispersed after exchanging hot words but without coming to blows.

At about sunset the same date Lal Singh and his brother Sunder Singh started abusing each other from their respective houses which open out into a common courtyard. This wordy warfare between the two brothers attracted the attention of Arjan Singh, Bagher Singh and one Ujagar Singh Mazhbi who on hearing the noise came to the house of Lal Singh. Lal Singh finding himself supported by three others threw out a challenge to Sunder Singh and told him to come out in the open. It is said that Sunder Singh, his two sons Banta Singh and Ajmer Singh, and Teja Singh, a cousin of theirs, accepted the challenge and rushed out of the house. Teja Singh and Banta Singh were armed with spears and they made an attack on Lal Singh and Dhan Kaur and inflicted on their persons a number of injuries. Ajmer Singh, it is said, was armed with a spear and he plunged his weapon into the chest of Bagher Singh who collapsed and died almost instantaneously. Arjan Singh soon after reported this incident at the police station after travelling a distance of about seven miles at 11-45 P.M. He gave to the police substantially the same version as has now been deposed to by him in the witness-box. In this report it was stated by Arjan Singh that it was Ajmer Singh who dealt Bagher Singh a barchha blow on his chest and that Bagher Singh fell down at this blow. The police arrested Sunder Singh, Teja Singh and Banta Singh but the appellant could not be found.

Sunder Singh, Teja Singh and Banta Singh were prosecuted under section 302/34 but were convicted under section 324, Indian Penal Code. Banta Singh and Teja Singh were sentenced to two years' rigorous imprisonment each and Sunder Singh to six months' rigorous imprisonment. On appeal, Sunder Singh was acquitted and the sentences imposed on Banta Singh and Teja Singh were reduced. A lenient view of the affair seems to have been taken because the fight between these near collaterals took place suddenly and ended promptly. Bagher Singh died as a result of one blow and injuries on the person of Lal Singh and Dhan Kaur were not very serious. Ajmer Singh was apprehended on 4th December, 1948, and as above stated, was tried by the learned Sessions Judge of Ferozepore and acquitted, but was convicted by the High Court on appeal by the State Government.

Lal Singh, P.W. 3, father of the deceased, Dhan Kaur, his mother, and Arjan Singh, his real brother, have given direct evidence about the occurrence. Ujagar Singh Mazhbi whose name is mentioned in the first information report was tendered for cross-examination but no question was put to him about the actual fight, and the manner in which it took place or the part that was taken in it by the accused. One Bishandas, whose shop adjoins the shop of Banta Singh Mazhbi, was tendered for cross-examination as P.W. 7. He deposed that Banta Singh Mazhbi and Lal Singh were the only persons when the quarrel about ear-rings took place near his shop. In re-examination he stated that Banta Singh, brother of the accused, and Teja Singh had come on one side and Lal Singh on the other when the quarrel about the ear-rings took place. No direct question was asked to the witness about the presence of Ajmer Singh on that occasion. The learned Sessions Judge considered

him a wholly independent witness and accepted his evidence about the incident that took place at Banta Singh Mazhbi's shop on the morning of the 28th. He held that Ajmer Singh was not present at Banta Singh Mazhbi's shop and that Lal Singh and Arjan Singh had falsely implicated him in the quarrel over the ear-rings, and that if the witnesses could falsely involve him in regard to one part of the occurrence, the possibility of his being implicated for the murder of Bagher Singh merely as a matter of vindictiveness could not be outruled. After examining the evidence of the three eye-witnesses in detail, the learned Sessions Judge reached the conclusion that they had suppressed the facts in order to absolve themselves of all liability for the happenings of the 28th, and had uttered untruths and that no confidence could be reposed in their statements about the part that they had assigned to Ajmer Singh. In the concluding part of the judgment he observed that

"the parties were at loggerheads on several issues and in the absence of independent evidence it is difficult to place reliance on the prosecution story in regard to Ajmer Singh."

The High Court on appeal minutely reviewed the evidence of these three eye-witnesses and considered that the variations in the statements of witnesses made at the two trials and which had weighed on the mind of the Sessions Judge were of a minor and trifling character and were quite natural as the statements at this trial had been made 27 months after the occurrence and that the narration of events by Arjan Singh was substantially the same as had been given by him at the earlier trial and in the first information report. As regards Lal Singh, who had resiled from his earlier statement and had denied that he was armed with a phaura or that Arjan Singh was armed with a lathi, it was said that this omission on his part was due to mere lapse of memory and forgetfulness rather than to a deliberate design to improve upon the prosecution story.

It was argued by Mr. Pritam Singh Safeer that in this case there were no compelling reasons for setting aside the order of acquittal and that due proper weight had not been given by the High Court to the opinion of the trial judge as regards the credibility of witnesses seen and examined by him. The learned counsel submitted that the High Court was in error in the view that

"when a strong *prima facie* case is made out against an accused person it is his duty to explain the circumstances appearing in evidence against him and he cannot take shelter behind the presumption of innocence and cannot state that the law entitles him to keep his lips sealed."

We think this criticism is well-founded. After an order of acquittal has been made the presumption of innocence is further reinforced by that order, and that being so, the trial Court's decision can be reversed not on the ground that the accused had failed to explain the circumstances appearing against him but only for very substantial and compelling reasons.

As the Courts below expressed divergent opinions on the credibility of the prosecution witnesses, we had to read the evidence adduced in the case with great care and after doing so, we are on the whole inclined to agree with the view expressed by the High Court. It is difficult to believe that without there being any truth in the fact that the appellant struck Bagher Sing with a barchha, Arjan Singh selected the appellant and ascribed to him that part soon after the occurrence. There are no material discrepancies in the statements made by Arjan Singh on different occasions and in our view, the reasons given by the learned Sessions Judge for rejecting his testimony are not convincing. We agree with the High Court that there are no sufficient reasons for distrusting his evidence. The number of persons who took part in the quarrel was not more than seven or eight and the blows inflicted were few, and in these circumstances Arjan Singh could have made no mistake as to the identity of the person who struck Bagher Singh fatally. This part of his statement is corroborated by the evidence of Lal Singh and Dhan Kaur. No cross-examination was directed against this part of their statements. It seems that the learned Sessions Judge took too exaggerated a view of the minor discrepancies in these statements and read them with a rather hypercritical mind. Bishandas, whose statement considerably impressed him, was only tendered for cross-examination and never made a full statement about the happenings of the 28th morning. The statement made

by him is somewhat cryptic and from this it cannot be definitely concluded that Ajmer Singh was not present on the morning of the 28th at the shop of Banta Singh Mazhbi. The learned Sessions Judge was not right in rejecting the whole of the prosecution evidence as unreliable merely on the basis of this cryptic statement. Ujagar Singh, the other so-called independent witness, was tendered for cross-examination but the defence did not ask him a single question about the happenings of the 28th. The argument therefore that the prosecution withheld from court independent witnesses who had witnessed the occurrence is without any substance. The learned Sessions Judge was apparently labouring under some misapprehension when he said that the prosecution had withheld from the court independent witnesses of the occurrence. Apart from Ujagar Singh Mazhbi, no one else appears to have been present when the attack was made on Bagher Singh, Lal Singh and Mst. Dhan Kaur by the party of the accused. All that appears in evidence is that after the fight was over a number of persons arrived on the scene but as they did not witness the attack on Bagher Singh they could give no evidence on this point and their non-production as witnesses cannot have any consequence on the case. It is significant that the defence also led no evidence to prove that the fight took place in a manner different from the one described by the prosecution witnesses, or that Ajmer Singh was not present on the occasion. In an appeal under section 417 of the Code of Criminal Procedure the High Court had full power to review the evidence upon which the order of acquittal was founded and we are satisfied that it did not in any way exercise it wrongly. The injuries on the person of Kartar Kaur and Sunder Singh were not proved to have been inflicted at the time of the occurrence and were of no consequence. The prosecution was under no obligation to explain how they came about.

It was next argued that the trial held by the Sessions Judge was vitiated as the examination of the appellant was not in accordance with the provisions of section 342, Criminal Procedure Code. There is considerable force in the point that the examination of the appellant by the Sessions Judge was defective. All that the Sessions Judge did was, that he read out the examination of the accused in the committal court to him and then recorded the following questions and answers—

"Q: Did you make before the Committing Magistrate the statement that has just now been read out to you?

A: Yes.

Q: Now that you have heard the entire evidence against yourself and the charge has been explained to you, do you wish to say anything else?

A: I am innocent.

Q: Do you wish to produce any evidence in defence?

A: No."

In the committal court the questions put to the accused and his answers were these:—

"Q: Did you pawn the ear-rings of your wife with Banta Mazhbi and squander the proceeds on or about 28th January, 1948?

A: No.

Q: Did Lal Singh interfere when you were demanding the ear-rings from said Banta Singh on 28th January, 1948, at Nathuwala and remark that the sweeper, *i.e.*, Banta was speaking truth when he denied the transaction?

A: No.

Q: Did you on 28th January, 1948, at Nathuwala along with your father Sunder Singh, Banta Singh, and Teja Singh, you Banta Singh and Teja Singh being armed with spears, attack Lal Singh, his son Bagher Singh and Dhan Kaur at their house and in furtherance of the common intention of you all, Banta and Teja caused simple injuries to Lal Singh with spears and you caused fatal injuries with a spear to Bagher Singh deceased?

A: No.

Q: Why this case against you?

A: Due to enmity.

Q: Anything else to say?

A: No."

The Sessions Judge did not even take care to ask the accused the routine question whether the statement made by him in the committal court was correct. As if hard pressed for time, he simply asked him whether he had made that statement read out to him in the committal court, and was satisfied with an answer in the affirmative. The second question asked is of a general character and does not satisfy the requirements of section 342, Criminal Procedure Code. We are of the opinion that when the Sessions Judge is required by that section to make the examination of the accused, his duty is not discharged by merely reading over the questions and answers to the accused put in the committing magistrate's court and by asking him whether he has to say anything about them. It is not sufficient compliance with the section to generally ask the accused that having heard the prosecution evidence what he has to say about it. The accused must be questioned separately about each material circumstance which is intended to be used against him. It was pointed out by this Court in *Tara Singh* v. *The State*[1] that the whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand.

In this particular case at one stage of the argument we were inclined to order a retrial of the accused in view of the defective examination of the accused by the Sessions Judge but on further thought we have reached the conclusion that the High Court was right in the view that the defective procedure followed by the Sessions Judge in this respect has not occasioned any prejudice to the accused. The facts of the case are free from any complication and the point in issue was a simple one and it cannot be said that the perfunctory examination of the appellant did any damage. The only point appearing in the evidence against the accused was that he gave a barchha blow to Bagher Singh. The witnesses had stated that fact in his face and had been cross-examined on the point by his counsel. He was fully apprised of the part ascribed to him in the quarrel. His answer to this specific question in the committal court was that he was innocent and that he was being implicated owing to enmity. He stuck to that reply in the court of session after fully understanding what he was asked. It is well settled that every error or omission not in compliance with the provisions of section 342 does not necessarily vitiate a trial. Errors of this type fall within the category of curable irregularities, and as held in *Tara Singh's case*[1], the question whether the trial is vitiated, in each case depends upon the degree of the error and upon whether prejudice has been or is likely to have been caused to the accused. We are of the opinion that the disregard of the provisions of section 342 in this case is not so gross as would justify our quashing the conviction and ordering a retrial.

The result is that we uphold the judgment of the High Court and dismiss the appeal.

Agent for Appellant : *R. S. Gheba.*

Agent for Respondent : *G. H. Rajadhyaksha.*

G.R./K.S. *Appeal dismissed.*

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1. (1951) S.C.R. 729 : (1951) 2 M.L.J. 291 : (1951) S.C.J. 518 (S.C.).

[THE SUPREME COURT OF INDIA.]

(Civil Appellate Jurisdiction.)

PRESENT :—MEHRCHAND MAHAJAN, S. R. DAS, VIVIAN BOSE AND N. H. BHAGWATI, JJ.

The Anglo-French Textile Company, Ltd., by Agents, Messrs. Best & Company, Ltd., Madras .. *Appellant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 42 (3)—Scope—Spinning and weaving mills in French India—Purchase through agent in British India of raw cotton for use in the mills—If operation, in connection with a business—Profits attributable to such purchases in India—Liability to assessment to tax.

Even purchase of raw materials could be an operation in connection with a business and if it was carried on in British India it might make the profits attributable to such operation taxable under section 42 of the Indian Income-tax Act. The contention that it is the act of sale alone from which the profits accrue or arise is unsustainable.

Commissioner of Income-tax, Bombay v. *Ahmedbai Umarbai & Co.*, 1950 S.C.R. 335 : 1950 S.C.J. 374 (S.C.), followed.

Though a few isolated acts of purchase of raw materials in British India may not be 'operations' within the meaning of that expression in section 42 (3) of the Indian Income-tax Act where the raw materials are purchased systematically and habitually through an established agency having special skill and competency in selecting the goods to be purchased and fixing the time and place of purchase such activity is well within the import of the term 'operation' as used in section 42 (3) of the Act. It is not in the nature of an isolated transaction of purchase of raw materials and a portion of the profits can be attributed to such purchases.

Where there is a continuity of business relationship between the person in British India who helps to make the profits (a regular agency purchasing raw cotton) and the person outside British India (the assessee a spinning and weaving mill) who receives or realises the profits such relationship does constitute a business connection and attracts the application of section 42 of the Indian Income-tax Act.

Accordingly the profits attributable to the purchase of raw materials in British India are assessable to Indian income-tax.

On appeal from the Judgment and Order dated the 18th January, 1950, of the High Court of Judicature at Madras (Satyanarayana Rao and Viswanatha Sastri, JJ.)[1] in Case Referred No. 27 of 1947.

O. T. G. Nambiar, Senior Advocate (*S. N. Mukherjee*, Advocate, with him) for Appellant.

M. C. Setalvad, Attorney-General for India and *C. K. Daphtary*, Solicitor-General for India (*G. N. Joshi* and *P. A. Mehta*, Advocates, with them) for Respondent.

The Judgment of the Court was delivered by

Mahajan, J.—This is an appeal from the judgment of the High Court of Judicature at Madras, dated 18th January, 1950, delivered on a reference by the Income-tax Appellate Tribunal under section 66 (1) of the Indian Income-tax Act, whereby the High Court answered the two questions referred in the affirmative.

The appellant is a public limited company incorporated in the United Kingdom and owns a spinning and weaving mill located at Pondicherry in French India. The year of account of the appellant is the calendar year. In the year 1939 no sales of yarn or cloth manufactured by the company were effected in British India, though in the previous year such sales were effected. All the purchases of cotton required for the mills were made in British India by Messrs. Best & Co., Ltd. Under an agreement between the appellant and Messrs. Best & Co., Ltd., Madras, dated 11th July, 1939, Messrs. Best & Co., Ltd., were constituted the agents of the appellant for the purposes of its business in India. Messrs. Best & Co., Ltd., have under the terms of the agreement full powers in connection with the business of the appel-

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* Civil Appeal No. 12 of 1952. 22nd December, 1952

1. (1950) 2 M.L.J. 798.

lant in the matter of purchasing stock, signing bills and other negotiable instruments and receipts and settling, compounding or compromising any claim by or against the appellant. The agents are empowered to borrow money on behalf of the appellant and to make advances. They are also expected to secure the best commissions, brokerages, rebates, discounts and other allowances in respect of and in connection with the business of the appellant. They are enjoined to keep proper accounts of the appellant and to pay over to the appellant the sum standing to its credit. They are remunerated by a salary of Rs. 6,500 per month and a percentage commission on the profits made. During the relevant year all the purchases of cotton required for the mill at Pondicherry were made by the agents in British India and no purchases were made through any other agency. The agents exercised their judgment and skill and purchased such qualities and quantities of cotton and at such prices as they in their experience considered most advantageous in the interests of the company.

Prior to 1939-40 the appellant was assessed to income-tax in British India on the profits computed on a turnover basis earned by the sales in British India of the goods manufactured by the appellant. In the course of the assessment year 1939-40 the appellant stated that it discontinued its business in British India with effect from 1st April, 1939, and claimed relief under section 25 (3) which was granted. In the course of his further enquiries the Income-tax Officer found that though the appellant was not selling its goods in British India and earning a profit thereby, it continued to have an active business connection in British India having regard to the way in which the business of purchasing goods and materials for the mills was carried on. Thereupon the Income-tax Officer held that such purchases of cotton in British India constituted a business connection in British India and that the profits attributable to the purchases were liable to tax under sections 42 (1) and 42 (3) of the Act. The net income of the company was computed to be Rs. 2,81,176 and ten per cent. of this sum was apportioned under section 42 (3) of the Act as being the profits and gains reasonably attributable to that part of the business operations which were carried out in British India. The appellant appealed against the said order of the Income-tax Officer to the Appellate Assistant Commissioner, who confirmed the order of the Income-tax Officer. A further appeal by the appellant to the Tribunal was unsuccessful.

At the instance of the appellant, the Tribunal stated a case and referred the following questions for the decision of the High Court under section 66 (1) of the Act :—

"1. Whether, in the circumstances of this case the assessee-company had any business connection in British India within the meaning of sections 42 (1) and 42 (3) of the Income-tax Act?

2. Whether any profits could reasonably be attributed to the purchase of entire cotton made in British India by the secretaries and agents of the assessee-company within the meaning of sections 42 (1) and 42 (3) of the Income-tax Act?"

The High Court answered both these questions in the affirmative and, in our opinion, rightly.

The learned counsel for the appellant reiterated before us the arguments that he had addressed in the High Court and contended that on the facts of this case there was no scope for the finding that any profits or gains accrued to the assessee directly or indirectly through or from any business connection in India. It was argued that a mere purchase of raw materials or goods in British India does not result in the accrual or arising of profits and that the profits on the sale of goods arise and accrue only at the place where the sales are effected and that in the present case, there being no sales effected in British India in the year of account 1939, no profits accrued or arose to the company in British India nor could any profits be deemed to have accrued or arisen in British India. In support of his proposition the learned counsel placed reliance on a number of cases, *inter alia*, on *Board of Revenue* v. *Madras Export Co.*[1], *Jiwan Das* v. *Commissioner of*

1. (1922) 44 M.L.J. 290 : I.L.R. 46 Mad. 360.

Income-tax, Lahore[1], *Rahim* v. *Commissioner of Income-tax*[2], *Commissioner of Income-tax, Bombay* v. *Western India Life Insurance Company*[3], *Commissioner of Income-tax* v. *Little's Oriental Balm, Ltd*[4]. Most of these decisions were given under the Act of 1922, before the insertion of section 42 (3) in the Act of 1922 by the amending Act of 1939.

As against the cases relied upon by the learned counsel for the appellant, several authorities have been cited to us which have proceeded on the footing that even purchase of raw materials could be an operation in connection with a business and if it was carried on in British India it might make the profits attributable to such operation taxable under section 42 of the Indian Income-tax Act. The case *Rogers Pyatt Shellac Co.* v. *Secretary of State for India*[5] is one of the leading decisions on this point. This case was decided under section 33 of the Indian Income-tax Act, 1918, and the judgment shows that the principle followed in the case was similar to that which was subsequently embodied in section 42 (3) of the Income-tax Act, 1922. The question referred to the High Court in that case was in these terms :—

"Is this company which purchased shellac and mica in India for sale in the open market in America liable to be assessed to income-tax and super-tax under either Income-tax Act VII of 1918 or Act XI of 1922 and the Super-tax Act VIII of 1917."

And it was answered in the affirmative. The same line of reasoning was adopted by the Rangoon High Court in *Commissioner of Income-tax, Burma* v. *Steel Brothers Co.*[6]. Among recent cases on this point which were decided under section 42 of the Income-tax Act, 1922, can be mentioned the case of *Motor Union Insurance Co., Ltd.* v. *Commissioner of Income-tax, Bombay*[7] and that of *Webb Sons & Co.* v. *Commissioner of Income-tax, East Punjab*[8]. In the last case, the assessee company which was incorporated in the United States of America was carrying on in America the business of manufacturing carpets. Its only business in British India was the purchase through its agent in British India, of wool as raw material for use in the manufacture of carpets. It was held that the purchase was an operation within the meaning of section 42 (3) and the profits from such purchases could be deemed to arise in British India and it was consequently assessable under section 42 (3) of the Indian Income-tax Act. The questions referred to the High Court in this case and relevant to this enquiry were these :—

"(i) Is mere purchase of raw material an operation within the meaning of section 42 (3) of the Act?

(ii) Can any profit arise out of mere purchase of raw material?"

While answering these questions in the affirmative it was said :—

"It is clear that the purchase of raw material by a firm of manufacturers is one of the processes or operations which contributes to an appreciable degree to the ultimate profit which is realized on the sale of manufactured articles."

There is thus no uniformity of judicial opinion on the question that the mere act of purchase produces no profit.

In our judgment, the contention of the learned counsel for the appellant,—and on which his whole argument is founded, that it is the act of sale alone from which the profits accrue or arise can no longer be sustained and has to be repelled in view of the decision of this Court in *Commissioner of Income-tax, Bombay* v. *Ahmedbhai Umarbhai & Co.*[9] That was a case that arose under the Excess Profits Tax Act XV of 1940. A firm which was resident in British India and carried on the business of manufacturing and selling groundnut oil, and owned some oil mills within British India also owned a mill in Raichur in the Hyderabad State where oil was manufactured. The oil manufactured in Raichur was sold partly within the State of Hyderabad and partly in Bombay. It was held by

1. (1929) I.L.R. 10 Lah. 657.
2. A.I.R. 1949 Orissa 60.
3. A.I.R. 1946 Bom. 185.
4. (1950) 2 M.L.J. 777: 18 I.T.R. 849.
5. (1924) I.L.R. 52 Cal. 1.
6. (1925) I.L.R. 3 Rang. 614 (F.B.).
7. A.I.R. 1945 Bom. 285.
8. (1950) 18 I.T.R. 33.
9. (1950) S.C.J. 374: 1950 S.C.R. 335.

this Court that the profits of that part of the business, *viz.*, the manufacture of oil at the mill in Raichur accrued or arose in Raichur even though the manufactured oil was sold in Bombay and the price was received there, and accordingly, that part of the profits derived from sales in Bombay which was attributable to the manufacture of the oil in Raichur was exempt from excess profits tax under the proviso to section 5 of the Act. Reference in this case was made to the decision of the House of Lords in In re *Commissioners of Taxation* v. *Kirk*[1], wherein it was held that where income was in part derived from the extraction of ore from the soil of New South Wales Colony, and from the conversion in the latter colony of the crude or into a merchantable product, this income was assessable under the New South Wales Land and Income-Tax Assessment Act of 1895, section 15, subsections 3 and 4, notwithstanding that the finished products were sold exclusively outside the Colony. Lord Davey while delivering the judgment of the Privy Council observed as follows :—

"It appears to their Lordships that there are four processes in the earning or production of this income—(1) the extraction of the ore from the soil ; (2) the conversion of the crude ore into a merchantable product, which is a manufacturing process ; (3) the sale of the merchantable product ; (4) the receipt of the moneys arising from the sale. All these processes are necessary stages which terminate in money, and the income is the money resulting less the expenses *attendant on all the stages*. The first process seems to their Lordships clearly within sub-section 3, and the second or manufacturing process, if not within the meaning of 'trade' in sub-section 1, is certainly included in the words 'any other source whatever' in sub-section 4.

So far as relates to these two processes, therefore, their Lordships think that the income was earned and arising and accruing in New South Wales."

On a parity of reasoning it can well be said in this case that the profits accrue or arise to the appellant from three business processes or operations, those being (1) the purchase of cotton in British India ; (2) its conversion by the process of manufacture in Pondicherry into yarn or cloth ; and (3) the sale of the merchantable product, and those have to be apportioned between these three operations. The same line of reasoning was adopted by the Madras High Court in *Bangalore Woollen, Cotton & Silk Mills Co., Ltd.* v. *Commissioner of Income-tax, Madras*[2]. There it was held that the purchase of raw materials by the managing agents in British India would be an operation within the meaning of section 42 (3) and it was reasonable to attribute a portion of the profits to such purchases in British India.

After a careful consideration of the decided cases on the subject and in view of the insertion of section 42 (3) in the Act of 1922 by the amending Act of 1939, we have reached the conclusion that in the present state of the law there is hardly any scope for maintaining the view contended for by the learned counsel for the appellant and we therefore agree with the High Court in repelling it. While maintaining the view taken by the High Court in this case we wish to point out that it is not every business activity of a manufacturer that comes within the expression "operation" to which the provisions of section 42 (3) are attracted. These provisions have no application unless according to the known and accepted business notions and usages the particular activity is regarded as a well-defined business operation. Activities which are not well defined or are of a casual or isolated character would not ordinarily fall within the ambit of this rule. Distribution of profits on different business operations or activities ought only to be made for sufficient and cogent reasons and the observations made here are limited to the facts and circumstances of this case. In a case where all that may be known is that a few transactions of purchase of raw materials have taken place in British India, it could not ordinarily be said that the isolated acts were in their nature "operations" within the meaning of that expression. In this case the raw materials were purchased systematically and habitually through an established agency having special skill and competency in selecting the goods to be purchased and fixing the time and place of purchase. Such activity appears to us to be well within the import of the term "operation" as used in section 42 (3) of the Act. It is not in the nature of an isolated transaction of purchase of raw materials. The first contention of the assessee is therefore negatived.

1. (1900) A.C. 588.   2. (1950) 18 I.T.R. 424.

The learned counsel argued in a rather half-hearted manner that there was no business connection of the assessee in British India. This contention does not require serious consideration. An isolated transaction between a non-resident and a resident in British India without any course of dealings such as might fairly be described as a business connection does not attract the application of section 42; but when there is a continuity of business relationship between the person in British India who helps to make the profits and the person outside British India who receives or realizes the profits, such relationship does constitute a business connection. In this case there was a regular ageny established in British India for the purchase of the entire raw materisls required for the manufacture abroad and the agent was chosen by reason of his skill, reputation and experience in the line of trade. The terms of the agency stated in the earlier part of this judgment fully establish that Messrs. Best & Co., Ltd., were carrying on something almost akin to the business of a managing agency in India of the foreign company and the latter certainly had a connection with this agency. We therefore negative this contention of the learned counsel as well.

For the reasons given above we uphold the view taken by the High Court and dismiss the appeal with costs.

Agent for Appellant : *P. K. Mukherji.*

Agent for Respondent : *G. H. Rajadhyaksha.*

G.R./K.S. ——— *Appeal dismissed.*

[THE SUPREME COURT OF INDIA.]

(Civil Appellate Jurisdiction.)

PRESENT :—MEHRCHAND MAHAJAN, S. R. DAS, VIVIAN BOSE AND N. H. BHAGWATI, JJ.

The Anglo-French Textile Company, Ltd., by Agents, M/s. Best and Company, Ltd., Madras .. *Appellant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 25 (1) and (2)—Scope—Nil return and assessment accordingly—Assessee if entitled to have " loss " determined and recorded.

There is no provision in the Income-tax Act which entitles the assessee to have a loss recorded or computed unless something is to be done with the loss. Thus, under section 24 (1) a loss can be set off against an income, profit or gain and under sub-section (2) the balance of a loss can be carried forward to a following year on the conditions set out there.

Where no return was filed at any stage of the case disclosing any income, profits or gains at all, and in the course of proceedings later taken under section 34 of the Income-tax Act, the assessee claimed that a certain loss should be determined and recorded, *held*, that that cannot be done.

On Appeal from the Judgment and Order dated the 18th January, 1950, of the High Court of Judicature at Madras (Satyanarayana Rao and Viswanatha Sastri, JJ.)[1] in Case Referred No. 28 of 1947.

O. T. G. Nambiar, Senior Advocate (*Samarendra Nath Mukherjee*, Advocate, with him), for Appellant.

M. C. Setalvad, Attorney-General for India and *C. K. Daphtary*, Solicitor-General for India (*G. N. Joshi* and *P. A. Mehta*, Advocates, with them), for Respondent.

The Judgment of the Court was delivered by

Bose, J.—The following question was referred to the High Court of Madras by the Income-tax Appellate Tribunal under section 66 (1) of the Indian Income-tax Act, 1922 :

" Whether on the facts and in the circumstances of the case when an assessment has been made under section 23 (1) of the Indian Income-tax Act, determining the assessee company's income as

* Civil Appeal No. 13 of 1952. 22nd December, 1952.

1. (1950) 1 M.L.J. 54.

'nil' and when proceedings under section 34 were subsequently started to assess the income which the Income-tax Officer believed to have escaped assessment the assessee company is entitled to claim that the loss of profits and gains (including depreciation allowance) sustained by it in the previous year should be determined in the course of such proceedings."

We are concerned in this case with the assessment year 1941-42. The assessee is the Anglo-French Textile Company, a company which is incorporated in the United Kingdom. It owns spinning and weaving mills at Pondicherry in French India and manufactures yarn and cloth there. The raw materials necessary for the manufacture, or at any rate much of it, such as cotton, used to be purchased in what was then the British India, through their agents Best & Company, Ltd., of Madras. The bulk of their manufactured goods were also sold in British India, the rest being sold elsewhere. But in the year material to this case it did no business in British India and accordingly it submitted no return to the Income-tax authorities.

On 25th April, 1941, the Income-tax Officer issued a notice to the assessee and called for a return. The assessee replied on 9th June, 1941, that it had

"at all times material to the assessment year no business in British India"

and consequently no profits arose or accrued or were received in British India and therefore the assessee

"was not liable to comply with the provisions of the Indian Income-tax Act."

The assessee added:

"In the circumstances the company is not liable to make a return but with a view to preserve the right of the company to appeal against any order that may be passed by you, if necessary, we submit herewith without prejudice a nil return receipt of which kindly acknowledge."

Appended to the letter was a piece of paper which has been called a "nil" return. It is the usual printed form in which returns are normally made but the only entry in the whole form is the word "nil." The following declaration was also added:

"I further declare that the company was not resident in British India during the previous year, etc. . . . . ."

On 25th March, 1942, the Income-tax Officer made the following order which he called an Assessment Order:

"The company made a nil return of income obviously for the reason that it is not carrying on any business in British India . . . . I accept the return of income filed by the company and declare it is not liable to tax for the year 1941-42."

A year later, namely, on 9th March, 1943, the Income-tax Officer sent the assessee a notice under section 34 (1) (*b*) in the following terms:

"Whereas in consequence of the definite information which has come into my possession I have discovered that your income assessable to income-tax for the year ending 31st March, 1942, has

(*a*) escaped assessment.

I therefore propose to assess the said income that has

(*a*) escaped assessment.

I hereby require you to deliver to me not later than . . . . a return in the attached form of your total income and total world income assessable for the said year . . . ."

In reply to this the assessee again submitted the same "nil" return and filed a statement showing a loss of Rs. 3,92,357 on its total world income. This was on 31st May, 1944.

The Income-tax Officer passed orders on this on 2nd June, 1944. He stated that the assessee was a non-resident company and that during the year no sales were effected in British India and concluded as follows:

"As the net result for the world business is only a loss, there can be no question of profits attributable to operations in British India under sections 42 (1) and 42 (3) in respect of cotton purchases. The 'nil' return filed is therefore accepted. .

Hence there is no assessment for 1941-42. As this is a non-resident company, the loss need not be carried forward under section 24 (2) as that section in terms does not apply to non-residents."

The last portion of the order is the one which occasions the assessee's grievance. It claims that the Income-tax Officer having accepted its statement of loss was bound to record it and carry it forward.

Appeals followed to the Appellate Assistant Commissioner of Income-tax and the Income-tax Appellate Tribunal and ultimately there was a reference to the High Court. The assessee has failed throughout and now appeals here.

The assessee's contention is based on the following provision of section 34. The first sub-section states that when a notice is issued under that section the Income-tax Officer may proceed to assess or reassess such income, profits or gains or recompute the loss or depreciation allowance and that

> "the provisions of this Act shall, so far as may be, apply accordingly, as if the notice were a notice issued under [sub-section (2) of section 22]."

This it is said attracts section 24 (2).

We need not decide whether this contention is well founded, namely, whether the assessee can claim to reopen the proceedings, because, even if he can we are of opinion that he cannot get what he asks for. There is no provision in the Act which entitles the assessee to have a loss recorded or computed, unless something is to be done with the loss. Thus, under section 24 (1) a loss can be set off against an income, profit or gain and under sub-section (2) the balance of a loss can be carried forward to a following year on the conditions set out there. Except for this there is nothing else that can be called in aid. But under sub-section (2) the loss can be carried forward when

> "the loss cannot be *wholly* set off under sub-section (1)"

and in that event only the "*portion* not *so* set off" can be carried forward. We are therefore thrown back on sub-section (1).

Sub-section (1) provides that where an assessee sustains a loss of profits or gains in any year, *under any of the heads mentioned in section* 6 he shall be entitled to have the amount of the loss

> "set off against his income, profits or gains *under any other head* in that year."

Therefore, before any question of set off can arise, there must be (1) a loss under one or more of the heads mentioned in section 6 and (2) an income, profit or gain under some other head. It follows that when there is no income under any head at all, there is nothing against which the loss can be set off in that year and unless that can be done sub-section (2) does not come into play.

Next, a set off under section 24 (1) can only be claimed when the loss arises under one head and the profit against which it is sought to be set off arises under a different head. When the two arise under the same head, of course the loss can be deducted but that is done under section 10 and not under section 24 (1). *See* the decision of the Privy Council in *Rm. Ar. Ar. Rm. Arunachalam Chettiar* v. *Commissioner of Income-tax, Madras*[1]. In the present case, the loss is computed by striking a balance in the profit and loss account of just the one business and consequently no question of different heads arises. On both these grounds, therefore, the assessee's contention must fail because, unless the loss can be set-off under sub-section (1) of section 24, it cannot be carried forward under sub-section (2) and if it cannot be carried forward the question of its determination and computation becomes irrelevant.

The High Court proceeds on the ground that when proceedings are taken under section 34 the assessee is not entitled to reopen the whole proceedings as the further proceedings are limited to assessing that portion of the income which has escaped assessment. We need not express any opinion on this. The question we have to answer is confined to the facts and circumstances of this case and those circumstances are (1) that no return was filed at any stage of the case disclosing any income, profits or gains at all, (2) that proceedings were later taken under sec-

1. (1936) 71 M.L.J. 772 : L.R. 63 I.A. 233 : (1936) 4 I.T.R. 173 at 178 and 179 (P.C.).

tion 34; and (3) in the course of these proceedings the assessee claimed that a certain loss should be determined and recorded.' Our answer is that that cannot be done for the reasons we have given and that consequently the question referred was rightly answered in the negative by the High Court.

The appeal fails and is dismissed with costs.

Agent for Appellant: *P. K. Mukherji.*

Agent for Respondent: *G. H. Rajadhyaksha.*

G.R./K.S. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SATYANARAYANA RAO, MR. JUSTICE SUBBA RAO AND MR. JUSTICE RAMASWAMI.

The Jumma Musjid Mercara by its Muthavalli Khan Saheb A. Abdul Rahaman Khan, Mercara .. *Appellant**

v.

Kodimaniandra Devaiah and others .. *Respondents.*

Transfer of Property Act (V of 1882), section 43—Scope of—If applies to cases of alienation prohibited by section 6 (a) of the Act—Conditions to attract section 43 to transfers.

Where a transferor in fact purports to transfer an expectancy or property which he had no right to transfer without making any representation that he had authority to transfer, then section 43 of the Transfer of Property Act will not help the transferee. Similarly, if both the transferor and transferee knew the truth, the section cannot be invoked by the transferee. Section 43 proceeds on the fundamental assumption that an erroneous or fraudulent representation by a transferor induced the transferee to part with the consideration without knowing the true facts and therefore such a transferee should be allowed to claim from the transferor, if he subsequently acquires any title to the property, that the transfer should operate on that title.

A transfer, which was made on an erroneous representation may, in fact and in effect, be a transfer of an expectancy, which is prohibited by the Statute. That does not prevent section 43 from operating in such cases.

Official Assignee of Madras v. *Sampath Naidu,* (1933) 65 M.L.J. 588 overruled; *Alamanayakunigari Nabi Sab* v. *Murukuti Papiah,* (1915) 29 M.L.J. 733 approved.

Per Subba Rao, J.—The mere fact that the subject-matter of the transfer is untransferable by reason of some statutory restriction or principle of public policy cannot take the case out of the operation of section 43, Transfer of Property Act. The want of title or a prohibition against transfer in a property affects the title purported to be conveyed. In either case, the transferee does not acquire title but that does not affect the competency of the transferor. The case of a transfer by a person legally competent to transfer is different from the case of a person not legally competent to transfer. In the former case the transferor is bound to make good his representation and in the latter his representation itself cannot bind him as he has no legal competency. If this distinction is borne in mind it is possible to reconcile the provision of section 43 and section 6 (a) of the Transfer of Property Act.

Appeal against the decree of the District Court, Coorg, in O. S. No. 1 of 1945.

T. Krishna Rao for Appellant.

K. Rajah Aiyar and *V. Seshadri* for Respondents.

The Order of Reference to the Full Bench was made by

Satyanarayana Rao, J.†—This appeal raises a question under section 43 of the Transfer of Property Act, on which there is conflict of opinion in this Court. Two decisions of this Court, *Alamanaya* v. *Murukuti*[1] and *Vellayyammal* v. *Palaniandi Ambalam*[2] have taken a view favourable to the respondents. But a different view was taken in *Official Assignee of Madras* v. *Sampath Naidu*[3] by a Bench. Madhavan Nair, J., in *Sreeramulu* v. *Somaraju*[4], followed the earlier decisions and the Allahabad High Court has also accepted the earlier decisions of this Court as laying down the law correctly. There is also a decision of a single Judge Wadsworth, J., in *Akkamma*

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* Appeal No. 852 of 1948. 5th November, 1952.

† 25th February, 1952.

1. (1915) 29 M.L.J. 733.
2. (1933) 65 M.L.J. 772.
3. (1933) 65 M.L.J. 588.
4. 1930 M.W.N. 1054.

v. *Ramalinga Reddi*[1]. In view of these conflicting decisions I think it is but proper that this appeal should be heard by a Bench and the papers will be placed before the Honourable the Chief Justice so that he may decide whether this case should be posted before a Bench or even at the outset before a Full Bench as it is essential that the conflict should be resolved once for all.

(Pursuant to the aforesaid Order, this appeal coming on for hearing the Court delivered the following)

JUDGMENTS : *Satyanarayana Rao, J.*—This appeal was referred to a Full Bench as there were conflicting decisions regarding the interpretation of section 43 of the Transfer of Property Act.

The plaintiff who was unsuccessful in the lower Court preferred this appeal against the judgment and decree of the District Court of Coorg in O.S. No. 1 of 1945. The plaintiff is the Jumma Masjid, Mercara, represented by its Mutavalli, Khan Sahib Abdul Rahman Khan. The suit is for recovery of possession of a half share in the immoveable properties described in the schedule attached to the plaint. According to the case of the plaintiff, the properties in suit originally belonged to one Sh. Basappa, and after his death in 1901, they devolved on his widow, Gangamma who became a convert to Islam, and made a gift of these properties on 5th September, 1932, to the Masjid. The properties continued in the possession of the plaintiff till the death of Gangamma which occurred on 17th February, 1933. But on her death, Santhappa and Basappa (this Basappa is a different person from Basappa the husband of Gangamma) the sister's son's sons of Gangamma's husband Basappa, became entitled to the properties as the reversioners to the estate. On 3rd March, 1933, under Ex. A. Santhappa sold his half interest in the properties to the Mosque and therefore, it is claimed that under this document, the plaintiff will be entitled at least to a half share in the suit properties. The father of defendants 1 to 3 one Rao Bahadur Subbayya, claimed on the death of Gangamma that the properties belonged to him and his joint family, as they were purchased on 18th November, 1920, under Ex. III from Santhappa, Basappa, and another in the name of his son, Ganapathi, who subsequently died leaving his widow the 4th defendant. He applied for transfer of patta and the Revenue authorities effected the transfer, and in pursuance of the order of the Revenue authorities, Rao Bahadur Subbayya took possession of the properties from the plaintiff. It is claimed by the plaintiff that the defendants had no title at all to the properties and that the plaintiff is entitled to a half share. It may be mentioned, even at the outset, that the title put forward by the plaintiff under the gift deed of Gangamma was not established in the trial Court. No deed of gift was produced and that title is now abandoned in the appeal. The title, therefore, of the plaintiff is now confined to the title acquired under the sale deed, Ex. A executed by Santhappa.

The defendants' case was that the suit properties belonged originally to three brothers, Nanjundappa, Santhappa and Basappa who constituted members of a joint family. Basappa died first in 1901, Santhappa died in 1903, and the properties survived thereafter to Nanjundappa, the last of the coparceners. He died in 1907 leaving behind him his widow, Ammakka. She died in 1910. After her death, the reversioners to the estate, namely, Basappa, Mallappa and Santhappa the sister's son's sons of the last holder, sold under Ex. III dated 18th November, 1920, the properties to Ganapathi, the husband of the fourth defendant and the son of Rao Bahadur Subbayya, for the benefit of their joint family. This was followed by a rectification deed, Ex. IV, dated 12th March, 1921, by which the omission in Ex. III of certain properties was made good. Ganapathi instituted O.S. No. 11 of 1921 on the file of the Subordinate Judge's Court of Coorg on the strength of Exs. III and IV to recover possession of the properties. The suit was contested by Gangamma, the widow of Basappa, on the ground that they were the self-acquired properties of Basappa. Her contentions were upheld by the trial Court and also on appeal by the District Judge and the Judicial Commissioner. When the appeal was pending before the Judicial Commissioner, the suit was

1. 1937 M.W.N. 416

remanded for a finding on the question whether Ammakka's marriage with Nanjundappa was in an approved form or not. But before the appeal could be disposed of Gangamma died, and the matter was not proceeded with further by the appellant, *viz.*, Ganapati, and the appeal was dismissed. The upshot of this litigation was that except two survey numbers which are not now in suit, the rest of the properties, the subject-matter of the present suit, were held to be the self-acquired properties of Basappa. The family was undoubtedly a joint family, there being no division. This finding is clearly binding on the parties to this litigation and the appeal was argued on the footing that the properties now in the suit were the self-acquired properties of Basappa. On that basis, it will be seen that at the time Ganapati purchased the properties from the three reversioners on the footing that the properties were joint family properties which survived to Nanjundappa, and after his death passed to Ammakka that in fact, they had no title and their right to succeed to Basappa's estate on the footing that they were the self-acquisitions of Basappa, was only an expectancy and a *spes successionis*. The title however was sought to be supported in the trial Court under section 43 of the Transfer of Property Act, which embodies the well known principle of feeding the grant by estoppel. As the reversioners, the vendors of Ganapati, succeeded after the death of Gangamma to the estate of Basappa. If this contention is well founded, Santhappa's conveyance to the plaintiff of his share in the reversion after it had opened cannot take effect and the title of the defendants would prevail.

The trial Court accepted the contentions of the defendants and upheld their title dismissing the plaintiff's suit.

In the lower Court, as many as 8 issues were framed, leaving the formal issue relating to relief. But in the appeal now before us, the argument was restricted and confined only to the correctness of the view taken by the trial Court that section 43 of the Transfer of Property Act would avail the defendants to defeat the title of the plaintiff to half the properties under the sale deed of Santhappa.

The main argument on behalf of the appellant was that the transfer by the reversioners in favour of Ganapati when it was made, was in fact and in effect, though not in form, the transfer of a chance of an heir apparent to succeed to an estate, which was prohibited by section 6 (*a*) of the Transfer of Property Act, and section 43 cannot be invoked to defeat the provision in section 6 (*a*). There can be, it was contended, no estoppel against a statute.

The sale deed, Ex. III definitely proceeds to state that Nanjundappa and Basappa were members of an undivided family, that the properties were joint family properties, and survived to Nanjundappa after the death of Basappa, that after Nanjundappa's death, they devolved on Ammakka, and after her death, they became the absolute owners of the property. Some of the properties, it is alleged in this deed, were in the possession of Gangamma for purposes of maintenance, and that as she was keeping a Mussalman and behaving herself contrary to caste, custom and law, she had not even the right of maintenance from the said property. This was the representation made to the purchaser by the reversioners who executed the deed in favour of Ganapati in 1920. There is nothing on record to show that at hat time the purchaser was aware that the property was in fact either wholly or in part the self-acquired property of Basappa, to which they had no immediate right to succeed. In fact, in the judgment in O.S. No. 11 of 1921, it was found that some of the items, at least two, were joint family properties. The point, therefore for consideration is whether section 43 of the Transfer of Property Act would help the defendants in securing the title to the properties, notwithstanding the fact that at the moment of the transfer which they obtained, their vendors had in fact only an expectancy which could not be transferred under section 6 (*a*) of the Act.

Before referring to the conflicting decisions on this point, it would be convenient to state our view of the effect of section 6 (*a*) and section 43 of the Transfer of Property Act read together. Section 43 was amended by the Amending Act XX of

1929 by inserting the words "fraudulently or" before the words "erroneously represents." The section as amended read as follows:

> "Where a person fraudulently or erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration such transfer shall, at the option of the transferee operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.
>
> Nothing in this seection shall impair the right of transferees in good faith for consideration without notice of the existence of the said option."

Then follows an illustration which is also relevant:

> "*A*, a Hindu, who has separated from his father *B*, sells to *C* three fields, *X*, *Y* and *Z*, representing that *A* is authorised to transfer the same. Of these fields *Z* does not belong to *A*, it having been retained by *B* on the partition; but on *B's* dying *A* as heir obtains *Z*. *C*, not having rescinded the contract of sale, may require *A* to deliver *Z* to him."

The section assumes that the transferor had no title at the time of the transfer or in any event that he had no authority to make a transfer, even if he had title. The essence of the principle underlying the section is that the person making the transfer makes a representation that he is authorised to transfer the property, and professes to transfer such property for consideration. After the amendment, the representation may even be fraudulent. The effect of the Amendment is to make it clear that the erroneous representation may be an innocent misrepresentation or fraudulent misrepresentation. In either case, the section applied. Believing the representation so made, the transferee parts with the money, obtains the transfer, which of course is ineffective to convey the property. If thereafter the transferor acquires any interest in the property so transferred, he must make good the transfer to the extent of the interest which he had so acquired subsequently. From this analysis, it follows that if no representation is made and the transferor in fact purports to transfer an expectancy or property which he had no right to transfer without making any representation that he had authority to transfer, the section will not help. Similarly if both the transferor and transferee knew the truth, the section cannot be invoked by the transferee. The section proceeds on the fundamental assumption that the erroneous or fraudulent representation induced the transferee to part with the consideration without knowing the true facts, and therefore such a transferee should be allowed to claim from the transferor if he subsequently acquires any title to the property that the transfer should operate on that title. A transfer which was made on an erroneous representation may, in fact and in effect, be a transfer of an expectancy, which is prohibited by the statute. That does not, in our opinion, prevent the section from operating. It is not concerned with the ultimate effect of the transfer when it was made. It is concerned only with an erroneous representation by the transferor of his authority to transfer when in fact he had none. The same statute contains the two sections 6 (*a*) and 43. If it was the intention of the Legislature that in all cases of transfer whether the transfer was made disclosing the true facts or was made with an erroneous representation regarding the authority, no effect should be given to the transfer, as the transfer is prohibited under section 6 (*a*) it would have stated so and created an exception to section 43. On the other hand, the illustration to the section indicates a contrary intention on the part of the Legislature, for in the illustration, on *B's* dying, *A* as heir obtains *Z* and *C* is entitled to require *A* to deliver *Z* to him though when *A* sold *Z* to *C*, his interest was in fact only an expectancy. At the time of the transfer, *A* made a representation that he was authorised to transfer the same, and he is called upon to make good the transfer, after the title had devolved on him. It is said that this illustration goes beyond the section, that it should be ignored and should not be taken into consideration in interpreting section 43. This, in our opinion, is to put the cart before the horse and to assume in the first instance that section 43 does not apply under any circumstances to transfers within the purview of section 6 (*a*) and then reach the conclusion that the illustration goes beyond the section. In this connection, the words of Lord Shaw of Dunfermline in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark*[1], should be borne in mind, as they contain the true view to take regarding the

1. (1916) 2 A.C. 575.

value of illustrations to a section in an Act. The learned Lord observes at page 581 :—

"It is the duty of a Court of law to accept, if that can be done the illustrations given as being both of relevance and value in the construction of the text. The illustrations should in no case be rejected because they do not square with the ideas possibly derived from another system of jurisprudence as to the law with which they or the sections deal. And it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It would be the very last resort of construction to make any such assumption. The great usefulness of the illustrations, which have, although not part of the sections, been expressly furnished by the Legislature as helpful in the working and application of the statute should not be thus impaired."

See also Craies on Statute law at pages 203 and 204 and Maxwell's Interpretation of Statutes, IX Edn., at page 46.

On a plain reading, therefore, of the sections and having regard to the recitals in the document, Ex. III, and the finding of the trial Court that the transferee was not aware of the truth at that time, it seems to be a clear case to which section 43 would aptly apply. This view is supported by some of the decisions of this Court, though there are also decisions against that view. It is now necessary to examine the decisions cited at the Bar in detail.

The decisions cited before us may be classified under two categories : (*a*) those relating to transfers by expectant heirs and (*b*) alienations of service inams. It has been held in this Court by Sir John Wallis, C.J., and Tyabji, J., in *Sri Jagannadha Raju* v. *Sri Rajah Prasada Rao*[1], that contracts for sale of expectancies are void and are not specifically enforceable by a suit, as to do so would be to defeat the provision in section 6 of the Transfer of Property Act and would also be against public policy within the meaning of section 23 of the Contract Act. This decision was confined to a case where a person purports and agrees to convey *in presenti* or *in futuro* the chance of an heir apparent to succeed to an estate and such a contract, it was held, could not be specifically enforced. The learned Judges in that case were not called upon to consider a case falling under section 43 of the Transfer of Property Act. This decision was approved by the Privy Council in *Annada Mohan Roy* v. *Gour Mohan Mullick*[2]. We refer to these decisions to show that they are not concerned with the interpretation of section 43 of the Transfer of Property Act, as in some decisions which will be referred to later. *Sri Jagannada Raju* v. *Sri Rajah Prasada Rao*[1], was referred to in support of the contrary conclusion that to facts similar to the present case section 43 does not apply.

Alamanayya Kunigari Nabi Sab v. *Murukutti Papiah*[3], a decision of Ayling and Tyabji, JJ., is a case which directly supports the contention of the respondent. The mortgage in that case was by the son, and he had no right to it as his father was alive at the time of the alienation. As they were Mahomedans, after the death of the father, the estate devolved on the son, the mortgagor, under Mahomedan law. The mortgagee contended that under section 43 of the Transfer of Property Act, the mortgage purported to be made by the son will operate on the interest which he had acquired after the death of the father. The question was whether section 43 supported the contention of the mortgagee. In the deed of mortgage, the son acknowledged that he had borrowed the amount for his necessity and stated that the lands were mortgaged by him and that he would not alienate the properties in favour of others till the debt was discharged. This undoubtedly implied that the son was the absolute owner of the properties, and it is on that representation that the mortgagee advanced the amount as a loan on the security of the property. It was contended on behalf of the mortgagor that section 43 should not be construed in such a manner as to nullify section 6 (*a*) of the Transfer of Property Act by validating a transfer which was at its inception void under section 6 (*a*). And reliance in support of the contention was placed upon *Ramasami Naick* v. *Ramaswami Chetti*[4], which related to an alienation of a service inam. Tyabji, J.,

1. (1915) 28 M.L.J. 650 : I.L.R. 39 Mad. 554.
2. (1923) 45 M.L.J. 617 : L.R. 50 I.A. 239 : I.L.R. 50 Cal. 929 (P.C.).
3. (1915) 29 M.L.J. 733.
4. (1907) 17 M.L.J. 201 : I.L.R. 30 Mad. 255.

who delivered the leading judgment in that case met this contention by pointing out that the argument neglects the distinction between "purporting to transfer the chance of an heir-apparent" and "erroneously representing that he (the transferor) is authorised to transfer certain immoveable property." The deed under consideration fell under the latter class. There was a clear representation by the transferor to the transferee that he was authorised *in present* to transfer the property, while in *Ramasami Naick* v. *Ramaswami Chetti*[1], the transferor purported to transfer a mere possibility of succession which clearly was within the prohibition of section 6 (*a*) of the stransfer of Property Act. The learned Judge then distinguished the cases cited before him on the ground that there was no erroneous representation in those cases either because both parties knew the true facts or the transferee was not misled by the erroneous representation of the transferor. The learned Judge also relied upon the illustration to section 43 in support of his view that the transaction in question was within the purview of section 43 and that the transferee was entitled to require the transferor to make good the title by substituting the title subsequently acquired for what was purported to be conveyed.' It must be noted that the learned Judge Tyabji, J., who was a party to the earlier decision in *Sri Jagannada Raju* v. *Sri Rajah Prasada Rao*[2], which was finally disposed of on 24th March, 1915, was also a party to the decision in *Alamanaya Kunigari Nabi Sab* v. *Murukutti Papiah*[3], which was pronounced on 29th March, 1915. It is not as if the learned Judge was not alive to the distinction between the two classes of cases, *viz.*, (1) those in which the alienation in question on the face of it purports to transfer the chance of on heir apparent, and (2) those in which the alienation proceeds on an erroneous representation that the transferor was authorised to transfer the property, though in fact he was not, as the learned Judge definitely adverts to this dictinction, at page 736 in *Alamanaya Kunigari Nabi Sab* v. *Murukuti Papiah*[3], and what is more, distinguishes the case in *Ramasami Naick* v. *Ramaswami Chetti*[1], on this very ground. In our opinion, this decision correctly interprets the section and clearly brings out the distinction between cases falling under section 6 (*a*) of the Act and cases protected by section 43, though in substance and in effect the transfer may be one which was hit by section 6 (*a*). The principle of this decision is in consonance with the decision of Krishnan Pandalai, J., in *Velayamal* v. *Palaniandi Ambalam*[4], though the learned Judge does not refer to the decision itself. It was also a case of a transfer by an expectant heir. The significant words used by the learned Judge at page 774 were:

> "The plaintiff's father having sold this property, by Exhibit II-A, as if it belonged to him and to the plaintiff, at a time when they had admittedly no title thereto, the plaintiff cannot now be heard to set up that fact after acquiring the title as reversioner in 1921?

It must be noticed that that sentence clearly brings out the distinction between a transaction which was protected by section 43 and one which is not so protected. To a similar effect is the decision of Wadsworth, J., in *Akkamma* v. *Ramalinga Reddi*[5]. The learned Judge distinguished the decision in the *Official Assignee, Madras* v. *Sampath Naidu*[6], in which a contrary view was taken by Beasley, C.J. and Bardswell, J., on the ground that it was a case in which:

> "the transfer, although framed as a transfer of an existing title, was in fact to the knowledge of the parties a transfer of a *spes successionis* such as is prohibited under section 6 (*a*) of the Transfer of Property Act."

If there is no such knowledge and the alienee believed the representation made by the alienor, in such a case, section 43, according to the learned Judge, would undoubtedly apply. *Muthuswami Pillai* v. *Sandanc Velan*[7], a decision of Krishnan and Odgers, JJ., also takes the same view. At page 220, it was observed:

> "In appeal it is contended that section 43 is not applicable to this case. The question is whether the first defendant represented that he was authorised to transfer the whole property and whether the transferee accepted the sale on that representation. There can be no doubt from Ex. A that the 1st defendant did purport to sell the whole property on behalf of himself and that the recital therein

1. (1907) 17 M.L.J. 201 : I.L.R. 30 Mad. 255.
2. (1915) 28 M.L.J. 650 : I.L.R. 39 Mad. 554
3. (1915) 29 M.L.J. 733.
4. (1933) 65 M.L.J. 772.
5. 1937 M.W.N. 416.
6. (1933) 65 M.L.J. 588.
7. (1926) 50 M.L.J. 218.

that he has purchased the property out of his self-earnings was in order to make the purchaser believe that he was getting a good title to the property. It is no indication that what was sold was less than the whole property."

This view was followed by the Allahabad High Court in *Shyam Narain* v. *Mangal Prasad*[1], by Sir Mahomed Sulaiman, C.J., and Rachhpal Singh, J., in which all aspects of the question were fully and elaborately considered by the learned Judges. After a review of the authorities for and against, the learned Judges conclude at page 478 as follows :

"It seems to us that when there were clear cases under that unamended Transfer of Property Act applying section 43 to the cases of heirs, and there was a specific illustration to section 43 which was in point, and the Legislature has not thought fit to delete the illustration in the amended Act, it is impossible to hold that the illutration is repugnant to the provisions of section 6 and is really wrong. Every attempt should be made to reconcile the provisions of section 43, together with illustration, with the provisions of section 6. Such a reconciliation is, in our opinion, patent enough. Section 6 does not prohibit emphatically the transfer of a chance of an heir ; nor does it make it absolutely illegal so as to vitiate the entire contract. It merely lays down that property of any kind may be transferred, but the chance of an heir cannot be transferred. This is no more than saying that a trnsfer of a mere chance of an heir is void in law and is of no effect. Section 6 (*a*) would, therefore, apply to cases where professedly there is a transfer of a mere *spes successionis*, the parties knowing that the transferor has no more right, than that of a mere expectant heir. The result of course would be the same where the parties knowing the full facts fraudulently clothed the transaction in the garb of an out and out sale of the property and there is no erroneous representation made by the transferor to the transferee as to his ownership."

But where an erroneous representation was made by the transferor to the transferee that he was the full owner of the property transferred and was authorised to transfer it and what was purported to be the property transferred was not a mere chance of succession but the property itself, and the transferee acts upon such erroneous representation, then if the transferor happens later before the contract of transfer comes to an end, to acquire an interest in that property, no matter whether by private purchase, gift, legacy or by inheritance or otherwise, the previous transfer can at the option of the transferee operate on the interest which has been subsequently acquired, although it did not exist at the time of the transfer. The illustration to section 43, is, in our opinion, directly applicable to such a case."

This passage summarises the view of the learned Judges considered from all aspects, with the additional reason that the continuance of the illustration to section 43 in the amended Act even after the view expressed in some of the decisions that the illustration goes beyond the section is an indication that that view is not accepted by the Legislature.

The Nagpur, Bombay and Patna High Courts have also taken the same view : See *Vithabai* v. *Malhar Shankar*[2], which follows *Shyam Narain* v. *Mangal Prasad*[1], at pages 162 and 163; *Ramjapan* v. *Jagesra*[3] and *Syed Bismilla* v. *Manulal Ghabildas*[4].

The Official Assignee, Madras v. *Sampath Naidu*[5], was strongly relied upon by the learned advocate for the appellant in support of his argument. It related to a mortgage of *spes successionis* and the learned Judges held that though in form the transaction represents a conveyance of present interest in the property, in substance and effect the transfer was of a *spes successionis* which was forbidden under section 6 (*a*) of the Transfer of Property Act does not become valid by the application of section 43 and that the illustration to section 43 of the Act is repugnant to the section 6 (*a*) and goes beyond section 43. The reasoning of the learned Judge was based partly on *Sri Jagannadharaju* v. *Sri Rajah Prasada Rao*[6], which as pointed out already, has nothing to do with section 43. It was further observed that the decision in *Alamanaya Kunigari Nabi Sab* v. *Murukuti Papiah*[7], was opposed to the Full Bench decision in *Sannamma* v. *Radhabhayi*[8] and the Privy Council decision in *Annada Mohan Roy* v. *Gour Mohan Mullick*[9]. The Privy Council decision in *Annada Mohan Roy* v. *Gour Mohan Mullick*[9], related to the enforcement of a contract to sell an expectancy, like the

1. (1934) I.L.R. 57 All. 474.
2. I.L.R. (1938) Bom. 155.
3. A.I.R. 1939 Pat. 116.
4. A.I.R. 1931 Nag. 51.
5. (1933) 65 M.L.J. 588.
6. (1915) 28 M.L.J. 650 : I.L.R. 39 Mad. 554.
7. (1915) 29 M.L.J. 733.
8. (1917) 34 M.L.J. 77 : I.L.R. 41 Mad. 418 (F.B.).
9. (1923) 45 M.L.J. 617 : L.R. 50 I.A. 239 : I.L.R. 50 Cal. 929 (P.C.).

decision in *Sri Jagannadharaju* v. *Sri Rajah Prasada Rao*[1] and has nothing to do with section 43 of the Transfer of Property Act. The Full Bench decision in *Sannamma* v. *Radhabhayi*[2] will be considered presently. The learned Judge, Bardswell, J., who delivered the judgment of the Court also remarked that the same learned Judge, Tyabji, J., who was a party to *Sri Jagannadharaju* v. *Sri Rajah Prasada Rao*[1] and *Alamanaya Kunigari Nabi Sab* v. *Murukuti Papiah*[3], drew a distinction in *Alamanaya Kunigari Nabi Sab* v. *Murukuti Papiah*[3], between transfers which purported to be transfers of the chance of an heir apparent and transfers which proceeded on an erroneous representation that the transferee was authorised to transfer certain immoveable property. And then follows the significant sentence at page 590:

"Reason has, however, already been given for holding that such a distinction cannot be drawn at any rate when the erroneous description is deliberately made with knowledge of its falsity."

If this sentence is intended to mean that both the alienor and alienee were aware of the truth and they purposely and deliberately clothed the transaction with false recitals in order to circumvent the prohibition in section 6 (*a*), no exception can be taken to it. It is perhaps on the basis of this sentence that the learned Judge, Wadsworth, J., in *Akkamma* v. *Ramalinga Reddi*[4], treated this decision as a case in which both parties knew the truth, and so did the Allahabad Judges in *Shyam Narain* v. *Mangal Prasad*[5]. If, on the other hand, it is meant to lay down by this that if the transferor alone knew the truth and that he deliberately made an erroneous representation which was believed by the transferee who was ignorant of the truth, even in such a case section 43 cannot be invoked by the transferee to his aid to validate the grant, we must respectfully differ from the view of the learned Judges. The very foundation of the section is that it is intended to protect the innocent transferee and bind the transferor who made the erroneous representation to make good his representation, provided he has subsequently acquired an interest in the property. As pointed out by the Judicial Committee at page 20 in *Tilakdhari Lal* v. *Kheden Lal*[6], the basis of the doctrine is:

"This principle of law, which is sometimes referred to as feeding the grant by estoppel, is well established in this country. If a man who has no title whatever to property grants it by a conveyance which in form would carry the legal estate, and he subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes. In such a case there is nothing on which the second grant could operate in prejudice to the first."

The very object of the section would be defeated if the transferor who makes the erroneous representation is allowed to escape on this principle by merely establishing that he knew the truth and his representation was not an innocent representation. It is to do away with any such fine distinction that the Legislature has now made it clear that whether the representation is innocent or fraudulent the section would apply, so as to put an end to all doubt. The illustration was brushed aside by Bardswell, J., on the ground that it is opposed to section 6 (*a*) and no attempt was made to reconcile the illustration with the section. It is also stated that the illustration is opposed to the Privy Council decision in *Annada Mohan Roy* v. *Gour Mohan Mullick*[7], one is not able to find anything that is said in *Annada Mohan Roy* v. *Gour Mohan Mullick*[7], to justify the observation of the learned Judges at page 590 of the *Official Assignee, Madras* v. *Sampath Naidu*[8], in support of this view, as *Annada Mohan Roy* v. *Gour Mohan Mullick*[7], did not concern itself with section 43 of the Transfer of Property Act.

For these reasons, we are unable to accept the view taken by the learned Judges in the *Official Assignee, Madras* v. *Sampath Naidu*[8].

As the learned Judges in the *Official Assignee, Madras* v. *Sampath Naidu*[8], placed reliance on the Full Bench decision in *Sannamma* v. *Radhabhayi*[2], which relates to service inams, it becomes necessary to deal with that class of cases. The starting

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1. (1915) 28 M.L.J. 650: I.L.R. 39 Mad. 554.
2. (1917) 34 M.L.J. 17: I.L.R. 41 Mad. 418 (F.B.).
3. (1915) 29 M.L.J. 733.
4. (1937) M.W.N. 416.
5. (1934) I.L.R. 57 All. 474.
6. (1920) 39 M.L.J. 243: L.R. 47 I.A. 239: I.L.R. 48 Cal. 1 (P.C.).
7. (1923) 45 M.L.J. 617: L.R. 50 I.A. 239: I.L.R. 50 Cal. 929 (P.C.).
8. (1933) 65 M.L.J. 588.

point for the discussion of this group of cases is the decision of Benson and Wallis, JJ., in *Ramasami Naick* v. *Ramasami Chetti*[1]. The alienation in question related to an impartible estate, and the question arose in execution proceedings in pursuance of a decree for sale on foot of a mortgage executed on 6th October, 1892, by defendants 1 to 5 in a suit, mortgaging an impartible estate which was inalienable. The first defendant was the zamindar on the date of the decree, and defendants 2 to 5 were among the group of dayadis who were entitled to the succession to the zamindari. The second defendant subsequently succeeded to the zamindari, and one of the contentions raised was that even if the mortgage by defendants 2 to 5 was invalid under section 6 (*a*) of the Transfer of Property Act, as the second defendant had succeeded to the zamindari, the mortgage could be given effect to against him. This contention was rejected on the ground that if the Indian statute intended that transfers forbidden by section 6 (*a*) should take effect against the transferors as and when they succeeded to the estate, a provision should have been inserted to that effect in section 43, Transfer of Property Act, in the same manner as they have provided in the case of persons erroneously representing that they were authorised to transfer immoveable property. There was no contention in that case that the second defendant was within the provision of section 43, as he made no sort of erroneous representation that he was authorised to transfer the property. As we were curious to know the language of the deed, we examined the printed records in the case and found that in the hypothecation deed the transfer was specifically of the right of expectancy to succeed to the impartible estate. It stated as follows :

"We are entitled to succeed and enjoy one after another according to seniority of age the aforesaid Ammayanayakanur zamin within the four boundaries mentioned herein. We have hypothecated to you the aforesaid Ammayanayakanur zamin being Item No. 1 mentioned herein."

It is for the reason that the deed did not proceed on the basis of any representation regarding the authority to transfer that the learned Judges observed at page 262 and treated the case as directly falling under section 6 (*a*) and that no exception was provided in section 43 to transfers *simpliciter* of an expectancy so as to apply the doctrine of section 43 in cases in which the transferors succeeded to the estate later. The case, therefore, has absolutely no application to alienations which purport to transfer the property on an erroneous representation that the transferor had authority to deal with it. Had this distinction been noticed, the later decisions would have been the other way. This was followed and applied in *Angannayya* v. *Narasanna*[2], which related to the sale of a village service inam. The sale was in 1889. The inam was enfranchised or resumed in 1891 and was subsequently mortgaged by the alienee in 1892. The transfer of the inam which formed the emoluments of a village office was prohibited by Regulation VI of 1831 which was in force on the date of the alienation and the alienation was null and void. The lands, however, became alienable after it was enfranchised. The learned Judges applied section 43 as under the deed of 1889, Ex. A, the alienor purported to transfer certain immoveable property as having fallen to his share which constituted a definite representation that he was authorised to transfer them. There was no disclosure that it was at that date an unenfranchised village service inam, the transfer of which was prohibited by statute. In our opinion, section 43 of the Transfer of Property Act was rightly applied in that case. The decision in *Ramasami Naick* v. *Ramasami Chetti*[1], was distinguished on the ground that it was not a case to which section 43 could be applied.

The next case which also related to a service inam is *Narahari Sahu* v. *Korithan Naidu*[3], a decision of Benson and Sundara Aiyar, JJ. The judgment is very short, and it proceeds on the assumption that the transfer was of a service inam which was prohibited by law and section 43 had no application. They applied the decision in *Ramasami Naick* v. *Ramasami Chetti*[1], but expressed the view that the learned

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1. (1907) 17 M.L.J. 201 : I.L.R. 30 Mad. 255.
2. (1908) 18 M.L.J. 247.
3. (1913) 24 M.L.J. 462.

Judges were unable to agree with the decision in *Angannayya* v. *Narasanna*[1]. The distinction pointed out in *Ramasami Naick* v. *Ramasami Chetti*[2], was not noticed by the learned Judges. Owing to this conflict of opinion between *Angannayya* v. *Narasanna*[1] and *Narahari Sahu* v. *Korithan Naidu*[3], the matter was referred to a Full Bench by Abdur Rahim and Bakewell, JJ., in *Sannamma* v. *Radhabhayi*[4]. It also related to village service inams which was situate in a proprietary estate, and therefore Madras Act II of 1894 applied. On 18th August, 1906, an inam title deed was granted, but the necessary notification as required by section 17 of the Act was issued later fixing 1st April, 1911, as the date from which enfranchisement would take effect. The result of postponing the notification was to continue the tenure of the inam as before with the incident of inalienability until the notification was issued. In between these dates, 1906 and 1911, on 23rd January, 1909, the lands were mortgaged, and the mortgagor stated expressly that the land was "enfranchised mirasi inam land belonging to them." We examined the printed papers in the case to find out whether the mortgage was on record, but unfortunately it was not. We have therefore to take the contents of the deed from the extracts in the judgment of the learned Judges. Abdur Rahim, J., at page 419 expressly stated that "the lands were described in the deeds" as "the enfranchised mirasi and inam lands belonging to us." And the title deed issued did not mention anything about the enfranchisement of the inam or that the lands were disannexed from the condition of service, but they continued to be subject to the service until the notification was issued. Had the transferee looked into the title deed to satisfy himself whether it was enfranchised inam which was alienable or not, he would have noticed that as the necessary notification was not issued by that date, it could not be alienated, there was no erroneous representation on the part of the transferor that the property was such that he was authorised absolutely to transfer it. Sir John Wallis, C.J., after stating the contents of the inam title deed, observed at page 425 that:

> "it said nothing about the enfranchisement of the inam or the lands from the condition of service and they remained liable as before, and continued to form the emoluments of the village office until the issue of the notification which was after the date of the alienation now in question."

It was treated therefore as a decision falling within the principle of *Ramasami Naick* v. *Ramasami Chetti*[2] and *Narahari Sahu* v. *Korithan Naidu*[3]. The decision in *Angannayya* v. *Narasanna*[1]. was dismissed with the remark that the learned Judges, White C.J. and Miller, J., did not cite any authority in support of the view, and the original illegality of the transfer was not referred to. Apart from the correctness of this criticism, the case which came up for decision before the Full Bench was one in which there was no sort of erroneous representation by the alienor. The decision therefore in *Sannamma* v. *Radhabhayi*[4], does not at all support the inference that even in cases where in respect of what was in fact a transfer of an expectancy an erroneous representation is made by the transferor and the transferee believed in that representation and paid consideration, section 43 could not be invoked by the transferee to claim the benefit of the subsequent title acquired by the transferor. The reliance by the learned Judges who decided the *Official Assignee, Madras* v. *Sampath Naidu*[5], on this decision in support of their view was not justified.

In our view, therefore, the decision in *Alamanaya Kunhigari Nabi Sab* v. *Murukuti Papiah*[6], lays down the law correctly and applies to the facts of the present case The decision in the *Official Assignee, Madras* v. *Sampath Naidu*[5], was wrongly decided and must be overruled.

The result is, the view taken by the lower Court is correct, and the decision must be affirmed. The appeal is dismissed with costs.

Subba Rao, J.—I agree. My only justification for a separate judgment is the importance of the question raised in the appeal.

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1. (1908) 18 M.L.J. 247.
2. (1907) 17 M.L.J. 201 : I.L.R. 30 Mad. 255.
3. (1913) 24 M.L.J. 462.
4. (1917) 34 M.L.J. 17 : I.L.R. 41 Mad. 418 (F.B.).
5. (1933) 65 M.L.J. 588.
6. (1915) 29 M.L.J. 733.

The facts are fully and accurately stated in the judgment of my learned brother and it is not necessary to restate them. The question is whether a person who with only a chance of succession or expectancy to a property, representing that he is the owner, transfers it to another and succeeds to the same, is precluded from questioning the validity of the transfer on the principle that the subsequent acquisition feeds the estoppel. The relevant provisions of the Transfer of Property Act affording a solution to the question raised may now be read :

Section 6. Property of any kind may be transferred except as otherwise provided by this Act or by any other law for the time being in force.

(*a*) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman or any other mere possibility of a like nature, cannot be transferred.

Section 43. Where a person fraudulently or erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

Illustration.—*A*, a Hindu, who has separated from his father *B*, sells to *C* three fields, *X*, *Y* and *Z* representing that *A* is authorised to transfer the same. Of these fields *Z* does not belong to *A*, it having been retained by *B* on the partition ; but, on *B's* dying *A* as heir obtains *Z*. *C* not having rescinded the contract of sale, may require *A* to deliver *Z* to him.

The argument of the learned counsel for the appellant, Mr. Krishna Rao may be briefly stated thus : Under section 6 of the Transfer of Property Act, *spes successionis* cannot be transferred and that provision is based upon principles of public policy. Section 43 obviously based upon the principle of estoppel cannot be so construed as to defeat the statutory provisions embodied in section 6 (*a*) conceived in public interests, for, if so construed, it would offend the principle that there cannot be an estoppel against statute. Alternatively, he would exclude the operation of the provisions of section 43 in regard to a case where the transferor with knowledge that he is possessed of only a *spes successionis* professes to transfer the same as if he had an interest *in presenti* in it.

At the outset, unhampered by judicial decisions, I shall attempt to consider the scope of the statutory provisions in accordance with the plain meaning of the words used therein. Section 43 is modelled on English law. The English common law doctrine of estoppel by deed was extended by equity to estoppel by representation. The rule in India is the rule extended by equity. The section is conceived in the interests of a *bona fide* transferee. It assumes that the transferor had no title over at least a portion of the property he had engaged to transfer. It also pre-supposes that the transferor had a capacity to transfer the property. The foundation of the doctrine embodied in section 43 is the representation made by a transferor either fraudulently or erroneously. Under the section, he is bound to make good the representation made by him. If he subsequently acquires good title to the property conveyed by him the said interest would feed the estoppel. The section saves only a transferee in good faith for consideration. In other respects, the wording of the section is imperative and it is not permissible to engraft any other exception to the statutory provision. If the Legislature intended to exclude properties, whose transfer is prohibited either by statute or by public policy, it would have added to the section a proviso or an exception to that effect. Far from enacting any such exception, it added an illustration, which directly covers the instant case. Under the illustration, though *A* transfers the property at a time when his father is alive and therefore has only an expectancy in the same, the transferee is entitled to require *A* to deliver the property to him when he succeeds to the property. It is a well-settled rule of construction that :

"illustrations appended to sections of a statute should ordinarily be accepted and should only be rejected as repugnant to the sections as the last resort of construction." (*See*, Maxwell on interpretation of Statutes, 9th Edn., page 46).

In *Mohamed Syedol Ariffin* v. *Yesh Ooi Gark*[1], the Judicial Committee had laid down the rule of construction in clear terms. Lord Shaw of Dumfermline delivering the judgment of their Lordships observed at page 581:

"It is the duty of a court of law to accept, if that can be done, the illustrations given as being both of relevance and value in the construction of the text . . . . . And it would require a very special case to warrant their rejection on the ground of their assumed repugnancy to the sections themselves. It would be the very last resort of construction to make any such assumption. The great usefulness of the illustrations, which have, although not part of the sections, been expressly furnished by the Legislature as helpful in the working and application of the statute, should not be thus impaired."

In this case, as I have already pointed out, the illustration is in full accord with the scope of the section. It brings out the meaning and dispels any lurking doubt on the true construction of the section. It is, therefore, clear that the mere fact, that the subject matter of the transfer is untransferable by reason of some statutory restriction or principle of public policy, cannot take the case out of the operation of the section. The want of title or a prohibition against transfer in a property affects the title purported to be conveyed. In either case, the transferee does not acquire title but that fact does not affect the competency of the transferor. To illustrate, a lunatic or a minor cannot transfer property. But in the case of *spes successionis* or in the case of property in regard to which the transferor has no title, his transfer may not convey title but it cannot be said that he has no capacity to convey property. In one case, the representation is made by a person possessing a legal competency to convey an interest in property and, therefore, he will be bound to make good his representation. In the other case, his representation itself cannot bind him as he has no legal competency to transfer property. As representation is the basis of the section, the person, who is legally competent to make the representation, will be bound to make good his representation. If this distinction between legal competency to transfer a property and a statutory prohibition against transfer of a particular property is borne in mind, there will be no difficulty in reconciling the provisions of the section 43 with that of section 6 (*a*) of the Transfer of Property Act.

It will be convenient at this stage to notice the cases cited at the Bar.

Strong reliance is placed on the judgment of the Full Bench in *Sannamma* v. *Radhabhayi*[2], and it is contended that the said decision finally and authoritatively decided that there is no scope for the application of section 43 of the Transfer of Property Act when the transfer is prohibited by law. A casual glance at the judgment seems to support the said contention but a deeper scrutiny of the facts discloses its irrelevance. There the mortgagor had by a deed dated 23rd January, 1909, mortgaged what he described as an enfranchised inam belonging to him. It appears that the authorities had decided to enfranchise the inam on the 18th August, 1906, but the formal notification spoken of in section 17 of Madras Act II of 1894, fixed 1st April, 1911, as the date from which the enfranchisement would take effect. The Full Bench held that the alienation being a prohibited and illegal one, on the date on which it was made, the subsequent removal of the prohibition by the notification of enfranchisement of the service inam land did not render the alienation valid and that section 43 of the Transfer of Property Act could not be applied to make a transfer valid which on the date on which it was made was prohibited by a statute. The decision did not turn upon any principle of representation, either fraudulent or innocent. It proceeded on the basis that, on the date of the transfer of the service inam in regard to which though enfranchisement proceedings were started but not completed, section 43 of the Transfer of Property Act could not apply as the transfer was one forbidden by law on the ground of public policy. *Ramasami Naick* v. *Ramasami Chetti*[1], is also a decision where an expectancy was transferred. The facts were the owner of an impartible and inalienable zamindari who had only a life estate mortgaged the same to another in

1. (1916) 2 A.C. 575.
2. (1917) 34 M.L.J. 17 : I.L.R. 41 Mad. 418 (F.B.)
3. (1907) 17 M.L.J. 207 : I.L.R. 30 Mad. 255.

1892 without possession. The four male members of the family who were in the line of heirs joined the owner of the estate in executing the mortgage. In the suit filed to enforce the mortgage, a consent decree was passed making the mortgagors liable for the amount. It was agreed that the amount decreed should be recovered from the owner for the time being and from other defendants when they succeeded to the estate. The impartible estate-holder died in 1904 and one of the mortgagors succeeded to the estate in 1905. When the decree was sought to be executed against the heir, the learned Judges held that the mortgage was a transfer of a bare expectancy and was a nullity under section 6 (*a*) of the Transfer of Property Act. When it was contended that section 43 of the Transfer of Property Act would save the document, the learned Judges made the following observations at page 262 :

> "We are unable to accept this contention. If the framers of the Indian Statute had intended, that transfers forbidden by section 6 (*a*) should take effect against the transferors whenever they succeeded to the estate they would have inserted a provision to this effect as they have in section 43 in the case of persons erroneously representing that they are authorised to transfer immoveable property. It has not been contended that the second defendant comes within the provisions of that section, and we see no ground on which a similar rule can be applied to cases under section 6 (*a*). *Equitas sequitur legem* and we do not think that we are at liberty to limit the operation of the express provisions of section 6 (*a*) in the manner suggested."

This case is, therefore, only an illustration to the proposition that transfer of *spes successionis* is invalid and is, therefore, not saved by section 43 of the Transfer of Property Act. It has no application to a case where a person sells the property representing that he is the owner of the same. The decision in *Alamanaya Kungari Nabi Sab* v. *Murukuti Papiah*[1], brings out in bold relief the distinction between a transfer of an expectancy *simpliciter* and a transfer wherein a representation is made that the transferor is the owner of the property. A person mortgaged a property belonging to his father erroneously representing that he was entitled to the property *in praesenti* and on his father's death he became entitled to the property as heir. In that case the learned Judges applied the provisions of section 43 of the Transfer of Property Act and held that the mortgagee could enforce his mortgage against the property mortgaged. When a similar contention now argued before us was raised before them Tyabji, J., repelled the contention in the following words :

> "This argument, however, neglects the distinction between purporting to transfer 'the chance of an heir apparent' and 'erroneously representing that he (the transferor) is authorised to transfer certain immoveable property'. It is the latter course that was followed in the present case. It was represented to the transferee that the transferor was *in praesenti* entitled to and thus authorised to transfer the property. In *Ramasami Naick's case*[2], what the transferors purported to transfer, were mere possibilities of succession within the prohibition in section 6 (*a*) of the Transfer of Property Act."

In *Vellayammal* v. *Palaniandi Ambalam*[3], the property was originally in the possession of the mother of the last male-holder and her daughter. They sold the property to the 6th defendant's father. The then reversioners, the plaintiff and his father filed a suit to set aside the alienation. Pending the suit the disputes were settled and one half of the property was restored to the reversioners and the other half was retained by the purchaser. The father of the plaintiff for himself and representing his sons including the plaintiff executed sale deeds conveying the property to the sixth defendant's father. When the succession opened the plaintiff filed a suit for setting aside the sale deeds. The learned Judge non-suited the plaintiff relying upon the provisions of section 43 of the Transfer of Property Act. The learned Judge stated at page 774 :

> "Under section 43 of the Transfer of Property Act the plaintiff's father having sold his property by Exhibit II-A as if it belonged to him and to the plaintiff, at a time when they had admittedly no title thereto, the plaintiff cannot now be heard to set up that fact after acquiring the title as reversioner in 1921."

In this state of law the question fell to be considered by a Bench consisting of Sir Horace Owen Compton Beasley, C.J., and Mr. Justice Bardswell in the *Official*

1. (1915) 29 M.L.J. 733.
2. (1907) 17 M.L.J. 201 : I.L.R. 30 Mad. 255.
3. (1933) 65 M.L.J. 772.

Assignee, Madras v. *Sampath Naidu*[1]. There, the suit properties originally belonged to G. S. Venkatakrishnama Chetti who had three daughters. These daughters succeeded to his estate on his death and the last of them died in October, 1926. On her death Venkatakrishnama Chetti the son of another of the three sisters, succeeded to the estate. The suit mortgages were executed by this Venkatakrishnama Chetti when he had only a *spes successionis*. After the death of the last survivor of the three sisters, he sold the properties to Ananda Mohan Chetti who in turn mortgaged the same to the plaintiff. The plaintiff filed the suit for a declaration that the two mortgages executed by Venkatakrishnama Chetti before succession opened were inoperative in law. The learned Judges accepted the contention. When the decision of *Alamanaya Kunigari Nabi Sab* v. *Murukuti Papiah*[2] was cited and the distinction drawn by the learned Judge between "purporting to transfer the chance of an heir apparent" and "erroneously representing that he is authorised to transfer certain immoveable property" was brought to their notice they refused to follow the reasoning and rejected the distinction made on the ground that if such a distinction were accepted

> "the effect would be that by a clever description of the property dealt with in a deed of transfer one would be allowed to conceal the real nature of the transaction and evade a clear statutory prohibition."

When the illustration to section 43 of the Transfer of Property Act was pressed upon them they held that the illustration was repugnant to the provisions of section 6 (*a*) of the same Act. They founded their conclusion on the Full Bench decision in *Sannamma* v. *Radhabhayi*[3], and that of the Judicial Committee in *Annada Mohan Roy* v. *Gour Mohan Mullick*[4]. They expressed their view in the following terms :

> "What has to be looked to is the substance of the transaction and not merely the form or colour of it."

This decision certainly supports the contention of the appellant. Learned counsel for the appellant contended that this decision lays down the principle that if a transferor knowing that he has only a right of expectancy transfers the property with a false recital the transfer would be invalid as the transferor has sold the same in contravention of the express prohibition in section 6 (*a*) of the Transfer of Property Act. To put it differently, his argument was that the prohibition under section 6 (*a*) is against a person with only a right of expectancy, from transferring the same and if he transfers it any camouflage or cloak adopted by him would not validate a transaction which is otherwise invalid.

I have gone through this judgment very carefully and I regret my inability to accept any of the reasons on which the judgment of the learned Judges was founded. Neither the decision in *Sannamma* v. *Radhabhayi*[3], nor that of the Judicial Committee in *Annada Mohan Roy* v. *Gour Mohan Mullick*[4], lays down the principle adumbrated by the learned Judges. The Full Bench considered the question of the applicability of section 43, Transfer of Property Act, to a transfer of a service inam inalienable in law on grounds of public policy. The Privy Council held in *Annada Mohan Roy* v. *Gour Mohan Mullick*[4], that an agreement to sell an expectancy is void for they pointed out that section 6 (*a*) of the Transfer of Property Act, 1882, which forbids the transfer of expectancies would be futile if a contract of the above character was enforceable. The question of the applicability of section 43 in cases where representation was made fraudulently or erroneously did not arise for consideration in those decisions. Nor can I agree with the learned Judges that the distinction pointed out by Tyabji, J., in *Alamanaya Kunigari Nabi Sab* v. *Murukuti Papiah*[2], is without foundation. Indeed in my view the said distinction is the only correct basis for reconciling the provisions of section 6 (*a*) with that of section 43 of the

1. (1933) 65 M.L.J. 588. (F.B.).
2. (1915) 29 M.L.J. 733.
3. (1917) 34 M.L.J. 17 : I.L.R. 41 Mad. 418 (F.B.).
4. (1923) 45 M.L.J. 617 : L.R. 50 I.A. 239 : I.L.R. 50 Cal. 929 (P.C.).

Transfer of Property Act. I cannot also agree with the following observations at page 590 in the *Official Assignee, Madras* v. *Sampath Naidu*[1] :

"reason has that such a distinction cannot be drawn, at any rate when the erroneous description is deliberately made with the knowledge of its falsity."

To quote again :

"If such a distinction were allowed the effect would be that by a clever description of the property dealt with in a deed of transfer one would be allowed to conceal the real nature of the transaction and evade a clear statutory prohibition."

Section 43 was primarily enacted in the interests of a *bona fide* transferee and his interests cannot obviously be protected if the act of the transferor is the guiding factor. Indeed the section protects a *bona fide* transferee from a clever description of the property by an unscrupulous transferor. At the same time a collusive transferee would not derive any protection under this section for there can be no estoppel when the truth is known to the transferee. I also find it very difficult to agree with the learned Judges when they rejected the clear illustration on the ground that it was repugnant to the provisions of section 6 (*a*) of the Transfer of Property Act. Repugnance, in my view arises not because of statutory provisions but because of the wrong interpretation put upon them. When the illustration can be reconciled with the provisions of sections 43 and 6 of the Transfer of Property Act without doing violence to either it is not permissible to reject the illustration. I have, therefore, no hesitation in holding that the aforesaid decision is not only wrong on principle but also contrary to the express provisions of section 43 of the Act. Wadsworth, J., in *Akkamma* v. *Ramalinga Reddi*[2], distinguished the case in the *Official Assignee, Madras* v. *Sampath Naidu*[1], on the ground that it was a case in which the transfer, although framed as a transfer of an existing title, was in fact to the knowledge of the parties a transfer of *spes successionis* such as is prohibited under section 6 (*a*) of the Transfer of Property Act. The aforesaid statement of facts of that judgment and the reasoning of the learned Judge do not support the observation of the learned Judge. The facts do not disclose that the transferee had knowledge of the fact that what was sold was only *spes successionis*. The decision in *Akkamma* v. *Ramalinga Reddi*[2], accords with the view I have expressed. In that case one Ramanna executed a mortgage to the first defendant's husband and then left the village. His whereabouts were not known for over ten years. It was presumed that he died. His heirs sold the property to the plaintiff. The plaintiff filed the suit for possession. The learned Judge applied the provisions of section 43 of the Transfer of Property Act. In *Shyam Narain* v. *Mangal Prasad*[3], Sulaiman, C.J., states the law at page 478 as follows :

"Section 6 does not prohibit emphatically the transfer of a chance of an heir; nor does it make it absolutely illegal so as to vitiate the entire contract. It merely lays down that property of any kind may be transferred but the chance of an heir cannot be transferred. This is no more than saying that the transfer of a mere chance of an heir is void in law and is of no effect. Section 6 (*a*) would therefore apply to cases where professedly there is a transfer of a mere *spes successionis* the parties knowing that the transferor has no more right than that of a mere expectant heir. The result, of course, would be the same where the parties knowing the full facts fraudulently clothe the transaction in the garb of an out-and-out sale of the property and there is no erroneous representation made by the transferor to the transferee as to his ownership. But where an erroneous representation is made by the transferor to the transferee that he is the full owner of the property transferred and is authorised to transfer it and the property transferred is not a mere chance of succession but immoveable property itself and the transferee acts upon such erroneous representation, then if the transferor happens later before the contract of transfer comes to an end to acquire an interest in that property no matter whether by private purchase, gift, legacy or by inheritance or otherwise, the previous transfer can at the option of the transferee operate on the interest which has been subsequently acquired although it did not exist at the time of the transfer."

The learned Judges also pointed out in that case that the illustration is not repugnant to the provisions of section 6 of the Transfer of Property Act. It is not necessary to consider in detail the decisions of the other High Courts. It would

1. (1933) 65 M.L.J. 588.
2. (1937) M.W.N. 416.
3. (1934) I.L.R. 57 All. 474 : A.I.R. 1935 All. 244 at 246.

be enough to state that the decision in *Shyam Narain* v. *Mangal Prasad*[1], was followed by the Bombay High Court in *Vitha Bai* v. *Madeher*[2] and by the Patna High Court in *Ram Japan* v. *Jagesara*[3]. The same view was expressed by the Nagpur High Court in *Bismilla* v. *Manulal Chabidas*[4]. I would therefore hold that the *Official Assignee, Madras* v. *Sampath Naidu*[5], has been wrongly decided.

I agree with my learned brother that the appeal is liable to be dismissed with costs.

Ramaswami, J.—I agree.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE RAJAGOPALAN.

Corporation of Madras by its Commissioner .. *Appellant**

v.

T. Balakrishna Mehta ... *Respondent.*

Madras Town Planning Act (VII of 1920), rules 20 and 2 —Betterment contribution—Recovery—Mode of—Distress proceeding—If available to the Corporation after the respective financial year concerned.

A demand for payment of betterment contribution could be made by the Corporation (or a Municipality) either in the half year in which it became due or in the succeeding half year only for the amount due in respect of the first half year. There is no right to demand under rule 20 betterment contribution due in respect of any other half year and half years other than one half year in respect of which it became due in that half year.

Hence betterment contribution due in respect of several years cannot be recovered by distraint proceedings after the expiry of the concerned financial year.

Appeal against the Judgment and Decree of the City Civil Court, Madras, dated, 23rd November, 1950, and made in O. S. No. 232 of 1949.

R. Rajeswara Rao and *R. Punna Rao* for Appellant in C.C.C. Appeal No. 66 of 1950.

V. K. John of *Messrs. John and Row* for Respondent in C.C.C. Appeal No. 66 of 1950 and Appellant in C.C.C. Appeal No. 50 of 1951.

G. Venkatesaiya for Respondents in C.C.C. Appeal No. 50 of 1951.

The Judgment of the Court was delivered by

Satyanarayana Rao, J.—These two appeals were heard together as a common question of law arises in both the appeals. C.C.C. Appeal No. 66 of 1950 is against the decision of the City Civil Court in O.S. No. 239 of 1949 and the plaintiff, who is the City Motor Service, Limited, is the appellant. C.C.C. Appeal No. 50 of 1951 is against the decision in O.S. No. 232 of 1949 of the City Civil Court, Madras, and the appellant is the Corporation of Madras. The two suits were heard by different Judges and they held opposite views on the common question of law, which arises for consideration. The suit O.S. No. 239 of 1949 was dismissed but O.S. No. 232 of 1949 was decreed.

It will be convenient to refer to the facts in C.C.C. Appeal No. 66 of 1950. The facts in the connected C.C.C. Appeal No. 50 of 1951 are similar though there is a slight difference in the material dates. In C.C.C. Appeal No. 66 of 1950, the defendant is the Corporation of Madras and the relief claimed was a declaration that the Corporation has no right to resort to distress proceedings for enforcing the collection of betterment contribution payable if any, in respect of the bungalow and ground bearing R.S. No. 329/2, Thousand Lights Town Planning area and Door No. 36, Whites Road, Mount Road, Madras, for the various financial years commencing from the date the scheme took effect and also for a permanent injunction restraining the defendant Corporation and its agents and servants from resorting to distress proceedings in any manner for enforcing the collection of betterment contribution or any portion thereof.

1. (1934) I.L.R. 57 All. 474 : A.I.R. 1935 All. 244.
2. I.L.R. (1938) Bom. 155.
3. A.I.R. 1939 Patna 116.
4. A.I.R. 1931 Nag. 51.
5. (1933) 65 M.L.J. 588.

*C.C.C. Appeal Nos. 50 of 1951 & 66 of 1950. 28th November, 1952.

The plaintiff is the owner of the bungalow and ground bearing R.S. No. 329/2, Thousand Lights Town Planning area and bearing Door No. 36, Whites Road, Mount Road, Madras. A notification under section 12 of the Madras Town Planning Act (Act VII of 1920) hereinafter called the 'Act' was issued by the Government in 1934 requiring the Corporation to prepare, publish and submit for their sanction a draft scheme in respect of lands in the Thousand Lights area for applying the Town Planning Scheme. The scheme was finally sanctioned by the Government of Madras and published in the *Fort St. George Gazette* on 7th July, 1941. Under section 14, sub-clause 6 of the Act, the scheme, therefore, took effect from that date and the execution of the scheme commenced from that date. The Government appointed an Arbitrator under section 27 of the Act and before the Arbitrator the defendant Corporation filed a claim against the plaintiff company for betterment contribution in respect of the aforesaid property. The Arbitrator had to decide, among others, two important questions : (i) whether the property was liable to betterment contribution under section 23 of the Act, (ii) and the market value of the property on the date of the notification under section 12 in accordance with the provisions of section 24 (*a*) of the Act. On 26th August, 1945, the Arbitrator gave an award holding that the property of the plaintiff was liable to betterment contribution and he also fixed the market value of the property under section 24 (*a*) of the Act. Thereupon an appeal was preferred by the plaintiff under section 29 of the Act to the Chief Judge of the Court of Small Causes against the award of the Arbitrator. The appeal was dismissed by the Chief Judge, Small Causes Court, on 2nd December, 1947.

The next stage in the proceedings under the Act to determine the betterment contribution is to fix the market value of the property in each financial year commencing from the date when the scheme took effect under section 14, in this case, 7th July, 1941. Under section 24 of the Act, the Commissioner fixed the market value for each of the financial years commencing from 1941-42 and ending with the financial year 1948-49 and served on the plaintiff in June, 1948, sixteen notices for the 16 half years in respect of the 8 financial years beginning from 1941-42 as required by rule 59 of the rules framed by the Madras Government under section 44, sub-sections (1) and (2) of the Act. The plaintiff preferred revision petitions Exs. A-2 series on 8th July, 1949, to the Commissioner of the Corporation of Madras, objecting to the estimate of the market value made by the Commissioner during the financial years. These were finally disposed of by the Commissioner on 29th November, 1948, confirming the estimate already made of the market value by him (*vide* Ex. A-3) and after the disposal of the revision petitions, the plaintiff was called upon to pay the amount within the period fixed in accordance with rule 62 but the plaintiff preferred an appeal under rule 63 to the Council against the order of the Commissioner. While these appeals were pending the Commissioner of the Corporation threatened distress proceedings to collect the betterment contribution from the plaintiff for the eight financial years and he, therefore, filed the present suit on 8th March, 1949, for the reliefs already mentioned. The appeals were subsequently dismissed on 9th August, 1949.

Though in the pleadings and in the issues framed in the lower Court, various other contentions were raised, the only substantial and outstanding question now debated in these appeals is whether the defendant Corporation is entitled to enforce by distress proceedings the collection of the betterment contributions for all the eight years and the decision of the question lies in a narrow compass though the arguments before us covered a wider ground.

It will be convenient at this stage to refer briefly to the relevant provisions of the Act and the Rules framed thereunder for a better understanding of the respective contentions of the parties. The Town Planning Act applies to the City of Madras governed by the City Municipal Act and also to the Municipalities governed by the District Municipalities Act, as is evident from the definition of ' chairman ' in section 2 (1) of the Act. Section 4 of the Act contains the provisions that may be made in the Town Planning Scheme. A proceeding for applying the Town Planning

Scheme may be initiated by a resolution under section 9 of the Act by the Municipalities or the Corporation as provided by section 10 or may be initiated at the instance of the Provincial Government, which may require the Municipality to prepare and publish for the sanction of the Government a Town Planning Scheme under section 12 of the Act. When all the preliminary steps are gone through, the scheme is published in the Official Gazette under sub-clause (5) of section 14 and a notification so published is conclusive evidence that a scheme has been duly made and sanctioned and the scheme takes effect from the date of the publication of such notification. Thereafter the execution of the scheme should be commenced (*vide* section 14 (6)). The next stage for the determination of the betterment contribution, which the Municipalities are empowered to levy under section 23 of the Act is to make a claim for that purpose within the time prescribed before the Arbitrator, who is appointed under section 27 of the Act. The functions of the Arbitrator in respect of the claim made by the Corporation or the Municipalities are enumerated in section 27, the chief of which are to determine in the first instance whether the property is liable for betterment contribution under section 23 and if so, to record the market value on the date of the notification under section 10 or section 12 as the case may be. This power to determine the market value is contained in section 24 (*a*) and the market value of the property on the date of the publication of the notification under section 10 or section 12 is treated as the basic value as they call it, which is the standard for comparison for arriving at the betterment contribution in each financial year. The betterment contribution which the Corporation or Municipality is entitled to levy is the annual betterment contribution and the term of years and the percentage of the increase in value not exceeding 10 per cent are fixed by the scheme. There is however an upper limit fixed by the proviso to section 23 for the betterment contribution as it states that the aggregate amount of the contributions so recovered shall not exceed one half of the maximum increase in value during the term of years fixed under the scheme. The mode of ascertaining and the time during which the ascertainment should be made are laid down in clauses (*a*) to (*d*) of section 24. The Chairman, that is, in the case of the Corporation, the Commissioner, has to fix in each of the financial years following the date on which the scheme takes effect under section 14, the market value of the property on the first day of April, of that year. In other words, even in the beginning of the financial year, he must proceed to estimate the market value of the property for the purpose of that financial year. If the market value so estimated by the Commissioner does not exceed the basic value, that is, the value fixed by the Arbitrator under clause (*a*) of section 24, no betterment contribution shall be leviable in that year. If, on the other hand, the market value fixed by the Commissioner under clause (*b*) exceeds the basic value, the Municipality is entitled to levy on the difference a betterment contribution according to the percentage fixed under the scheme. This annual betterment contribution is a first charge on the property (*vide* section 25) but is subject to the prior payment of land revenue, if any, due to the Government and it shall be paid in half yearly instalments of one half of the amount fixed for the year, that means that if the contribution is fixed for the financial year 1941-42, it must be paid in two half yearly instalments in that year and the amount to be paid is one half of the amount fixed for the whole year. Against the decision of the Arbitrator, an appeal is provided by section 24 to the authority provided therein and the amount of contribution fixed by the Commissioner under clause (*d*) is also subject to revision by him under the rules and against his decision there is a further appeal to the Council. The mode of collecting the betterment contribution in respect of each financial year is provided by sub-section (2) of section 25 of the Act. The Provincial Government is authorised to make rules for the assessment and collection of betterment contribution by that sub-section but subject to such rules however it is provided that the Chairman shall have the same powers and shall adopt the same procedure for the assessment and collection of betterment contribution as he has for the assessment and collection of property tax. Further, the persons affected shall have the same right to receive notice of assessment and to object to the assessment and to appeal in respect thereof as they have in respect of the property tax.

and the decision shall to the same extent be final and conclusive. If under the City Municipal Act or the District Municipalities Act, lands and buildings are exempt from property tax, they shall also be exempt from betterment contribution. The rules framed by the Government under the Act do not provide for the collection of betterment contribution.

The language of section 25 (2), that

> " the Chairman shall have the same powers and shall adopt the same procedure for the assessment and collection of the betterment contribution as he has for the assessment and collection of the property tax "

naturally, therefore, refers to and attracts the provisions of the City Municipal Act in this case and of the District Municipalities Act in the case of Municipalities. The provisions relating to property tax are contained in sections 98 to 109 of the City Municipal Act and section 138 enacts that the Rules and tables embodied in Schedule IV shall be read as part of the chapter. Schedule IV contains taxation rules and Part I deals with the assessment of property tax and Part VI provides for the collection of taxes. Rules 20 and 21 are the relevant rules so far as collection by distress is concerned. Under rule 20 sub-clause (1) it is provided that where any tax, not being a tax in respect of which a notice has to be served under section 113 or section 120-A or a direction has been given under rule 6 is due from any person, the commissioner shall cause to be served upon or sent to such person a bill for the sum due before proceeding to enforce the provisions of rule 21. Sub-clause (3) of that rule states that where a notice, bill or direction referred to in sub-rule (1) has not been served or given either in the half year in which tax became due or in the succeeding half year, the tax for the half year first mentioned in this sub-rule shall not be demanded. Under rule 21 :

> "if the amount due on account of any tax is not paid within fifteen days from the service of the notice or bill or the giving of the direction referred to in section 113 or section 120-A or rule 6 or rule 20 and if the person from whom the tax is due has not shown cause to the satisfaction of the Commissioner why it should not be paid, the Commissioner may recover by distraint under his warrant and sale of the movable property of the defaulter or if the defaulter is the occupier of any building or land in respect of which a tax is due, by distress and sale of any movable property which may be found in or on such building or land the amount due on account of the tax together with the warrant fee and distraint fee and with such further sums as will satisfy the probable charges that will be incurred in connection with the detention and sale of the property so distrained ",

so that if within 15 days from the date of the service of the bill under rule 20—we are not concerned in this case with section 113 or section 120 (*a*) or rule 6—the tax is not paid, the Commsisioner is entitled to recover by distraint under a warrant for sale of the property of the defaulter the arrears due. The requirement of Rule 20 (3) is that the bill referred to in sub-rule (1) of rule 20 has to be served or given either in the half year in which the tax became due or in the succeeding half year. If it is not so served, the tax for the half year first mentioned in the sub-rule cannot be demanded. On the interpretation of this clause, in our opinion, the decision of the question whether the distraint in this case for the sixteen half years is valid has to be determined. To illustrate the meaning of this clause, we may take a concrete example. Taking the last of the financial years in the present case 1948-49, the financial year commenced on the 1st of April, 1948, and ended with the 31st March, 1949. The first half year ended with September, 1948, and the second half year with March, 1949. If the tax became due in the first half year ending with September, 1948, a demand notice under sub-rule 1 may be issued for the amount due in respect of that half year or in the succeeding half year. If such a notice is given in either of the two half years then the distraint would be valid for the amount, which became due in the first half year. Otherwise, he cannot make a demand and distrain the property under Rule 21. So far the meaning of the sub-clause seems to be unambiguous and does not admit of any serious doubt.

It must be mentioned that the appellant does not dispute his liability to pay betterment contribution fixed for the eight financial years and it is also clear from section 25 that, that amount is a first charge on the property, subject however to the

revenue payable to Government. What is disputed is that the mode of enforcing that liability is not by distraint for all the half years by a demand made in the second half year of 1948-49, *i.e.*, after November, 1948. By the demand, the Corporation can recover only the betterment contribution payable in respect of the financial year 1948-49 and no more. On a plain reading of the provisions of the Town Planning Act and the Rules framed thereunder and the rules in Part VI of Schedule IV to the City Municipal Act, it is clear that in each financial year, at its commencement, the Commissioner has to determine the betterment contribution payable for the financial year and that that amount should be paid in two half-yearly instalments during that year. If no payment is made and if a demand is made in accordance with rule 20 of Part VI of Schedule IV to the City Municipal Act, he can distrain moveables for the recovery of the betterment contribution payable in respect of that financial year. But unfortunately for the Corporation, in the present case, the determination of the betterment contribution for the eight financial years took a long time as the various stages for its fixation had to be gone through and no doubt those steps proceeded in a very leisurely manner. It took nearly seven years to determine the betterment contribution for the eight financial years after the scheme took effect under section 12. It is, therefore, contended on behalf of the Corporation by Dr. John, the learned counsel, that it is unthinkable that the Legislature could have intended to make distraint available even long before the betterment contribution was ascertained and that before it was ascertained it could not have become due. If the contribution was determined within the periods contemplated by section 24 of the Act, the Commissioner could exercise the right of distraint by complying with the provisions of rule 20. But it was impossible for him to have complied with those provisions because the amount was not ascertained finally. It is no doubt true that an amount, which was not ascertained, cannot become payable before it is ascertained. Take for example the case of arrears of rent. If the rent had to be ascertained, it cannot be said that before ascertainment the rent became due and the period of limitation to recover rent under Article 110 of the Limitation Act commences to run even before such ascertainment as held by the Privy Council in *Rangayya Appa Rao* v. *Bobba Sriramulu*[1]. The provisions in such a case for recovery of rent would apply only to rent, which is ascertained and not to rent, which is in the process of ascertainment. Dr. John was, therefore, right in his contention that the betterment contribution did not become due until it was ascertained by the Commissioner on the 29th of November, 1948. But that would only help him to contend that the cause of action for enforcing the charge under section 25 of the Act accrued and arose only on that date even in respect of the contribution for the years commencing from 1941-42. When once it is ascertained, it became due and became payable. But that does not help him in invoking the provisions for distraint under rules 20 and 21. The language of sub-clause 3 of rule 20 clearly refers to the tax, which not only became due in that half year but also which became due in respect of that half year. Therefore, a demand could be made either in the half year in which it became due or in the succeeding half year only for the amount due in respect of the first half year. It is no doubt true that the betterment contribution for all the half years became due in 1948-49 but the Commissioner has no right to demand under rule 20 betterment contribution due in respect of any other half year or half years other than one half year in respect of which it became due in that half year. He may make however the demand either in that half year or the succeeding half year. The language of the rule excludes the possibility of any such construction which has been urged on behalf of Corporations by Dr. John the learned counsel.

Dr. John then referred to the inconvenience in realising the betterment contribution that may be caused by driving the Corporation to file a suit as the proceedings may take a very long time. That may be so but we cannot get over the clear language of the rule as our function is only to interpret the rule as it stands.

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1. (1903) 14 M.L.J. 1 : L.R. 31 I.A. 17 : I.L.R. 27 Mad. 143 (P.C.).

and not to legislate. Further, he also contended that the demand referred to in rule 62 after the disposal of the revision petition by the Commissioner complies with the demand contemplated by rule 20. Rule 21 clearly contemplates a demand under rule 20, and not any other demand outside it. Even if it be assumed that a demand under rule 62 tantamounts to a demand under rule 20 even then it would not help the Corporation as distress cannot be made for more than one half year in which the betterment contribution became due under sub-rule (3) of rule 20.

Reference was made in the course of the arguments to section 387 of the City Municipal Act and it was contended that without complying with the provisions of rule 20 a demand could be made for betterment contribution as a contribution payable under any other law, *i.e.*, the Town Planning Act in this case. The language of section 25 (2) excludes the applicability of section 387 as the procedure to be applied under the former section is the procedure for the assessment and collection *of the property tax* and not the procedure prescribed under the City Municipal Act for the recovery of any other amount as compensation or contribution. Section 387 does not therefore help the respondent. For these reasons we think that the respondent is not entitled to recover by distraint proceedings any amount in respect of the financial years beginning from 1941-42 except the betterment contribution due in respect of the financial year 1948-49. This the appellant is willing to pay and in fact in the connected appeal it is represented that the amount has been already paid though in C.C.C. Appeal No. 66 of 1950 it was not paid in full. For these reasons we think that the decision of the learned City Civil Judge in O.S. No. 239 of 1949 is erroneous and must be reversed. C.C.C. Appeal No. 66 of 1950, is, therefore, allowed and the suit is decreed except in respect of the financial year 1948-49 with costs here and in the Court below.

C.C.C. Appeal No. 50 *of* 1951: The facts are similar though the dates are somewhat different and it is unnecessary to burden this judgment with details of those dates. The question raised is the same and for the reasons given in the connected appeal, the decision of the lower Court in this case is correct and the decree must be confirmed. The amount due in respect of the financial year 1948-49 was already paid by the plaintiff. The appeal is dismissed with costs.

C.C.C. Appeal No. 66 *of* 1950 *allowed and C.C.C. Appeal No.* 50 *of* 1951 *dismissed.*

R.M.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMASWAMI.

B. N. Viswanathan .. *Petitioner**

v.

The Assistant Registrar of Joint Stock Companies, Madras .. *Complainant.*

Companies Act (VII of 1913), sections 76 and 131—Failure to hold General Body meeting and failure to place the balance-sheet before General Body meeting—Distinct offences for which separate sentences can be imposed.

A director of the company cannot be allowed to rely upon his own default for arranging to hold a General Body meeting as required by Section 76 of the Companies Act in order to establish his innocence in respect of the charge of failure to place the balance-sheet before the General Body meeting as required by section 131.

Appayya v. *State*, (1952) 1 M.L.J. 608, followed.

Two distinct offences are created by the two sections and there can be no case of the accused being prosecuted twice and punished twice for the same offence and put in double jeopardy. On the other hand, the same transaction may give rise to several distinct offences.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the Order of the Court of the Fourth Presidency Magistrate, G.T., Madras, dated 24th September, 1951, in C.C. No. 4903 of 1951.

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* C.R.C. No. 263 of 1952. 3rd September, 1952.
(C.R.P. No. 246 of 1952).

J. R. Gundappa Rao for Petitioner.

The State Prosecutor (*S. Govind Swaminathan*) for the State.

Complainant not represented.

The Court made the following

ORDER.—This is a criminal revision case which has been filed against the conviction and sentence of the Fourth Presidency Magistrate, G.T., Madras, in C.C. No. 4903 of 1951.

The facts are: The petitioner before us, B. N. Viswanathan, who was the fourth accused in the lower Court was one of the Directors of the Madras Electrical Industries Ltd., by its Managing Agents, the Indian Trades and Investments, Ltd. This fourth accused appears to have had the controlling interest in the Managing Agency because out of the ten shares of the Managing Agency concern, nine belongs to his wife, for whom he acts, and one belongs to this accused as pointed out by Mack, J., in his order in O. P. No. 1028 of 1951. This accused has also given his address as 310-311, Linghi Chetti Street, to the Assistant Registrar of Joint Stock Companies and this is the address of the Managing Agency concern, the Indian Trades and Investments Ltd., also.

In these circumstances on account of the internecine quarrels which seem to have dogged the footpath of this firm from the beginning the company laid its last balance-sheet and profit and loss account before the General Body meeting held on 31st March, 1949. No balance-sheet and profit and loss account had been laid before a General Body meeting of the company before 30th June, 1950, as should have been done under the provisions of section 131 (i) of the Indian Companies Act. Therefore, this petitioner and three others were charged for an offence under section 131 (1) of the Indian Companies Act. This accused was convicted and he was sentenced to pay a fine of Rs. 50.

It is also seen that this petitioner has also been put up along with other Directors for not holding a General Body meeting under section 76 of the Indian Companies Act. It is undisputed that all these directors got convicted under section 76 and fines were imposed on them and this Court refused to interfere in revision.

The case for this petitioner now as set out by him in paragraphs 9 and 10 of the memorandum of revision is as follows:

"The learned Magistrate failed to appreciate the provisions of sections 76, 131 and 133 of the Indian Companies Act, that it is mandatory under section 76 of the said Act to hold an annual meeting within a calendar year and it is only discretionary to hold other general meetings and that the balance-sheet of a company should also be presented only at an annual meeting and not in other meetings and erred in giving double punishment, once for not holding a meeting and again for not laying the balance-sheet before a meeting which was not held. The learned Magistrate should have held on a construction of sections 76 and 131 that they have reference that the mandatory nature of the sections referred to the annual balance-sheet and annual meeting. The learned Magistrate ignored the constitution of the company as embodied in the Articles of Association of the Company with supplementary provisions under the Indian Companies Act, wherever the Act was permissive and erred in holding that two different meetings were contemplated under sections 76 and 135 of the Indian Companies Act."

This contention, that no offence has been made out inasmuch as no General Body meeting was held within the period prescribed and therefore no question of placing balance-sheet arose and that the charge against him as it stands is misconceived and that no offence has been committed by him on that footing has been examined by me in a parallel case in *Appayya* v. *State*[1]. I followed the Bench decision of the Calcutta High Court in *Debendranath Das Gupta* v. *Registrar of Joint Stock Companies*[2], and the English decision in *Park* v. *Lawton*[3], and held that the Director could not be allowed to rely upon his own default for arranging to hold a General Body meeting in order to establish his innocence. Then I cited with approval *Bhagirath* v. *Emperor*[4]; and pointed out that the argument drawn from misery by the Director that he was helpless and circumstances forced him from

1. (1952) 1 M.L.J. 608.
2. (1917) I.L.R. 45 Cal. 486.
3. (1911) 1 K.B. 588.
4. A.I.R. 1948 Cal. 42.

pressing on and getting a meeting held, could not be accepted. The same reasoning applies here with necessary changes and the plea put forward by this accused that because a General Body meeting could not be held the balance-sheet could not be presented is without any substance.

Then we shall examine the allegation of double punishment. Section 76 of the Companies Act lays down that a general meeting of every company will be held within eighteen months from the date of its incorporation and thereafter once at least in every calendar year and not more than fifteen months after the holding of the last preceding general meeting and that on failure to do so every director or manager of the company who is knowingly and wilfully a party to the default shall be liable to a fine not exceeding five hundred rupees. Then section 131 (1) regulates the laying of a balance-sheet. This balance-sheet it is stated should be laid before the company in a general meeting. Section 133 lays down that if any default is made in laying before the company or in issuing a balance-sheet and profit and loss account . . . . . as required by section 131 or if any balance-sheet and profit and loss account is issued . . . . . which does not comply with the requirements laid down by and under section 131, section 132, section 132-A . . . . . the company and every officer of the company who is knowingly and wilfully a party to the default shall be punishable with fine which may extend to five hundred rupees.' Thus, two distinct offences are created, *viz.*, a distinct offence for not holding a General Body meeting and another offence for not laying the balance-sheet before the company in the general meeting.

It is possible to have a General Body meeting under section 76 without laying the balance-sheet and a balance-sheet can be laid before a general meeting which need not be one convened under section 76. Therefore, there is no case of the accused being prosecuted twice and punished twice for the same offence and put in double Jeopardy. On the other hand, the same transaction may give rise to several distinct offences and the instant case is one such instance.

Therefore the point taken fails and there are no other grounds to interfere in revision except to reduce the fine to Rs. 10. The excess fine amount if collected will be refunded to petitioner.

K.S. ——————— *Fine reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AIYAR.

Srimathi K. Ponnalagu Ammal .. *Appellant**

v.

The State of Madras, represented by the Secretary to the Revenue Department, Madras and others .. *Respondents.*

Practice—Application to leave to appeal by person not party to the trial proceeding—Consideration for granting leave.

The practice consistently followed by English Courts, *viz.*, that where an appellant is not a party to the record he can only appeal by leave to be obtained on motion *ex parte* from the court of appeal and that leave to appeal will not be given to a person not a party unless his interest is such that he might have been made a party, is a just and equitable practice and is in no way inconsistent with the doctrine that a right of appeal can only be created by Statute. The test to find out when it would be proper to grant leave to appeal to a person not a party to a proceeding against the decree or judgment in such proceedings is that leave should be granted to persons who, though not parties to the proceedings would be bound by the decree or judgment in the proceedings and who will be precluded from attacking its correctness in the proceedings.

Where in proceedings by way of a writ taken out by the senior widow of a zamindar of an impartible estate to which the State and Court of Wards were the only parties it was held that the Court of Wards had no power to refuse to give possession to the senior widow who was their ward and who had subsequently ceased to be such and that if a third party, *viz.*, the junior widow's adopted son, had paramount rights it was for that party to institute a suit in a trial Court to establish his or her rights

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* L.P.A. No. 134 of 1952 and W.P. No. 317 of 1952. 7th November, 1952.

and the junior widow applied to the appellate court for leave to appeal, *held*, as the judgment was not a judgment *in rem* but was binding only between the senior widow, the State and the Court of Wards and would not affect the legal rights of the junior widow but the carrying into effect of the judgment would adversely affect her which could be prevented by her by taking other steps, it was not a fit and proper case in which leave shall be granted.

Appeal under clause 15 of the Letters Patent against the order of Subba Rao, J., dated 15th April, 1952, in C. M. P. No. 13519 of 1950, being a petition for issue of a Writ of Mandamus, etc.

K. V. Venkatasubramania Aiyar, *K. S. Desikan* and *V. C. Sri Kumar* for Appellant.

R. Kesava Aiyangar, *K. S. Ramamurthi*, *K. Parasaran* and the Government Pleader (*P. Satyanarayana Raju*) for Respondents.

The Court delivered the following

JUDGMENT : L.P.A. No. 134 of 1952.—This is an appeal under the Letters Patent against the judgment of Subba Rao, J., in C. M. P. No. 13519 of 1950. That petition was filed in the following circumstances. Krishna Vijaya Poochaya Naicker, Zamindar of Marungapuri, an impartible estate situated in Tiruchirapalli district, died on 17th September, 1926, leaving behind him three widows, Lakshmi Ammani, Ponnalagu Ammani and Muthulagu Ammani. As one of the incidents of impartible estates in Southern India is that the estate is descendible to a single heir, the seniormost of the three widows would be first entitled to succeed. The Government, on the assumption that Lakshmi Ammani was the seniormost of the widows, proceeded to exercise powers conferred on them by the Madras Court of Wards Act. On 11th July, 1927, the following notification was published in the *Fort St. George Gazette* and in the *Tiruchirapalli District Gazette* :

"Under section 15 of the Madras Court of Wards Act 1902 His Excellency the Governor in Council declares Lakshmi Ammani Ammal, the proprietrix of the Marungapuri estate in the Kulitalai taluk of the Tiruchirapalli District to be incapable of managing her property and directs the Court of Wards to assume the superintendence of that property.

2. The Collector of Tiruchirapalli will discharge in respect of the property the duties imposed on a Collector by the said Act."

It is common ground that in pursuance of this notification the Court of Wards assumed the superintendence not only of the impartible estate of Marungapuri but also other partible properties left by the deceased Zamindar.

The late Zamindar left behind him a will dated 30th July, 1915, and a codicil dated 10th August, 1926. Ponnalagu Ammani alleged that she took the son of her daughter in adoption to her husband on 1st December, 1949, under the authority given to her by her husband in the will and the codicil. She appears to have sent a petition to the Government on 6th January, 1950, on behalf of the minor adopted son. Lakshmi Ammani filed another petition on 1st May, 1950, evidently attacking the validity of the alleged adoption. The Government passed an order, G.O. No. 2709 on the 9th October, 1950, dealing with both the petitions and communicated portions of their order to the two widows respectively. The following is the portion of the order communicated to Ponnalagu Ammani :

"(5). With reference to her petition dated 6th January, 1950, read above, Srimathi Ponnalagu Ammani is informed that the Government have directed the Court of Wards to release from its superintendence the properties pertaining to Marungapuri estate which are now under its superintendence. As, however, there is dispute as to title to the properties between the senior Zamindarini and the adopted boy the Government have decided to retain custody to enable either of the claimants to obtain suitable orders from the civil court in regard to the custody of the properties."

To Lakshmi Ammani the Government communicated paragraph 4 of their order, which runs as follows :

"(4). With reference to her petition, dated 1st May, 1950, read above Srimathi Lakshmi Ammani is informed that the Government have been advised that the adoption made by Srimathi Ponnalagu Ammani is valid in law and that she (Srimathi Lakshmi Ammani) has no longer any subsisting legal right or title to the impartible and partible properties of the late Zamindar which are in the custody of the Court of Wards and that it is therefore not possible to hand over possession of such properties without an order of a civil court. The Government have directed the Court of Wards to release the properties from its superintendence. She is informed that in case she does not obtain suitable orders from a civil court, within a period of three months from the date of receipt of this

order regarding the custody of the properties, the Government will, on the expiry of that period, take such steps in regard to them as they may consider suitable and necessary in the light of the legal advice they have received."

On 17th October, 1950, the following notification was published in the *Fort St. George Gazette* :

"In exercise of the powers conferred by section 15 of the Madras Court of Wards Act, 1902 (Madras Act I of 1902) and of all other powers enabling them in this behalf, His Excellency the Governor of Madras hereby rescinds Revenue Department Notification, No. 210, dated the 11th July, 1927, published at page 1079 of Part I of the *Fort St. George Gazette*, dated the 19th July, 1927, declaring Srimathi Lakshmi Ammani Ammal, the then proprietrix of the Marungapuri estate, in the Kulitalai taluk of the Tiruchirapalli district, to be incapable of managing her property and directing the Court of Wards to assume the superintendence of that property."

The Government followed it up by another notification a few days later which was published in the *Fort St. George Gazette*, dated 21st November, 1950. It was in the following terms :

"It is hereby notified under section 62 of the Madras Court of Wards Act (I of 1902) that, under orders of Government, the Court of Wards has released from its superintendence the Marungapuri estate in the Kulitalai taluk in the Tiruchirapalli district including the separate and partible properties left by the late Zamindar."

Immediately after this notification Lakshmi Ammani filed in this Court an application under Article 226 of the Constitution for the issue of a Writ of Mandamus or any appropriate writ or order directing the State of Madras and the Court of Wards to deliver possession of the Marungapuri Zamin properties which were in the superintendence of the Court of Wards to her with accounts, records, documents, etc. She also prayed for an *ad interim* injunction restraining the respondents from parting with the custody of the properties in favour of any person other than her pending disposal of the main application. In the affidavit filed by her karyasthar, after setting out the facts above narrated, he alleged that the Court of Wards was bound to hand over possession of all the properties including the accumulated income only to her and stated that the Court of Wards having assumed management on her behalf and in her right, it would be unjust and incompetent for them to set up the rights of anyone else in derogation of and inconsistent with her rights without surrendering and restoring possession of the properties to her.

The Collector of Tiruchirapalli filed a counter-affidavit on behalf of the respondents. He stated *inter alia* that the Government were advised that the adoption was validly made and had the effect of divesting Lakshmi Ammani of the estate and the adopted son became entitled not only to the impartible zamindari but also to the separate and partible properties left by the late Zamindar. The attitude taken up by the Government and the Court of Wards is summed up in paragraph 5 of the counter-affidavit in which the objection was taken that the question as to who is the proprietor of the estate could not be decided in proceedings by way of a writ and the matter could only be decided properly in a civil court at the instance of either of the two claimants.

Lakshmi Ammani's karyasthar filed a reply affidavit alleging that it was not competent to the respondents to raise any objection to the re-delivery of the zamin to her as it was from her they took the zamindari and it was on her behalf that they had been in management of the estate. A legal plea was put forward in the following terms :

"The respondents having accepted the position of guardianship and taken the zamin in that capacity it is not competent for them to assert any hostile title or set up *jus tertii* until they had surrendered possession and discharged themselves from the guardianship with which the statute had clothed them."

Lakshmi Ammani's karyasthar subsequently filed a further affidavit evidently because of the notification of the Marungapuri estate under Madras Act XXIV of 1948. He alleged that even if that Act was valid the notification under it would not vest in the Government the properties other than the Zamindari like the separate properties, jewels, etc., left by the late zamindar, and these had in any event to be re-delivered to her. A schedule was attached to the affidavit setting out in

detail, the items of properties which would not vest in the Government under Madras Act XXVI of 1948.

The petition was disposed of by Subba Rao, J. He held after a consideration of the facts and the relevant provisions of the Court of Wards Act that the Court of Wards had no power to refuse to give possession to the person who was their ward and who had subsequently ceased to be such. If a third party had paramount rights it was for that party to institute a suit in a civil Court to establish his or her rights. The learned Judge recognised the effect of Madras Act XXVI of 1948, namely, that even on his finding Lakshmi Ammani could only claim to recover possession of properties that did not vest in the Government under the provisions of that Act. He therefore directed the respondents to hand over to her the properties belonging to Lakshmi Ammani in their possession excluding the properties that vested in the Government under Madras Act XXVI of 1948. This order was passed on 15th April, 1952.

Neither the State of Madras nor the Court of Wards filed any appeal. But on 22nd April, 1952, Ponnalagu Ammani filed an application before us asking for leave to prefer a Letters Patent appeal against the order on the ground that neither she nor the adopted son had been impleaded in Lakshmi Ammani's petition, that she was a person whose rights were affected by the said decision and as an aggrieved person she should be granted leave to file an appeal though she was not a party to the petition. In the affidavit filed in support of the application she submitted that even if the adoption were to be disregarded she would be entitled to an equal share in the partible properties left by the late Zamindar, and if the adoption were to be upheld neither she nor Lakshmi Ammani would be entitled to any share. We granted leave to appeal as we thought that Ponnalagu Ammani was vitally interested in the subject-matter and felt aggrieved by the order passed by Subba Rao, J., and we admitted the Letters Patent Appeal. The order granting leave was, however, passed *ex parte.*

A preliminary objection was taken by Mr. Kesava Aiyangar on behalf of Lakshmi Ammani that the appeal was incompetent because Ponnalagu Ammani who was not a party to the petition disposed of by Subba Rao, J., could not file an appeal against the order in that petition and there was no provision of law under which this Court had the power or jurisdiction to grant leave to a person not a party to a proceeding to prefer an appeal against an order in that proceedings. His contention briefly was that the right of appeal is the creation of a statute and a Court could not enlarge its appellate jurisdiction by its own rules of practice. His contention was obviously based on the assumption that there was something in the Letters Patent which impliedly restricted the right of appeal against judgment or order in any proceeding to the parties to the proceeding.

The material provision of the Letters Patent is clause 15. It runs thus :

"*Appeal from the Courts of Original jurisdiction to the High Court in its appellate jurisdiction.*—And we do further ordain that an appeal shall lie to the said High Court of Judicature at Madras from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction, by a court subject to the superintendence of the said High Court and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any division court, pursuant to section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any division court, pursuant to section 108 of the Government of India Act made (on or after the 1st day of February, 1929) in the exercise of appellate jurisdiction in respect of a decree or order made by a Court subject to the superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such division court shall be to us, Our Heirs or Successors in Our or Their Privy Council, as hereinafter provided."

The argument was that the word "judgment" in this clause had the same meaning as the word "decree" in the Civil Procedure Code and section 96 of the Code which provides for an appeal from "every decree passed by any Court exercising

original jurisdiction to the Court authorised to hear appeals from the decisions of such Court" has been construed as conferring that right of appeal only on the parties to the suit who might be aggrieved by the decree.

Mr. Kesava Aiyangar relied on the following observation which occurs in the opinion of Sir John Edge in *S. J. Bhogilal* v. *Temple Committee*,[1]:

"The term 'judgment' in the Letters Patent of the High Court means in civil cases a decree and not a judgment in the ordinary sense."

In the Code of Civil Procedure we find three expressions used relating to the decisions of Courts, namely, decree, order and judgment. Decree is defined as follows:

"'Decree' means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 47 or section 144, but shall not include (*a*) any adjudication from which an appeal lies as an appeal from an order, or (*b*) any order of dismissal for default."

"Order" means "the formal expression of any decision of a civil Court which is not a decree." "Judgment" is defined as "the statement given by the Judge of the grounds of a decree or order." Their Lordships of the Judicial Committee evidently had in mind this definition of judgment when they refer to "a judgment in the ordinary sense." The scheme of appeals under the Civil Procedure Code is this. Under section 96,

"Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorised to hear appeals from the decisions of such court."

Under section 104 an appeal lies from certain orders mentioned in that section and in Order XLIII. But no appeal ordinarily lies from any other order. In certain cases a second appeal is provided from appellate decrees (section 100). No appeal lies against a judgment as such, as distinct from a decree or order. Under clause 15 of the Letters Patent an appeal lies from "the judgment" of one Judge of the High Court. This difference in language has led to the view taken by this Court in the leading case *Tuljaram Row* v. *Alagappa Chettiar*[2], and subsequent decisions following it that certain decisions of Judges on the Original Side of the High Court are subject to appeal under clause 15 of the Letters Patent though similar decisions would not be appealable under the Civil Procedure Code. We are not now concerned with the correctness of this view. Sulaiman, J., in *Hariram Singh* v. *Emperor*[3], was inclined to hold that in view of the observation made by the Privy Council in *Bhogilal* v. *Temple Committee*[1], the word "judgment" cannot now be taken in its widest possible sense so as to include every order which terminates a proceeding pending in the High Court so far as that Court is concerned. It was not disputed before us that an appeal would lie from the judgment of a Judge of this Court disposing of an application for a writ under Article 226 of the Constitution to a Division Bench though it may not be strictly a decree within the meaning of the Civil Procedure Code. Mr. Kesava Aiyangar's anxiety to equate judgment in clause 15 of the Letters Patent with "decree" in the Civil Procedure Code was to have the benefit of rulings in which it was held that only parties to a suit could appeal against the decree in the suit. Support for this view is apparently sought from the definition of "decree" as:

"the formal expression of an adjudication which conclusively determines the rights of the parties to the suit."

Varadachariar, J., in *United Provinces* v. *Atiqa Begum*[4], observes at page 150:

"Section 96, Civil Procedure Code, does not in terms say who is entitled to prefer an appeal, but according to the Code it is the decree that has to be appealed against. The decisions have therefore laid it down as a matter of inference that a party adversely affected by the decree is the only person entitled to appeal."

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1. (1925) 49 M.L.J. 25 : A.I.R. 1925 P.C. 155 (P.C.).
2. (1910) I.L.R. 35 Mad. 1 : 21 M.L.J. 1 (F.B.).
3. (1938-39) F.L.J. 153 : (1939) 2 M.L.J. (Supp.) 23 (F.C.) : 1939 F.C.R. 159.
4. (1940) 3 F.L.J. 97 : 1940 F.C.R. 110 : (1941) 1 M.L.J. 65 (F.C.).

Observations in decisions of the Federal Court in Appeals sought to be preferred in criminal cases which were relied on by Mr. Kesava Aiyangar appear to us to be entirely irrelevant. Their Lordships in those cases were concerned with the question whether an interlocutory order made in a criminal proceeding could be carried in appeal to the Federal Court, and it was held that it could not be. (See *Kuppuswami Rao* v. *The King*[1]).

It is equally not necessary to deal with the rulings of English and Indian Courts to which Mr. Kesava Aiyangar referred us for the proposition that there is no inherent right of appeal and the creation of a right of appeal is an act which requires legislative authority and that neither the inferior Court nor the superior Court nor both combined can create such a right (*Attorney-General* v. *Sillem*[2], *National Telephone Co., Ltd.* v. *Post-master General*[3], *Pushpati Bharati* v. *Secretary of State*[4] and *Lakpatram* v. *Beharilal*[5]. In the case before us there is no controversy about the right of appeal as such. The only controversy is as to who is entitled to appeal. On that question the cases referred to above have no bearing whatever.

Mr. Kesava Aiyangar concedes that every party to a suit is not entitled as of right to file an appeal against the decree in the suit. The party must be aggrieved. While it has been held that a party who is not aggrieved is not entitled to appeal; it has also been held that even a successful party in a suit can file an appeal against a finding of the Court on one of the issues which is adverse to him, though the final decision is in his favour (Vide *Nimmagadda Venkateswarlu* v. *Bondapati Lingayya*[6] and *Harachandradas* v. *Bholanath Das*[7]). It was laid down in these cases that the test to be applied in each case is whether the finding sought to be appealed against is one to which the rule of *res judicata* may be held to be applicable so as to disentitle the aggrieved party to agitate the question covered by the finding in any other proceeding. This rule is certainly an extension of the principle that it is only a party adversely affected by the decree that is entitled to appeal (*Vide* Varadachariar, J., at page 151 in *United Provinces* v. *Atiqa Begum*.[8] This extension is evidently based on grounds of justice. Guha, J., in *Harachandra Das* v. *Bholanath Das*[7], says :

"...The Code of Civil Procedure, by the provisions relating to the right of appeal, as they now stand, does not provide for an appeal against a finding contained in a judgment, the appellants in this Court have, therefore no right of appeal, under the law. On grounds of justice and recognising that, on that ground, the implication of suitable exception or qualification may be justifiable and even necessary, we are prepared to follow the rule engrafted on the statute by a current of decisions by High Courts in this country, that an aggrieved party may have a right of appeal, and that the test to be applied in such a case is whether the finding sought to be appealed against is one to which the rule of *res judicata* may be held to be applicable, so as to disentitle the aggrieved party to agitate the question covered by the finding in any other proceeding."

On the immediate question, namely, whether a person who is not a party to a suit or other proceeding is under no circumstance entitled to prefer an appeal against the decision in that suit or proceeding, there is very little authority in India. In *Indian Bank* v. *Bansiram Jashamal*[9], Madhavan Nair and Jackson, JJ., held that neither under the general principles of law nor under the Civil Procedure Code can a person who was not a party to a suit prefer an appeal against the decree therein. In that case the Official Receiver representing the general body of creditors was a defendant in a suit brought by two plaintiffs to declare their title to two items of property. The suit went against the Official Receiver. But he did not file an appeal. One of the creditors thereupon filed an appeal against the decree in the suit and along with it filed an application praying that in the circumstances this Court may be pleased to permit the applicant to appeal against the decree. The learned Judges held that under the Civil Procedure Code no person who is not a party to the suit can prefer an appeal under section 96, because :

1. (1948) 1 M.L.J. 103 : 1947 F.L.J. 110 : 1947 F.C.R. 180 (F.C.).
2. (1864) 10 H.L.C. 704 : 11 E.R. 1200.
3. (1913) 2 K.B. 614, 621.
4. 1939 F.L.J. 1.
5. (1939) F.L.J. 121 : 1939 F.C.R. 121.
6. (1924) I.L.R. 47 Mad. 633.
7. (1935) I.L.R. 62 Cal. 701.
8. (1940) 5 F.L.J. 97 : 1940 F.C.R. 110 : (1941) M.L.J. 65 (F.C.).
9. (1933) 66 M.L.J. 532 : I.L.R. 57 Mad. 670.

"the right of appeal is a special creature of statute and it can be exercised only by those in whom the power is vested expressly or implied by the statute."

Two decisions of the Chancery Court in England were relied on by the appellant in which leave to a person interested in, but not a party to an action, was given to appeal from an order by which the person was aggrieved. But the learned Judges did not act on those decisions as in their opinion they related to powers of the appellate Court to grant leave to appeal and such power was vested on the practice prevailing in the English Courts. No provision of law or rule of practice, they said, has been shown to them entitling the appellant to claim such leave. But they added that even if such permission could be asked they were not satisfied that it was a proper case in which the permission should be given. This ruling was followed by a single Judge (Abdur Rahman, J.) in *Kasi Chettiar* v. *Secretary of State*[1].

Mr. Kesava Aiyangar further contended that an appellate Court cannot give leave to appeal unless under a statutory power. In support of this contention he relied on the decisions in *Pushpati Bharati* v. *Secretary of State*[2], *Lakshmatram* v. *Beharilal*[3], *Kishori Lal* v. *Governor in Council, Punjab*[4] and *Ramanayya* v. *Kotayya*[5]. These decisions are only authority for the position that when under a statute a right of appeal is conferred on an aggrieved party only with the leave of or on a certificate from the Court from which the appeal is sought to be preferred and if such leave or certificate be refused by that Court, an appellate Court will not have the power to grant the leave or certificate. In the decisions of the Federal Court their Lordships had to consider the effect of section 205 of the Government of India Act, 1935, under which an appeal to the Federal Court was available only with a certificate from the High Court. In the earliest of these cases, their Lordships say:

"In the first place though every Court of superior jurisdiction no doubt possesses inherent powers for certain purposes (of which it is unnecessary and perhaps would be unwise to attempt an exhaustive definition) we know of no authority for the proposition that a Court by the exercise of any inherent powers can extend its appellate jurisdiction or increase its revisional authority over other Courts."

In the later case in *Kishorilal* v. *Governor in Council, Punjab*[4], their Lordships point out that a certificate under section 205 is a necessary condition precedent to all appeals to the Federal Court, and if the High Court refuses to grant a certificate it is not for them to enquire into the reasons for the refusal against which no appeal lay to that Court. We have nothing like that here. There is no provision making such a leave a condition precedent to an appeal, like the one under consideration.

Mr. Venkatasubramania Aiyar for the appellant relied on the decision in *Bombay Province* v. *W. I. Automobile Association*[6], and the English practice on which that decision is based. In the Bombay case, Chagla, C.J., and Bhagwati, J., held that a person not a party to a suit may prefer an appeal if he is affected by the order of the trial Court provided he obtained leave from the Court of appeal. The learned Chief Justice observed as follows:

"The Civil Procedure Code does not in terms lay down as to who can be a party to an appeal. But it is clear and this fact arises from the very basis of appeals, that only a party against whom a decision is given has a right to prefer an appeal. Even in England the position is the same. But it is recognised that a person who is not a party to the suit may prefer an appeal if he is affected by the order of the trial Court, provided he obtains leave from the Court of appeal therefore; whereas in the case of a party to a suit he has a right of appeal, in the case of a person not a party to the suit who is affected by the order he has no right but the Court of appeal may in its discretion allow him to prefer an appeal."

Bhagwati, J., referred to the decision of this Court in *Indian Bank* v. *Bansiram Jashamal*[7] and accepted it as authority for the position that no person who is not a party to

1. (1941) 1 M.L.J. 534.
2. (1939) F.L.J. 1.
3. (1939) F.L.J. 121 : 1939 F.C.R. 121 (F.C.).
4. (1940) 3 F.C.R. 12 : 1940 F.L.J. 12 (F.C.).
5. (1920) 52 Mad. 952.
6. A.I.R. 1949 Bom. 141.
7. (1933) 66 M.L.J. 582 : I.L.R. 57 Mad. 670.

a suit or proceeding has a right of appeal. But if he was aggrieved by a decision of the Court, the remedy open to him was to approach the appellate Court and ask for leave to appeal which the appellate Court would grant in proper cases. The learned Judge cites a passage from the decision in In re *Securities Insurance Co.*[1], where Lindley, L.J., said that the practice of the Courts of Chancery both before and after 1862 was well settled that while a person who was a party could appeal without any leave a person who without being a party was either bound by the order or was aggrieved by it or was prejudicially affected by it could not appeal without leave.

There is abundant authority recognising the existence of such a practice and innumerable instances of such a practice to some of which learned counsel referred us, namely, In re *Markham Markham* v. *Markham*[2]; In re *Padstow Total Loss and Collision Assurance Association*[3], *Attorney-General* v. *Marquis of Ailesbury*[4], and In re *Ferdinand Ex Tsar of Bulgaria*[5]. The position is thus stated in the Annual Practice for 1951 at page 1244:

"Persons not parties on the record may, by leave obtained on an *ex parte* application to the Court of appeal, appeal from a judgment or order affecting their interests, as under the old practice."

Halsbury's Laws of England, Vol. XXVI, page 115, gives the same rule in a different form:

"A person who is not a party and who has not been served with such notice (notice of the judgment or order) cannot appeal without leave, but a person who might properly have been a party may obtain leave to appeal."

Several instances are referred to in the foot-note and the limits of the rule can be gathered from these instances. Leave will not be given where the applicant could not have been a party and application for leave must be made within the time limited for the appeal. The reason for the practice apparently is the principle that a person who could have been made a party and who might have appealed could not afterwards bring an action to declare that the judgment or order was not binding on him (*Vide*, In re *Hambrough's Estate, Hambrough* v. *Hambrough*[6]).

In more or less similar terms the rule and its limits are stated in *Seton on Judgments and Orders*, 7th Edn., Vol. 1, at page 824:

"Where the appellant is not a party to the record he can only appeal by leave to be obtained on motion *ex parte* from the Court of Appeal . . . . .Leave to appeal will not be given to a person not a party unless his interest is such that he might have been made a party."

Mr. Kesava Aiyangar of course could not deny that such a practice was well established in England. But he contended that such a practice could not be followed by our Courts, governed as we are by the Civil Procedure Code and the Letters Patent. We do not see why. The very doctrine on which Mr. Kesava Aiyangar rests his whole case, namely, that a right of appeal is a creature of statute and an appellate Court cannot create a right of appeal is founded on English authorities like *Attorney-General* v. *Sillem*[7]. The provisions as regards appeal in England are not materially different from those contained in the Civil Procedure Code or Letters Patent. In neither of them is there any express mention of persons who could appeal. In our opinion the practice consistently followed by the English Courts is a just and equitable practice and is in no way inconsistent with the doctrine that a right of appeal can only be created by statute. With respect to the learned Judges of the Bombay High Court we agree with them that there is no reason why the practice should not be followed by Courts in India.

Now, what is the test to find out when it would be proper to grant leave to appeal to a person not a party to a proceeding against the decree or judgment in such proceedings? We think it would be improper to grant leave to appeal to every person who may in some remote or indirect way be prejudicially affected by a decree or judgment. We think that ordinarily leave to appeal should be granted

1. (1894) 2 Ch.D. 410.
2. (1880) 16 Ch.D. 1.
3. (1882) 20 Ch.D. 137 at 142.
4. (1885) 16 Q.B.D. 408, 412.
5. (1921) 1 Ch.D. 107 at 110.
6. (1909) 2 Ch.D. 620.
7. (1864) 10 H.L.C. 704: 11 E.R. 1200.

to persons who, though not parties to the proceedings, would be bound by the decree or judgment in that proceedings and who would be precluded from attacking its correctness in other proceedings. We can give as an instance the case where an Official Receiver impugns an alienation by the insolvent and sues to set it aside and fails. If he does not appeal the decision of the trial Court would be final and binding not only on him but also on all the creditors. In such a case, if the Official Receiver does not choose to file an appeal an aggrieved creditor should ordinarily be given leave to appeal if he shows a *prima facie* case against the order sought to be appealed. A more or less similar test has been applied to cases where a successful party has been allowed to file an appeal against an adverse finding. (*Vide*, *Nimmagadda Venkateswarlu* v. *Bodapati Lingayya*[1] and *Harachandradas* v. *Bholanath Das*[2].)

Applying that test, can we say that Ponnalagu Ammani will be bound by the judgment of Subba Rao, J., in the application filed by Lakshmi Ammani to which she was not a party? We think not. The Court of Wards cannot be said to have represented her. The judgment of Subba Rao, J., was in no sense a judgment *in rem*. It is binding only as between Lakshmi Ammani and the Government and the Court of Wards. Mr. Venkatasubramania Aiyar when he says that the judgment of Subba Rao, J., affects his client adversely, means not that the decision affects her legal rights but that the carrying of it into effect would adversely affect her, that is, if and when the Government and the Court of Wards deliver possession of the properties to Lakshmi Ammani as directed by that Judgment. But it will be open to Ponnalagu Ammani to prevent the happening of such a thing by taking other steps. In these circumstances we do not think that this is a fit and proper case in which leave to appeal should be granted. We therefore hold that the appeal is incompetent and dismiss it.

V.P.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SUBBA RAO.

P. Narasimha Reddy .. *Petitioner**

v.

The District Magistrate, Cuddapah .. *Respondent.*

Arms Act (XI of 1878), sections 5, 17, 19, *and Rule* 43—*Refusal of license for a gun—No reasons given in the order—Validity—Constitution of India* (1950), *Article* 19 (1) (f)—*Gun if 'property'—Whether the provisions of the Act and rule contravene the Article.*

An application for a licence for a gun was rejected by an order of the District Magistrate which read " the gun licence applied for will not be granted."

In an application for the issue of a writ of *certiorari* and *mandamus*,

Held, the Government is authorised under the Arms Act to make rules for issuing of licences to keep guns. A power to issue a licence necessarily carries with it the power to refuse to issue a licence. When under section 17 of the Act the Government authorises a particular officer to issue a licence if he is satisfied that certain conditions are complied with, it follows that if he is not so satisfied, he cannot issue a licence. The provisions of rule 43 are not therefore illegal and under that rule the magistrate can issue or refuse to issue a licence in his discretion.

(ii) A gun which is a material object which can be acquired and owned is ' property ' within the meaning of Article 19 (1) (*f*) of the Constitution.

(iii) Many situations can be visualised when the uncontrolled user of firearms may be detrimental to the public interests while the possession of firearms by desirable persons will be a protection and safeguard. The State can therefore intervene and put restrictions on the user to protect the general public without destroying the fundamental rights and the machinery evolved, *viz.*, a licensing system, the power of issuing licences being vested in a responsible officer of the Government like the District Magistrate whose discretion in passing orders being judicial and subject to appeal to the Board of Revenue, imposes reasonable restrictions on the fundamental right within the meaning of Article 19 (5).

1. (1924) I.L.R. 47 Mad. 633.
2. (1935) I.L.R. 62 Cal. 701.

* C. M. P. Nos. 7676 and 7677 of 1951. 29th July, 1952.

(iv) The licensing machinery established will be a reasonable restriction on the fundamental right only if the District Magistrate gives reasons for his order for the scrutiny of the appellate tribunal and since in the instant case the order did not give reasons it must be quashed and the District Magistrate directed to dispose of the matter afresh according to law.

Petition praying that in the circumstances stated in the affidavit filed with C. M. P. No. 7677 of 1951 the High Court will be pleased to issue a writ of *mandamus* directing the respondent to issue a licence applied for by the petitioner, for the possession of a single barrel cartridge Gun No. 12 Bore (S.B.B.L.), etc.

Messrs. Row and Reddy for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*) for Respondent.

The Court delivered the following

JUDGMENT.—C. M. P. No. 7676 of 1951 is an application under Article 226 of the Constitution of India to issue a writ of *mandamus* directing the District Magistrate, Cuddapah to issue a licence applied for by the petitioner for the possession of a single barrel cartridge Gun No. 12 Bore (S.B.B.L.). C.M.P. No. 7677 of 1951 is an application by the same party for issue of a writ of *certiorari* to call for the records of the District Magistrate, Cuddapah and to quash his order, dated 9th March, 1951. The petitioner is a citizen of the Indian Union residing in the village of Anantharjupet, Kodur firka, Cuddapah district. It is stated in the affidavit that both on the eastern and southern side of the village, where his lands are situated, there are reserve forests and also unreserved forests and that these forests are infested by wild animals of various types like deer, stag, sambur, wild pigs, cheetahs, bears and tigers. As those animals cause considerable destruction of food crops and of cattle, the petitioner applied on 2nd January, 1951, to the respondent for a licence for a single barrel cartridge Gun No. 12 Bore (S.B.B.L.) for the purpose of hunting and the protection of crops from wild animals. On the 19th March, 1951, the petitioner received an order of the respondent refusing the grant of a licence, without any reasons being assigned therefor. It is alleged that in his own village licences were given for other persons on similar grounds. The respondent in his counter states that he was satisfied that the petitioner was not a suitable person to be entrusted with a firearm and that in *bona fide* exercise of his discretion he refused the licence to the petitioner.

Learned counsel for the petitioner raised before me the following points :

1. The Magistrate has no power to refuse a licence.

2. The refusal of the licence to acquire and hold a gun is a violation of his fundamental right under Article 19 (1) (*f*) of the Constitution of India.

Mr. Vepa Sarathy for the Government contended that a right to acquire and hold a gun is not a right to hold property within the meaning of the said Article but is a right created by the Arms Act, and the petitioner cannot, therefore, ask for a licence as of right. Assuming that Article 19 (1) (*f*) applies, he argued that the provisions of the Arms Act and the Rules made thereunder impose only reasonable restrictions within the meaning of Article 19 (5). The relevant provisions of the Arms Act and the Rules framed thereunder read as follows :

"Section 5. No person shall manufacture, convert or sell, or keep, offer or expose for sale, any arms, ammunition or military stores except under a licence and in the manner and to the extent permitted thereby . . . .

Section 17. *Power to make rules as to licences.* The Central Government may, from time to time by notification in the official Gazette, make rules to determine the officers, by whom, the form in which, and the terms and conditions, on and subject to which, any licence shall be granted ; and may. . . . .

Section 19. *For breach of sections* 5, 6, 10, 13 *to* 17. Whoever commits any of the following offences (namely) :

(*a*) manufactures, converts or sells, or keeps, offers or exposes for sale, any arms, ammunition or military stores in contravention of the provisions of section 5 ; . . . . . . shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

Rule 43. Discretion and control of authorities empowered to grant licences—(1) Every authority empowered to grant or renew a licence or to give his previous sanction to such grant or renewal may, in his discretion,

(a) refuse to grant or renew such licence or to give such sanction, or

(b) where the authority is subordinate to a Provincial Government, refer the application for orders to such Provincial Government:

Provided that in any case in which such authority refuses to grant or renew a licence, the applicant for such grant or renewal may appeal to the immediate official superior of the authority so refusing.

In the Province of Madras the Board of Revenue shall be considered to be the immediate official superior of the District Magistrates for the purpose of such appeals.

(2) Every such authority shall exercise all powers and perform all duties conferred or imposed by these rules, subject to the control of the executive authorities to whom he is subordinate."

The schedule to the rules gives the forms of the application and that of the licence issued under the Act.

The first contention of the learned counsel turns upon the provisions of section 17 of the Act and rule 43 of the Rules. It is said that the rule-making power of the Government is limited only to the laying down of the conditions for the issue of a licence, not for the refusal of the same, and, therefore, the rule empowering the District Magistrate to refuse a licence is invalid, being inconsistent with the provisions of the Act. Emphasis is laid on the following words in section 17 of the Act:

" rules to determine the officers by whom the form in which, and the terms and conditions, on and subject to which, any licence shall be granted ......"

To accept this contention is to take a very narrow view of the provisions of section 17. Under section 5 no person shall keep any arms except under a licence. The Government is authorised to make rules for issuing of such licences. A power to issue a licence necessarily carried with it the power to refuse the issue of a licence. When under section 17 the Government authorises a particular officer to issue a licence if he is satisfied that certain conditions are complied with, it follows that if he is not satisfied he cannot issue a licence. I therefore hold that the provisions of rule 43 are not illegal and that under that rule the District Magistrate can either issue or refuse to issue a licence in his discretion.

The next question is whether the impugned order violates the fundamental right under Article 19 (1) (*f*) of the Constitution and, if so, whether it is saved by Article 19 (5) of the Constitution of India. Learned counsel for the Government contended that to hold a gun is not to hold a property within the meaning of the article. The word " property " has not been defined in the Constitution. The expression " property " includes:

"Every interest one may have in any and everything that is subject of ownership by man, together with the right to freely possess, enjoy and dispose of the same." (See *Metropolitan Trust Co.* v. *Jones*[1].)

Cooly in his Constitutional Law at page 392 defines property as follows:

" Whatever a man produces by the labour of his hand or his brain, whatever he obtains in exchange for something of his own, and whatever is given to him, the law will protect him in the use or enjoyment and disposition of it."

There is no reason to assume that the makers of the Constitution did not use this word in its usual sense to take in everything that is subject of ownership by man. Whatever difficulty there may have been in other cases, I find it difficult to hold that a gun, which is a material object that can be acquired and owned, is not property. But the learned counsel relied upon the judgment of the Supreme Court in *Veerappa Pillai* v. *Raman and Raman, Ltd.*[2], in support of his contention that a right to acquire and hold a gun is a right created by the Arms Act and, therefore, no one is entitled to a permit as of right even if he satisfied all the prescribed conditions. The learned Judges in the aforesaid case were dealing with a person's right to get a permit as of right to ply a motor bus under the Motor Vehicles Act. After pointing out that the Act established a regular hierarchy of administrative bodies to deal with the regulation of transport by means of motor vehicles, the learned Judges stated at page 812:

1. 149 A.L.R. 1416. 2. (1952) 1 M.L.J. 806 (S.C.).

"Thus we have before us a complete and precise scheme for regulating the issue of permits, providing what matters are to be taken into consideration as relevant, and prescribing appeals and revision from subordinate bodies to higher authorities. The remedies for the redress of grievances or the correction of error are found in the statute itself and it is to these remedies that resort must generally be had. As observed already, the issue or refusal of permits is solely within the discretion of the transport authorities and it is not a matter of right."

But these observations were considered by a Bench of this Court consisting of Rajamannar, C.J. and Venkatarama Aiyar, J., in W. P. No. 333 of 1951 (*C. S. S. Motor Service, Tenkasi* v. *State of Madras, represented by the Secretary to the Government of Madras Home Department and the Sri Murugan Transport Palayamcottai*[1]), wherein the learned Judges pointed out that the observations of the Supreme Court should be confined to an order prior to the making of the Constitution of India, and that whenever a question of fundamental right arises, the validity of the impugned order should be tested with reference to the provisions of the Constitution of India. I cannot therefore accept this contention.

It was then contended that the order is saved by the provisions of Article 19 (5) of the Constitution. Under Article 19 (5) nothing in sub-clause (*f*) shall affect the operation of an existing law in so far as it imposes, or prevent the State from making any law imposing reasonable restrictions on the exercise of any of the rights conferred by the said sub-clause either in the interests of the general public or for the protection of the interests of any scheduled tribe. The fundamental right, therefore, recognised under Article 19 (1) (*f*) to acquire, hold and dispose of property can be restricted within the limits of the provisions of Article 19 (5). The restrictions that can be imposed on the said right are conditioned by the provisions of that clause :

1. They should be reasonable, and
2. They should be in the interests of the general public, not a denominational part of it.

The Supreme Court of India has defined the phrase "reasonable restriction" in *Chintamanrao* v. *State of Madhya Pradesh*[2] as follows :

"The phrase reasonable restriction connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature beyond what is required in the interests of the public. The word 'reasonable' implies intelligent care and deliberation, that is the choice of a course which the reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19 (1) (*g*) and the social control permitted by clause (*b*) of Article 19, it must be held to be wanting in that quality."

There cannot be a hard and fast rule on the question of what restrictions are reasonable. The reasonableness of a restriction depends upon the nature of the right claimed, the object to be achieved, the means employed and the limitations imposed. They should be fair and commensurate with the purposes aimed at. Their validity should also be tested by another yardstick, namely, whether they were conceived and enacted in the interests of the general public. They could be made for purposes such as public security, public order, public health and public morality. Judged by the aforesaid conditions, can it be said that the restrictions imposed under the Arms Act and the rules framed thereunder are unreasonable restrictions not aimed in the interests of the general public ? The restrictions on the free acquisition and user of firearms is certainly necessary in the interests of the general public. Many situations can be visualised when the uncontrolled user of firearms may be detrimental to the interests of the general public, violent revolutions may be encouraged, wild game may be exterminated, murder and arson might be resorted to, and peaceful structure of society may be destroyed. At the same time possession of firearms in the hands of desirable persons may be a protection and safeguard against unruly elements and wild animals. They may also be required by peaceful citizens for entertainment and recreation such as shooting exercises, mild games etc. The State therefore may well have to intervene and put restrictions on the user to protect the general public, without at the same time destroying the fundamental right. The machinery evolved to achieve the purpose is the licensing

1. (1952) 2 M.L.J. 894. 2. (1950) S.C.J. 571 at 573.

system. The application form gives all the particulars necessary for the officer to decide on the desirability of issuing or refusing to issue a licence. The officer empowered to issue the licence is a responsible officer of the Government, the District Magistrate. In his discretion he may give or refuse the licence. The discretion is obviously a judicial one as his order is subject to an appeal to the Revenue Board. When his order is subject to an appeal, it is his duty to give reasons for his refusal, for the appellate tribunal must be in a position to evaluate the correctness or reasonableness of his rejection. Having regard to the right claimed and its dangerous potentialities, I cannot say that the restrictions imposed are not reasonable. But the necessary condition of the reasonableness is that the Magistrate should exercise judicial discretion disclosing his mind for the scrutiny of the appellate tribunal, excluding the possibility of arbitrary action. Learned counsel for the petitioner relied upon a judgment of a Bench of this Court in W.P. No. 441 of 1951. There the learned Judges, Rajamannar, C.J. and Venkatarama Ayyar, J., were dealing with the sections of the Essential Supplies (Temporary Powers) Act, 1946. Under clause 11 of the Act the Development Officer shall have discretion to grant or refuse a licence to any applicant. It shall not be necessary for the Development Officer to assign any reason for any decision taken by him under that clause. The learned Judges held that the 'arbitrary power' envisaged in the said clause offends the fundamental rights of a citizen. But under rule 43 of the rules framed under the Arms Act, as interpreted by me, the District Magistrate cannot arbitrarily refuse to give the permit, but he must exercise a judicial discretion supported by reasons, subject to the scrutiny of an appellate tribunal. The scope of the two Acts and the mischief intended to be averted are not the same. Clause 11 of the Essential Supplies (Temporary Powers) Act, 1946, embodies an arbitrary discretion; rule 43 (1) confers a judicial discretion. I cannot therefore apply that decision to the facts of this case.

The impugned order is a laconic one. It reads:

"The gun licence applied for will not be granted."

No reasons were given for the refusal. The order is of an arbitrary character though under rule 43 it should be made in exercise of a judicial discretion. The necessary safeguard against an arbitrary refusal, *i.e.*, giving reasons for refusal, is ignored. As I hold that the licensing machinery established a reasonable restriction on the fundamental right only if the District Magistrate gave reasons for his order for the scrutiny of the appellate tribunal, I must hold that the order without giving such reasons offends the fundamental right of the petitioner to acquire and hold property. The order of the District Magistrate, therefore, is set aside and he is directed to dispose of the application of the petitioner in accordance with law. The petitioner will have his costs.

V.P.S. — *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AYYAR.

Kalidindi Ramakrishna Raju .. *Appellant**

v.

K. Someswara Rao and others .. *Respondents.*

Madras Village Panchayats Act (X of 1950), section 19 (1)—Disqualification of membership of panchayat—Whether applies to membership of panchayats prior to the Act—Jurisdiction of District Munsiff's Court.

Section 19 (1) of the Madras Act X of 1950 obviously applies to cases of disqualification arising after the commencement of the Act. The District Munsiff who is the tribunal prescribed under the new Act cannot decide the question of disqualification of a member of a panchayat whose membership has ceased even before the commencement of the Act on account of his default in attending the meeting of the Board.

* L. P. A. No. 352 of 1952. 17th December, 1952.

The Madras Local Boards Act (XIV of 1920), which is not repealed *in toto* by the Madras Village Panchayats Act (X of 1950), applied to panchayats as well before the new Act. In accordance with section 57 of the Local Boards Act any dispute as to disqualification of any member of the panchayat must be referred to the District Court.

Appeal under clause 15 of the Letters Patent and Art. 226 of the Constitution of India against the judgment and order of Chandra Reddi, J., dated 21st November, 1952, in W.P. No. 408 of 1952, preferred to the High Court for the issue of a writ of *certiorari* calling for the records relating to the proceedings in O.P. No. 11 of 1951, District Munsifs Court, Tanuku and to quash the said proceedings.

E. Venkatesam, V. V. Raghavan and *M. Ramachandra Raju* for Appellant.

The Judgment of the Court was delivered by

The Chief Justice.—The appellant before us filed a petition under section 19 (1) of Madras Act X of 1950 before the District Munsif of Tanuku alleging that the first respondent had ceased to be a member of the Panchayat Board of Polamuru by reason of non-attendance of three consecutive meetings of the Board. An objection was raised on behalf of the first respondent that the District Munsif had no jurisdiction to entertain the petition. But the Munsif overruled the objection and decided on the merits that the respondent had ceased to be a member. The respondent thereupon applied to this Court for the issue of a writ of *certiorari* to quash the order of the District Munsif. That application came on before Chandra Reddi, J. The learned Judge held that the District Munsif had no jurisdiction to entertain the petition and quashed his order. Hence this appeal.

On the allegations made by the appellant, we are of opinion that the learned Judge was right in holding that the petition under section 19 (1) of the new Act of 1950 was not maintainable. That section obviously applies to cases of disqualification arising after the commencement of the Act. Section 19 (1) of the Act refers to disqualifications under sections 13, 15, 16 and 17. Section 17 speaks *in futuro*. It says " a member shall cease to hold office as such ", in certain contingencies. It is not alleged that the first respondent assumed office under the Act and thereafter ceased to hold office. Reliance was placed on section 131 which provides for transitory provisions in regard to the first reconstitution in accordance with the provisions of the new Act of panchayats in existence at the commencement thereof and to rule 4 (1) of Schedule III which contains such transitional provisions. Rule 4 (1) provides that

" the members of a panchayat holding office at the commencement of this Act shall be deemed to be the elected members of the panchayat under this Act and such members shall continue to hold office under this Act up to such date as the Government may, by notification, fix in this behalf, and in case no such date is fixed, up to the date on which their term of office would have expired if this Act had not come into force."

It is clear that the case of the appellant is that the first respondent was not holding office at the commencement of this Act. Because he must be deemed to have ceased to hold office even before that date on account of his default in attending the meetings of the Board. It follows that if the contention of the appellant is accepted rule 4 (1) will not apply to the first respondent. Then, who is to decide the question whether the first respondent has ceased to hold office before the commencement of the new Act of 1950 ? Surely the District Munsif who is the tribunal prescribed under the new Act could not decide that question. The Madras Local Boards Act of 1920 which applied to panchayats as well before the new Act, specially provides that a dispute as to disqualification of any member of the panchayats shall be referred to and decided by the District Court. But for Madras Act X of 1950 there can be no doubt whatever that the dispute now raised by the appellant would and should have been referred to the District Court. Now, has the passing of the new Act made any difference ? Whatever might have been said if the new Act purported to repeal the Madras Local Boards Act in its entirety or in parts, we find actually no such repeal and new Act of 1950 contains only amendments of some of the provisions of the Madras Local Boards Act, 1920. Schedule IV contains

such amendments which include a complete omission of some of the provisions of the Local Boards Act. Section 57 of that Act, however, is not one of the sections either omitted or modified in any way. It appears to be fairly clear that if a dispute is raised that a member of a panchayat had ceased to hold office at a time when the Madras Local Boards Act of 1920 applied to panchayats, then that dispute must be referred to the District Court in accordance with the provisions of section 57 of that Act.

The petition filed before the District Munsif was therefore incompetent and the order of the learned District Munsif who had no jurisdiction to entertain the petition was rightly quashed by Chandra Reddi, J.

The appeal is therefore dismissed.

R.M. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

A. Danapal Chetti .. *Appellant**

v.

K. Rajagopal Chetti .. *Respondent.*

Suits Valuation Act (VII of 1887), section 11—Scope and effect—Objection to pecuniary jurisdiction taken for first time on appeal—If appellate Court can return plaint to proper Court.

An appellate Court cannot direct a plaint to be returned to the party for presentation to the Court having jurisdiction when no objection to jurisdiction had been taken during the trial and when lack of jurisdiction was found to result from a mere under-valuation in the plaint. Under proviso B to section 11 of the Suits Valuation Act, this course can only be adopted when the under-valuation or over-valuation has, in the opinion of the appellate Court, prejudicially affected the disposal of the suit on its merits. Where objection to jurisdiction on the ground of under-valuation was not taken in the trial Court the appellate Court cannot return the plaint but has to hear the appeal on its merits and dispose of it according to law.

Appeals against the order of the District Court, Chingleput, dated 9th February, 1949, and made in A.S. Nos. 145, etc., of 1948, respectively, preferred against the decree of the Court of the District Munsif, Trivellore, in O.S. Nos. 80, etc., of 1945.

M. Natesan for Appellant.

D. Ramaswami Aiyangar for *V. Somasundaram* for Respondents.

D. Narasaraju for the Government Pleader (*P. Satyanarayana Raju*) for the State.

The Court delivered the following

JUDGMENT.—This batch of four appeals arise out of a judgment in four appeals, A.S. Nos. 85, 96, 100 and 145 of 1948 in which the learned District Judge of Chingleput on 9th February, 1949, remanded four suits, *viz.*, O.S. Nos. 368, 302, 379 and 80 of 1945 disposed of by the District Munsif of Trivellore in a common judgment for fresh disposal. He held in appeal that one of the suits O.S. No. 80 of 1945 was beyond the financial jurisdiction of the District Munsif and directed the return of that plaint for presentation to the proper Court. Holding that the District Munsif had no jurisdiction to try O.S. No. 80 of 1945, he took the view that the common trial of the four suits was without jurisdiction, and that the logical consequence was to set aside the decrees and judgments even of the three suits tried by the District Munsif which he had admittedly full jurisdiction to decide. In an elaborate judgment, the learned District Judge took the view that section 11 of the Suits Valuation Act would not apply to this case.

The relevant facts necessary for a disposal of these appeals are these : One Kadirvelu Chetti executed five sale deeds in his lifetime in favour of three persons. After his death, his son Rajagopala Chetti executed a sale deed in favour of one

*A. A. O. Nos. 195 to 197 and 206 of 1949. 17th December, 1952.

Pattu Chetti of the property covered by these alienations ignoring the father's alienations as being sham and nominal. These four suits resulted. Overruling some objections raised, the learned District Munsif, as it appears to me, quite rightly tried the four suits on common evidence raising as they did the substantial issue as to whether the alienations of the father Kadirvelu Chetti were valid and for consideration or were sham and nominal. He found that the five sale deeds were true and real and decreed the four suits accordingly. There was no objection as regards jurisdiction taken before him as regards any suit.

The point of jurisdiction arose in the appellate Court as regards one suit, O.S. No. 80 of 1945 in this way. This was a suit filed by Kadirvelu Chetti's son Rajagopala Chetti for the recovery of Rs. 1,673-8-0 as mesne profits from the vendees from his father under two of the sale deeds, which he sought to ignore as sham and nominal. An issue as regards court-fee was framed in the suit, but the plaintiff later paid court-fee of Rs. 15 on each declaration sought as regards each sale deed.

In A.S. No. 145 of 1948 filed against this decision, court-fee appears to have been paid only on the mesne profits sought. The court-fee examiner took an objection that court-fee of Rs. 15 for each declaration should have been collected in the appeal also. This court-fee objection was heard by the learned District Judge who went much further than the court-fee examiner, and upheld a point taken by his own office in their explanation on the court-fee examiner's objection that *ad valorem* court-fee should be paid on the consideration appearing on both these sale deeds, *i.e.*, Rs. 2,000 and Rs. 300 respectively. That took the suit, of course, out of the jurisdiction of the District Munsif. After the learned Judge had given his finding the deficit court-fee was paid. When the appeals came up for hearing, the learned Advocate for the appellants made capital out of the jurisdiction position arising out of the learned District Judge's finding as regards court-fee in this one suit and advanced arguments which prevailed with the District Judge.

I am with respect quite unable to follow how he came to the conclusion that section 11 of the Suits Valuation Act does not apply to this case. In my opinion, it clearly applies and the learned District Judge had jurisdiction to dispose of these four appeals. Section 11 of the Suits Valuation Act was specially enacted, as it appears to me, to provide for such cases where no objection as regards jurisdiction was raised in the trial Court and on mere grounds of under-valuation or over-valuation it is found in the appellate Court that strictly and technically the suit was outside the jurisdiction of the trial Court. The learned District Judge relied on two Bombay decisions reported in *Bai Mahkor* v. *Bulakhi Chaku*[1] of the year 1874 and *Babaji* v. *Lakshmibai*[2] of the year 1884, which took the view that an appellate Court finding that the Court of first instance had no jurisdiction should have ordered the plaint to be returned. The learned District Judge overlooked the fact that the Suits Valuation Act became law in 1887 and section 11 appears to have been specially enacted to provide for that prevailing view. The District Judge was also inclined to accept the view placed before him that under Order 7, rule 10, Civil Procedure Code, the appellate Court was bound to do what this rule required of a Court of first instance, *viz.*, to return the plaint as soon as it finds that it had no jurisdiction.

Mr. D. Ramaswami Aiyangar for the appellant-plaintiff in A.S. No. 145 of 1948 has argued that under section 107 (2), Civil Procedure Code, the appellate Court shall have the same powers as are conferred on Courts of original institution in respect of suits instituted therein. The learned District Judge however failed to observe that section 11 of the Suits Valuation Act by legislative enactment requires appellate Courts in such cases to act in a particular manner.

Proviso (*b*) to section 11 directly governs cases of this kind, and I am quite unable to appreciate the argument of Mr. Ramaswami Aiyangar that it does not apply. The relevant portion of section 11 may be reproduced here :

"Notwithstanding anything in section 578, Civil Procedure Code [now section 99, Civil Procedure Code Act (V of 1908)] an objection that by reason of the over-valuation or under-valuation

1. (1874) I.L.R. 1 Bom. 538.

2. (1884) I.L.R. 9 Bom. 266.

of a suit or appeal a Court of first instance or lower appellate Court which had not jurisdiction with respect to the suit or appeal exercised jurisdiction with respect thereto shall not be entertained by an appellate Court unless,

(a) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded or in the lower appellate Court in the memorandum of appeal to that Court, or

(b) the appellate Court is satisfied, for reasons to be recorded by it in writing, that the suit or appeal was over-valued or under-valued and that the over-valuation or under-valuation thereof has prejudicially affected the disposal of the suit or appeal on its merits."

The effect of this section, as it appears to me, is quite clear. The learned Advocate is unable to cite before me a single decision in which an appellate Court has, subsequent to 1887, directed a plaint to be returned to the Court having jurisdiction when no objection to jurisdiction had been taken during the trial and when lack of jurisdiction was found to result from a mere under-valuation in the plaint. Under proviso (b), this course can only be adopted when the under-valuation or over-valuation has in the opinion of the appellate Court, prejudicially affected the disposal of the suit on its merits. There is no such finding in the present elaborate order of remand by the learned District Judge nor does that aspect arise for consideration in view of the finding of the District Judge that section 11 had no application at all. The facts of this case are on all fours with *Yuvarajah of Pithapuram* v. *Province of Madras*[1] a decision by Chandrasekhara Ayyar, J. (as he then was). That was a more extreme case than the present in which an objection to pecuniary jurisdiction was taken at the earliest opportunity before the District Munsif, who held that the suit was properly valued and disposed it of on merits. On appeal, the Subordinate Judge differed from the District Munsif and held that the suit was under-valued, and without hearing the appeal directed the return of the plaint for presentation to the proper Court. It was held that section 11 (b) of the Suits Valuation Act governed the case and the lower appellate Court was directed to take back the appeal on its file and dispose of it according to law. In the case before me, no objection to jurisdiction was even taken before the trial Court.

The appellant in O.S. No. 80 of 1945 proceeded to judgment in a forum of his own choice, and it is clearly not open to him on the simple principles governing section 11 of the Suits Valuation Act and the specific requirements of this section to capitalise an under-valuation of his plaint for the purpose of having his suit retried by another Court.

A Full Bench of the Lahore High Court in *Sardar Khan* v. *Aisha Bibi*[2] also held that section 11 of the Suits Valuation Act governs all cases of erroneous valuation irrespective of the question as to whether the value of the suit is determined by rules having the force of law or in any other manner. A difficulty placed before the learned District Judge which he found to be a real one, was the argument that in this particular case there was neither over-valuation nor under-valuation but valuation on an erroneous basis. This is one of the grounds which, though the two decisions *Yuvarajah of Pithapuram* v. *Province of Madras*[1] and *Sardar Khan* v. *Aisha Bibi*[2], were placed before him which led him to the conclusion that section 11 would not apply. He observed that what was meant by over-valuation or under-valuation has not been specifically decided. As it appears to me, over-valuation or under-valuation must rest on some erroneous basis. There is also direct authority, if authority were needed for this position, in *Meenakshi Amma* v. *Krishnan Nair*[3] in which a learned Bench of this Court agreeing with the opinion of Kumaraswami Sastriar, J., in *Tirumal Rao* v. *Subramania Gurukkal*[4] held that the words "over-valuation and under-valuation" includes erroneous valuation caused by misapplication of a section of the Court-Fees Act.

I find with respect to the learned District Judge that section 11, proviso (b) of the Suits Valuation Act directly governs this case. The order of remand, which would result in three suits of 1945 being retried by a District Munsif and

1. (1946) 2 M.L.J. 282.
2. (1924) I.L.R. 6 Lah. 105 (F.B.).
3. (1920) 62 I.C. 715.
4. (1919) 52 I.C. 992.

another suit of 1945 being presented in the court of a Subordinate Judge for trial is set aside. The learned District Judge in my view clearly had jurisdiction to dispose of these appeals, which are sent back to the District Court with a direction that they be given as expeditious a disposal as possible, in view of these suits having been instituted more than seven years ago. The costs of these appeals will irrespective of the result be paid by the respective respondents. The order directing refund of the court-fees paid on the appeals to the appellant is cancelled.

Leave to appeal refused.

K.S. *Appeal allowed.*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT :—MEHRCHAND MAHAJAN, S. R. DAS AND N. H. BHAGWATI, JJ.

The Strawboard Manufacturing Co., Ltd. .. *Appellant**

v.

Gutta Mill Worker's Union .. *Respondent,*

The State of Uttar Pradesh .. *Intervener.*

Uttar Pradesh Industrial Disputes Act (XXVIII of 1947), sections 6, 3 and 4—Scope—Time for making award—If can. be extended ex post facto.

In view of the language of section 6 of the U. P. Industrial Disputes Act and in the absence of a rule like the proviso to rule 16 of the order (subsequently made on 15th March, 1951) the State Government had no authority whatever to extend the time for making an award after the expiry of the time fixed. The Adjudicator became *functus officio* on the expiry of the time specified in the original order of reference and an award which had not been made within that time must be held to be without jurisdiction and a nullity. Section 14 of the U. P. General Clauses Act, 1904, does not in terms or by necessary implication, give any such power of extension of time to the State Government. The power of amendment and modification conferred on the State Government by section 21 of the U. P. General Clauses Act, does not enable such power to be so exercised as to have retrospective operation.

On appeal from the Judgment and Order, dated the 20th November, 1950, of the Labour Appellate Tribunal, Lucknow, in Appeal No. 10 of 1950.

Bakshi Tek Chand and *Veda Vyasa*, Senior Advocates (*S. K. Kapur*, Advocate, with them), for Appellant.

Shaukat Hussain, Advocate, for Respondent.

Bishen Singh, Advocate, for Intervener.

The Judgment of the Court was delivered by

Das, J.—This appeal has been filed with the special leave granted by this Court on 10th May, 1951. By the order granting such leave the appeal has been restricted to one point only, namely,

"whether the Government of Uttar Pradesh had the power to extend the time for making the award *ex post facto, i.e.*, after the time limit originally fixed therefor had expired."

There is no dispute as to the facts. An industrial dispute having arisen between the appellant company and its employees, by Labour Department Notification No. 637 (ST)/XVIII-53 (ST)/50, dated 18th February, 1950, the Governor of Uttar Pradesh was pleased, in exercise of the powers conferred by section 3 read with section 4 of the Uttar Pradesh Industrial Disputes Act, 1947 (U.P. Act No. XXVIII of 1947), to refer the said dispute to the Labour Commissioner, Uttar Pradesh or a Conciliation Officer of the State Government nominated by him for adjudication on seven several issues specified therein and to direct the adjudicator to conclude the adjudication proceedings and submit his award to the Government not later than 5th April, 1950. The Labour Commissioner by his letter No. I.M.R. 14-A nominated Shri M. P. Vidyarthi, Regional Conciliation Officer, Uttar Pradesh, as the adjudicator in the above dispute with a direction that he should submit his

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* Civil Appeal No. 134 of 1951. 17th December, 1952.

award by 25th March, 1950 and that if the proceedings were not likely to be completed within that time he should move the Government for extension of time at least a week before the specified date. By Notification No. 897 (ST)/XVIII-53 (ST)/50, dated 20th March, 1950, the Governor was pleased to order that the adjudicator should also adjudicate on an additional issue formulated therein. By a further Notification No. 950 (ST)/XVIII-53 (ST)/50, dated 24th March, 1950, the Governor was pleased to refer another additional issue for the decision of the adjudicator. The adjudicator did not make his award on or before 5th April, 1950, as directed by the first order of reference but made his award on 13th April, 1950, that is to say eight days after the expiry of the time originally fixed for the making of the award. About thirteen days after the delivery of the award Labour Department Notification No. 1247 (ST)/XVIII-53 (ST)/50, was issued on 26th April, 1950, whereby the Governor was pleased, in exercise of powers conferred by section 3 read with section 4 of the Act, to allow the adjudicator in the said dispute to submit his award by 30th April, 1950. Thereafter by Notification No. 1447 (ST)/XVIII-53 (ST)/50 dated 1st August, 1950, the Governor was pleased, in exercise of powers conferred by section 6 (2) read with sections 3 and 4 of the Act, to order that the award be enforced for a period of six months from the date of that order in the first instance and thereafter for such further period as might be prescribed.

On 17th August, 1950, the appellant company preferred an appeal against the award to the Labour Appellate Tribunal contending, *inter alia*, as follows :—

"That the award dated 13th April, 1950, is vitiated, having been given after the expiry of the time limit.

(*a*) In its order dated 18th February, 1950, para. (5), Government directed the adjudicator to conclude the proceedings and submit his award not later than the 5th April, 1950. The award is dated 13th April, 1950. The Government, however, tried to remedy this defect by the issue of G.O. No. 1247 (ST)/XVIII-53 (ST)/50 dated 26th April, 1950, but under the law this is of no avail. To be a valid extension of date granted to the adjudicator, Government order should have been issued before the 5th April, 1950, to keep the authority of the adjudicator alive. On the date the adjudicator made the award, *i.e.*, 13th April, 1950, he had no power to make an award."

The Appellate Tribunal by its decision given on 20th November, 1950, dismissed the appeal with the following observations on the point mentioned above :

"With regard to the last point our view is that as the Government had the authority under section 6 of the Act to fix time limit for submitting an award it had also the necessary and incidental power to extend the time limit originally fixed, if it considered it necessary. The first proviso to section 3 empowers the Provincial Government to add more matters for adjudication. It is obvious that additions to the matters already referred to would or may take more time than that had been originally estimated, and so it may lead to an impossible position if the Government had no power to extend the time originally fixed by it, and it makes no difference, in our opinion, whether the time is extended before or after the expiry of the time originally limited."

The present appeal is against that decision of the Appellate Tribunal but limited to the question hereinbefore mentioned.

Dr. Tek Chand appearing in support of this appeal urges that the adjudicator derived his authority under the order made by Notification No. 637, dated 18th February, 1950. Section 6 (1) provides that the adjudicator "shall, within such time as may be specified, submit its award to the State Government". The time specified by the order was "not later than 5th April, 1950". On the expiry of that time the adjudicator became *functus officio* and had no power or authority to make the award. It is true that two more issues were, by the two subsequent orders, added to the list of issues to be determined by the adjudicator but those issues, Dr. Tek Chand submits, did not involve any detailed investigation into facts necessitating any further time for making the award. Learned counsel contends that the Uttar Pradesh Act under consideration has no provision empowering the State Government to enlarge the time for the making of the award by the adjudicator. In the circumstances, if the State Government took the view that the addition of those two issues would render the time specified in the original order inadequate for the purpose it should have cancelled the previous notification and issued a fresh notification referring all the issues to the adjudicator and specifying a fresh period of time within which he was to make his award. The State Government did not adopt

that course. What it purported to do was to extend the time for making the award not only after the time originally fixed had expired but also after the award had actually been submitted. The argument is that even assuming but not admitting that the State Government had the power to extend the time before the time had expired it certainly had no power to do so after the award had been made, for it was meaningless, urges Dr. Tek Chand, to extend the time to do an act which had already been done. He refers us to the decision of the Judicial Committee in *Raja Har Narain Singh* v *Chaudhrain Bhagwant Kuar*[1], where it was held that under the Code of Civil Procedure of 1882 the Court had no power to extend the time for making the award after the award had been filed. Section 514 of that Code enabled the Court to grant a further time and from time to time to enlarge the period for the delivery of the award but section 521 provided that no award shall be valid unless made within the period allowed by the Court. Their Lordships of the Privy Council took the view that it would not have been competent for the Court to extend the time after the award had been made, for once the award was made and delivered the power of the Court under section 514 was spent and that although the Court had the fullest power to enlarge the time under that section as long as the award was not completed it no longer possessed any such power when once the award was made. In order to give full effect to section 521 the Judicial Committee had to confine the exercise of the power to extend the time given to the Court by section 514 to a point of time before the award had been made This decision was relied upon by Mr. Justice Harrington sitting singly on the Original Side of the Calcutta High Court in *Shib Krishna Dawn & Co.* v. *Satish Chander Dutt*[2], which was a case governed by the Code of 1908. The learned Judge overlooked the fact that paragraph 8 of the Second Schedule to the Code of 1908 which corresponded to section 514 of the Code of 1882 expressly conferred power on the Court to allow further time and from time to time, either before or after the expiration of the period fixed for the making of the award, to enlarge such period and that paragraph 15 which corresponded to section 521 of the Code of 1882 contained no provision that an award made out of time was *ipso facto* invalid and that consequently the reasoning underlying the decision of the Judicial Committee in the case of *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar*[1] had no application to the case before him, which was governed by the Code of 1908. Having regard to the difference in the language of the relevant provisions of the two Codes, the correctness of the decision of Harrington, J., was doubted by Mr. Justice Chitty also sitting singly on the Original Side of the Calcutta High Court in *Sri Lal* v. *Arjun Das*[3]. Eventually the decision of Mr. Justice Harrington was dissented from by a Division Bench of the same High Court sitting in appeal from the Original Side in *Jetha Lal Laxmi Chand Shah* v. *Amrita Lal Ojha*[4], which held that the Court had power to enlarge the time for making the award even after the award had actually been made. The learned Judges in the last mentioned case referred to and relied on the case of *Lord* v. *Lee*[5]. Reference has also been made by learned counsel for the respondents to *Dentron* v. *Strong*[6] and to *May* v. *Harcourt*[7]. It will be noticed that all those English cases were decided under section 15 of the Common Law Procedure Act, 1854 (17 & 18 Vict., Ch. 125). It is true that in that English statute there was no provision similar to section 521 of our Code of 1882 which was noticed by the Privy Council in the case cited by Dr. Tek Chand; nevertheless section 15 of the English statute like section 514 of the Code of Civil Procedure of 1882 corresponding to paragrah 8 of the second Schedule to the Civil Procedure Code of 1908 and like section 9 of the English Arbitration Act, 1889, corresponding to section 12 of the Indian Arbitration Act, 1899, empowered the Court, from time to time, to enlarge the time for making the award. There is a similar provision for enlargement of time in section 148 of our Civil Procedure Code of 1908. There is, however, no similar provision in the

1. (1891) L.R. 18 I.A. 55 : I.L.R. 13 All. 300 (P.C.).
2. (1911) I.L.R. 38 Cal. 522.
3. (1914) 18 C.W.N. 1325.
4. I.L.R. (1938) 2 Cal. 482 : 42 C.W.N. 883.
5. (1868) L.R. 3 Q.B. 404.
6. (1874) L.R. 9 Q.B. 117.
7. (1884) L.R. 13 Q.B.D. 688.

Uttar Pradesh Industrial Disputes Act, 1947. Section 6 (1) of that Act peremptorily requires the adjudicator to submit his award to the State Government " within such time as may be specified " and not " within such time as may from time to time be specified." It is significant that the only occasion when the State Government can, under the Uttar Pradesh Act, specify a fresh period of time is when it remits the award for reconsideration under sub-section (2) of section 6, for under sub-section (3) the adjudicator is enjoined to submit his award, after reconsideration, within such period as may be specified by the State Government. Even in this case, under section 6 (2) and (3) the State Government may in the order remitting the award specify a time within which the award, after reconsideration, must be filed. This gives power to the State Government to fix a fresh period of time to do a fresh act, namely, to reconsider and file the reconsidered award. It does not give the State Government any power to enlarge the time fixed originally for the initial making of the award. Therefore, except where the State Government under section 6 (2) remits the award for reconsideration it has no power even to specify a fresh period of time and much less a power to extend the time for the initial making of the award under section 6 (1). In exercise of the powers conferred by clauses (*b*), (*c*), (*d*) and (*g*) of section 3 and section 8 of the Uttar Pradesh Industrial Disputes Act, 1947, the Governor was pleased to make an order embodied in Notification No. 615 (LL) XVIII-7 (LL)-1951, dated 15th March, 1951. The proviso to rule 16 of that order authorised the State Government to extend from time to time the period within which the Tribunal or the adjudicator was to pronounce the decision. These rules were, however, not in force at the time material to the case before us. Learned counsel appearing for the respondent and for the State of Uttar Pradesh have not referred us to any similar rule which was in force in 1950. In view of the language of section 6 of the Uttar Pradesh Act and in the absence of a rule like the proviso to rule 16 referred to above it must follow that the State Government had no authority whatever to extend the time and the adjudicator became *functus officio* on the expiry of the time specified in the original order of reference and, therefore, the award which had not been made within that time must be held to be without jurisdiction and a nullity as contended by Dr. Tek Chand.

Learned counsel for the respondents refers us to the provisions of section 14 of the Uttar Pradesh General Clauses Act, 1904, which provides that where by any Uttar Pradesh Act any power is conferred on the State Government, then that power may be exercised from time to time as occasion requires. Sections 3 and 4 of the Uttar Pradesh Industrial Disputes Act, 1947, certainly confer power on the State Government to refer disputes to an adjudicator for decision and section 6 (1) may be read as empowering the State Government to specify the time within which the adjudicator to whom an industrial dispute is referred for adjudication is to submit his award. The combined effect of section 14 of the Uttar Pradesh General Clauses Act and section 6 (1) of the Uttar Pradesh Industrial Disputes Act, 1947, it is contended, is that the adjudicator is enjoined to submit his report " within such time as may from time to time be specified " and that this being the position, the principles laid down in the English decisions referred to above must be held to be applicable to the present case. We are unable to accept this line of reasoning. Under section 14 of the Uttar Pradesh General Clauses Act the State Government may exercise the power conferred on it by sections 3, 4 and 6, that is to say, it can from time to time make orders referring disputes to an adjudicator and, whenever such an order of reference is made, to specify the time within which the award is to be made. This power to specify the time does not and indeed cannot include a power to extend the time already specified in an earlier order. The legislative practice, as evidenced by the provisions of the different statutes referred to above, is to expressly confer the power of extension of time, if and when the Legislature thinks fit to do so. There is no question of any inherent power of the Court and much less of the Executive Government in this behalf. Section 14 of the Uttar Pradesh General Clauses Act does not in terms, or by necessary implication, give any such power of extension of time to the State Government and, therefore, the respondents can derive no support from that section.

Learned advocate for the Intervener, the State of Uttar Pradesh, draws our attention to section 21 of the Uttar Pradesh General Clauses Act, 1904 and contends that the order of 26th April, 1950, should be taken as an amendment or modification, within the meaning of that section, of the first order of 18th February, 1950. It is true that the order of 26th April, 1950, does *ex facie* purport to modify the order of 18th February, 1950, but, in view of the absence of any distinct provision in section 21 that the power of amendment and modification conferred on the State Government may be so exercised as to have retrospective operation the order of 26th April, 1950, viewed merely as an order of amendment or modification, cannot, by virtue of section 21, have that effect. If, therefore, the amending order operates prospectively, *i.e.*, only as from the date of the order, it cannot validate the award which had been made after the expiry of the time specified in the original order and before the date of the amending order, during which period the adjudicator was *functus officio* and had no jurisdiction to act at all. We do not think the respondents can derive any support from section 21 of the Uttar Pradesh General Clauses Act.

The result, therefore, is that the appeal must be allowed and the award must be declared to be null and void and we order accordingly. In the circumstances of this case we make no order as to costs.

Agent for Appellant: *Ganpat Rai.*

Agent for Respondent: *S. D. Sekhari.*

Agent for the Intervener: *C. P. Lal.*

G.R./K.S. ——— *Appeal allowed.*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT :—MEHRCHAND MAHAJAN, S. R. DAS AND N. H. BHAGWATI, JJ.

The Workers of the Industry Colliery .. *Appellants**

v.

The Management of the Industry Colliery .. *Respondent.*

Industrial Disputes Act (XIV of 1947), sections 20 and 22—Scope—Conciliation proceedings—No settlement arrived at—Proceedings—When terminated—Strike before such termination—Illegal.

A strike shall be illegal if it is commenced or declared in contravention of section 22 or section 23 of the Industrial Disputes Act. Section 22 (1) (*a*) provides that no person employed in a public utility service shall go on strike in breach of a contract *inter alia* during the pendency of any conciliation proceedings before a conciliation officer and seven days after the conclusion of such proceedings. Where no settlement is arrived at, a conciliation proceeding shall be deemed to have concluded when the report of the conciliation officer is *received* by the appropriate Government or when the report of the Board is published under section 17 as the case may be. Any strike commenced before the report is actually *received* by the appropriate Government will be illegal.

The Chief Labour Commissioner in the absence of any delegation is only the channel or Post Office through which correspondence between the Regional Labour Commissioner (Central) and the Central Government is to pass and he cannot possibly be regarded as an agent of the Central Government for the purpose of receiving the report.

Chaturbhuj Ramlal v. *Secretary of State for India,* A.I.R. 19 7 All. 215, distinguished.

Although factually the conciliation proceedings terminate when a settlement is arrived at before the conciliation officer or when it is found that no settlement can be arrived at, the Act by a legal fiction, prolongs the conciliation proceedings until the actual receipt of the report by the appropriate Government and goes on to provide that the appropriate Government must have seven days time to consider what further steps it would take under the Act. As time is of the essence of the Act the relevant provisions must be punctually obeyed and carried out if the Act is to operate harmoniously at all and public officers should in the discharge of their duties avoid slackness or delay.

On Appeal by Special Leave granted by the Supreme Court on the 1st December, 1950 from the Judgment, dated the 24th April, 1950 of the Central Government Industrial Tribunal, Dhanbad, in Appeal No. 1 of 1950, arising out of Order, dated the 2nd February, 1950 of the Regional Labour Commissioner (Central), Dhanbad.

* Civil Appeal No. 133 of 1951. 12th December, 1952.

N. C. Chatterjee, Senior Advocate (*S. L. Chhibber*, Advocate, with him) for Appellants.

S. P. Sinha, Senior Advocate (*S. N. Mukherjee*, Advocate, with him) for Respondent.

The Judgment of the Court was delivered by

Das, J.—This appeal by special leave is directed against the decision dated 24th April, 1950 of the Central Government Industrial Tribunal at Dhanbad confirming the decision dated 2nd February, 1950 of the Regional Labour Commissioner (Central), Dhanbad, which had declared the one-day strike by the appellants that took place on 7th November, 1949 to be an illegal strike. The relevant facts are as follows :—

On 13th October, 1949 the appellants through the Secretary of their Union gave a notice to the respondents, under section 22 (1) of the Industrial Disputes Act, 1947, that they proposed to call a one-day strike on the expiry of 6th November, 1949 for the fulfilment of demands, 16 in number, noted therein. This strike notice was, in accordance with rule 85 of the rules framed under the Industrial Disputes Act, 1947, sent to (1) the Conciliation Officer (Central), Dhanbad, (2) the Regional Labour Commissioner (Central), Dhanbad (3) the Chief Labor Commissioner, Department of Labour, Government of India, New Delhi, (4) Secretary, Ministry of Labour, Government of India, New Delhi and (5) A.D.C., Dhanbad. This notice was received at the office of the Regional Labour Commissioner (Central), Dhanbad, on 15th October, 1949. The Regional Labour Commissioner (Central) held conciliation proceedings at Dhanbad on 22nd October, 1949, but the appellants, by their letter of the same date, declined to participate in the proceedings alleging that they were convinced that nothing would come out of the same and that the proceedings should, therefore, be considered " to be ceased". On the same day the Regional Labour Commissioner (Central) Dhanbad, addressed letter No. RLC/CON 5 (Token) 7910 to the Chief Labour Commissioner, New Delhi, stating that after receipt of the notice of strike he had issued notice to the parties for conciliation, that the employers' representatives were ready to discuss the demands but the Union's representative filed a petition in writing saying that they did not want to participate in the proceedings and that no fresh material had been placed before him to change his view and that he was not in favour of recommending a reference of the demand to the Industrial Tribunal. The letter ended with a request that the Government may be informed of the situation. It appears that this report was received in the office of the Chief Labour Commissioner, New Delhi, on 25th October, 1949. Although the Chief Labour Commissioner, in his letter of 17th November, 1949 to the Regional Labour Commissioner (Central), Dhanbad, states that the contents of the latter's report had already been communicated to the Ministry of Labour, a copy of the report was actually sent to and received by the Ministry of Labour only on that day. In the meantime on 7th November, 1949 the appellants, about 700 in number, went on one day strike as per their strike notice. Apparently the respondents contended that the strike was illegal and they made an application, under section 8 (2) of the Coal Mines Provident Fund and Bonus Scheme Act, 1948, to the Regional Labour Commissioner (Central), Dhanbad, for a decision on the question whether the strike was legal or illegal. By his order, dated 2nd February, 1950, the Regional Labour Commissioner (Central), Dhanbad, declared that the strike was illegal. Being aggrieved by the aforesaid decision the appellants, under section 8 (4) of the last mentioned Act, preferred an appeal to the Central Government Industrial Tribunal at Dhanbad which, however, also held that the strike was illegal and that the conclusions arrived at by the Regional Labour Commissioner (Central) were correct and accordingly dismissed the appeal. The appellants thereafter applied for and obtained special leave to appeal to this Court.

The only question raised on this appeal is whether the strike was illegal. Section 24 (1) of the Act provides, *inter alia*, that a strike shall be illegal if it is commenced

or declared in contravention of section 22 or section 23 of the Act. Section 22 (1) provides as follows :—

"22. (1) No person employed in a public utility service shall go on strike in breach of contract—

(*a*) without giving to the employer notice of strike, as hereinafter provided, within six weeks before striking ; or

(*b*) within fourteen days of giving such notice ; or

(*c*) before the expiry of the date of strike specified in any such notice as aforesaid ; or

(*d*) during the pendency of any conciliation proceedings before a conciliation officer and seven days after the conclusion of such proceedings."

Notice of strike having been given in terms of clause (*a*) and 14 days having elapsed after the giving of such notice as required by clause (*b*) and the actual strike having taken place after 6th November, 1949, being the date specified in the strike notice, the only other question for consideration is whether the strike took place during the pendency of any conciliation proceedings before a Conciliation Officer, and seven days after the conclusion of such proceedings. Under section 20 (1) a conciliation proceeding shall be deemed to have commenced on the date on which a notice of strike under section 22 is received by the Conciliation Officer. In this case the strike notice was received by the Regional Labour Commissioner (Central), who is the Conciliation Officer, on 15th October, 1949 and the conciliation proceedings, therefore, commenced on that date under section 20 (1). The relevant portion of sub-section (2) of that section runs as follows :—

"(2) A conciliation proceeding shall be deemed to have concluded—

(*a*) ....,

(*b*) where no settlement is arrived at, when the report of the conciliation officer is received by the appropriate Government or when the report of the Board is published under section 17, as the case may be, or

(*c*) ...."

The Regional Labour Commissioner (Central), who is the Conciliation Officer in this dispute, is required by section 12 to hold conciliation proceedings in the prescribed manner and, without delay, investigate the dispute and to do all such things as he thinks fit for the purpose of inducing the parties to come to a fair and amicable settlement of the dispute. In this case the Regional Labour Commissioner (Central) held conciliation proceedings on 22nd October, 1949, but no settlement could be arrived at as the appellants declined to take part in the proceedings on the ground that they were convinced that nothing would come out of it. That being the position, under section 12 (4) it became the duty of the Regional Labour Commissioner (Central) to

"as soon as practicable after the close of the investigation, send to the appropriate Government a full report setting forth the steps taken by him for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement thereof together with a full statement of such facts and circumstances and the reasons on account of which, in this case, a settlement could not be arrived at".

Sub-section (6) of this section requires that the report shall be submitted within fourteen days of the commencement of the conciliation proceedings or within such shorter period as may be fixed by the appropriate Government. As already stated, the conciliation proceedings commenced on 15th October, 1949. The report, therefore, was to be submitted within fourteen days from that date. In point of fact the report was sent by the Regional Labour Commissioner (Central) to the Chief Labour Commissioner, New Delhi, on 22nd October, 1949 (which was well within 14 days from the commencement of the conciliation proceedings), with the request that the Government may be informed of the situation. Under sub-section (4) the report has to be sent to the "appropriate Government" which according to the definition under section 2 (*a*) means, in relation to an industrial dispute concerning a mine, the Central Government. The Regional Labour Commissioner (Central) did not send the report direct to the Central Government but sent it to the Chief Labour Commissioner, New Delhi, in accordance with what

has been called the usual course and routine of official business. The report, however, was received by the Central Government on or about 17th November, 1949 and it is only on such receipt that the conciliation proceedings are to be deemed to have concluded according to the provisions of section 20 (2) (*b*). *Prima facie*, therefore, the strike which took place on 7th November, 1949 was during the pendency of the conciliation proceedings as held by the authorities below.

Shri N. C. Chatterjee, however, argues that in point of fact the conciliation proceedings came to an end when the appellants had withdrawn from the proceedings and the Regional Labour Commissioner (Central) had sent his report. It is by a legal fiction, introduced by section 20 (2) (*b*), that the conciliation proceedings are prolonged until the actual receipt of the report by the appropriate Government. According to Shri N. C. Chatterjee the conciliation proceedings should be held to terminate when the Regional Labour Commissioner (Central) sent his report within fourteen days of the commencement of the conciliation proceedings. The difficulty in accepting this argument is that while the word " send " is used in section 12 (4) and the word " submitted " in section 12 (6) the word used in section 20 (2) (*b*) is " received ". That word obviously implies the actual receipt of the report. To say that the conciliation proceedings shall be deemed to have concluded when the report should, in the ordinary course of business, have been received by the appropriate Government would introduce an element of uncertainty, for the provisions of section 22 (1) (*d*) clearly contemplate that the appropriate Government should have a clear seven days' time after the conclusion of the conciliation proceedings to make up its mind as to the further steps it should take. It is, therefore, necessary that the beginning of the seven days' time should be fixed so that there would be certainty as to when the seven days' time would expire. It is, therefore, provided in section 20 (2) (*b*) that the proceedings shall be deemed to have concluded, where no settlement is arrived at, when the report is actually received by the appropriate Government. Shri N. C. Chatterjee on the other hand strongly urges, and not without some force, that on that construction it may be possible for the Government or its officers to withhold the report designedly or the report may be lost in course of transit or may be actually received after the expiry of the date fixed for the strike in the notice under section 22 (1). Shri N. C. Chatterjee also points out that it will not be possible for the workers to know when the report is actually received and their right to strike may thus be taken away from them. Shri N. C. Chatterjee contends that the Government cannot take advantages of its own wrong. While we feel considerable force in Shri N. C. Chatterjee's argument based on hardship we are bound to assume that the public officers concerned would act fairly and properly. Further, it is not a case of the Government taking advantage of its own wrong as suggested by Shri N. C. Chatterjee, for here we are concerned with a dispute between the employers and the employees and there is no material before us to justify our attributing the misdeeds, if any, of the Regional Labour Commissioner (Central) or of the Chief Labour Commissoner, to the respondents, the employers who are entitled to take their stand on the language of the law. The Court can only construe the statute as it finds it and if there is any defect in the law it is for other authority than this Court to rectify the same.

Shri N. C. Chatterjee also urges that the Regional Labour Commissioner (Central) should have, under section 12, sent his report to the appropriate Government which in this case means the Central Government and he should not have sent the report to the Chief Labour Commissioner. Assuming that that is the position, then the fact will still remain that the Central Government did not receive the report and, therefore, the conciliation proceedings did not come to an end when the strike took place. Shri N. C. Chatterjee also suggests that the Chief Labour Commissioner should have returned the report to the Regional Labour Commissioner (Central) because under the law the report should not have been made to him. He, however, did not return the same to the Regional Commissioner but took upon himself to forward the same to the Labour Ministry. In the circumstances, Shri N. C. Chatterjee

urges, on the authority of *Chaturbhuj Ram Lal* v. *Secretary of State for India*[1], that the Chief Labour Commissioner must be deemed to be the agent of the Central Government for the purpose of receiving the report. We adjourned this case in order to enable Shri N. C. Chatterjee to ascertain whether there was any delegation of authority in this behalf by the Central Government to the Chief Labour Commissioner. Shri N. C. Chatterjee has not been able to discover any such delegation of authority. It seems obvious to us that the Chief Labour Commissioner cannot possibly be regarded for this purpose as the Central Government. In point of fact by a notification in the *Gazette of India*, dated 5th April, 1947, the Chief Labour Commissioner has been appointed as a Conciliation Officer and, therefore, in conciliation proceedings conducted by him he has to submit his report to the Central Government. It follows, therefore, that the Chief Labour Commissioner must be an authority separate from the Central Government. According to rule 85 to which reference has been made the strike notice has to be sent, amongst others, to the Chief Labour Commissioner as well as to the Department of Labour of the Government of India, which again indicates that the two are different entities. The Chief Labour Commissioner is, therefore, only the channel or post office through which correspondence between the Regional Labour Commissioner (Central) and the Central Government is to pass and he cannot possibly be regarded as an agent of the Central Government for the purpose of receiving the report. The Chief Labour Commissioner being the official channel the ruling relied upon by Shri N. C. Chatterjee can have no application to the facts of this case.

For reasons stated above we are of opinion that the conclusions arrived at by the authorities below on this point are correct and that this appeal must be dismissed. In the peculiar circumstances of the case, however, we think that there should be no order as to costs and the parties should bear their own costs.

Before concluding we must draw the attention of the authorities concerned to the slack and unbusinesslike manner in which the matter was dealt with in the office of the Chief Labour Commissioner. The Act requires that the Conciliation Officer must submit his report within 14 days from the commencement of conciliation proceedings and then on receipt of the report by the appropriate Government the conciliation proceedings are to be deemed to have concluded. Although factually the conciliation proceedings terminate when a settlement is arrived at before the Conciliation Officer or when it is found that no settlement can be arrived at, the Act, by a legal fiction, prolongs the conciliation proceedings until the actual receipt of the report by the appropriate Government and goes on to provide that the appropriate Government must have seven days' time to consider what further steps it would take under the Act. Up to the expiry of this period of seven days the Act permits no strike but after that period is over the employees are left free to resort to collective action by way of a strike. Indeed, it is on the basis of these provisions that the date of strike has to be carefully selected and specified in the notice of strike to be given by the employees under section 22 (1) of the Act. Thus, even a cursory perusal of the Act makes it clear that time is of the essence of the Act and that the requirements of its relevant provisions must be punctually obeyed and carried out if the Act is to operate harmoniously at all. In this case the conciliation officer submitted his report on 22nd October, 1949, *i.e.*, well within 14 days from the commencement of the conciliation proceedings as required by section 12 (6) of the Act. The report was sent through what has been called the routine official channel. Admittedly, it was received in the office of the Chief Labour Commissioner at New Delhi on 25th October, 1949, but surprisingly it was not passed on to the Ministry of Labour, which is also in New Delhi, until about 17th November, 1949. The employees had no means of knowing when the report was actually received by the Central Government which is the appropriate Government in this case or when the period of seven days after such receipt expired. But in the belief, entertained, we think, quite legitimately, that the official business had been conducted

1. A.I.R. 1927 All. 215.

regularly and promptly the employees went on strike on 7th November, 1949, as previously notified. It now transpires that the report had not been actually received by the Central Government and, therefore, on the letter of the law, the strike must be held to be illegal and the employees must face and bear the consequences of an illegal strike and may even be deprived of benefits to which they would otherwise have been entitled. This hardship has been thrown upon the employees for no fault of their own but simply because of the callous indifference or utter inefficiency and slackness apparently prevailing in the office of the Chief Labour Commissioner which cannot be too strongly deprecated. It is to be hoped that public officers should, in the discharge of their official duties in future, show a greater sense of responsibility than what they have done in the case before us.

Agent for Appellants: *Gobind Saran Singh.*

Agent for Respondent: *P. K. Chatterjee.*

G.R./K.S. *Appeal dismissed.*

[THE SUPREME COURT OF INDIA.]

(Civil Appellate Jurisdiction.)

PRESENT :—MEHRCHAND MAHAJAN, S. R. DAS AND N. H. BHAGWATI, JJ.

The Commissioner of Income-tax, Madras .. *Appellant**

v.

K. Srinivasan and K. Gopalan .. *Respondents.*

Income-tax Act (XI of 1922), section 25 (3) and (4)—Scope of exemption under on transfer of a business —"Previous year"—Construction.

The "previous year" in the context of section 25 (3) and (4) of the Indian Income-tax Act means a completed accounting year immediately preceding discontinuance or succession. The intention of the Legislature being to give relief against double assessment for the years 1922-1923 the assessee in the case of discontinuance or succession would be entitled to claim exemption from payment of tax for the broken period and also claim that the income, profits and gains of the previous year, *i.e.*, the year preceding the broken period should be treated as the income, profits or gains of the broken period.

It cannot be said that the expression "previous year" in sub-sections (3) and (4) of section 25 in the context of those sub-sections means the end of an accounting year (a period of twelve months) expiring immediately preceding the date of discontinuance or succession.

On Appeal from the Judgment and Order, dated the 2nd January, 1950, of the High Court of Judicature at Madras (Satyanarayana Rao and Viswanatha Sastri, JJ.) in Case Referred No. 68 of 1946.

M. C. Setalvad, Attorney-General for India (*P. A. Mehta*, Advocate, with him) for Appellamt.

K. S. Krishnaswami Ayyangar, Senior Advocate (*M. Subbaraya Ayyar*, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

Mahajan, J.—This is an appeal from the judgment of the High Court of Judicature at Madras in a reference made by the Income-tax Appellate Tribunal under section 66 (1) of the Indian Income-tax Act (XI of 1922).

For several years prior to 1939-40 the respondents, who are brothers, had been carrying on in partnership the business of "The Hindu", a daily newspaper of Madras. The profits of this business had been charged to income-tax in the hands of the respondents under the Indian Income-tax Act of 1918. The firm's year of account was a period of twelve months ending with 30th June each year. In respect of the profits of the year of account ending 30th June, 1938, assessment was made in the year 1939-40 and the firm was charged to income-tax for that

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* Civil Appeal No. 9 of 1952. 22nd December, 1952.

assessment year. On the 1st March, 1940, the respondents transferred their business as a going concern to a private limited company called "Kasturi & Co., Ltd."

For the assessment year 1940-41 the respondents claimed that the firm was not liable to pay any income-tax on the income of its business from the end of the accounting year ending 30th June, 1938 to 29th February, 1940, the date on which the limited company succeeded to the business of the firm (*i.e.*, for a period of 20 months) under section 25 (4) of the Act, as it had been assessed under the Indian Income-tax Act, 1918. The income-tax officer disallowed the claim and held that since the assessment pertained to the year 1940-41 the previous year with reference to that assessment would be the year ending 30th June, 1939 and the period for which exemption could be claimed under section 25 (4) of the Act was the interval from the end of that previous year, *i.e.*, the 1st July, 1939 upto the date of succession, *i.e.*, 29th February, 1940, *i.e.*, a period of eight months. This order was confirmed on appeal by the Appellate Assistant Commissioner. On further appeal the Tribunal held that on a proper construction of section 25 (4) of the Act, tax was not payable by the firm in respect of the profits and accounts of the business for the whole of the period from 1st July, 1938 to 29th February, 1940 (a period of 20 months). At the instance of the Commissioner of Income-tax (the appellant) the Tribunal stated a case to the High Court and referred to it the following question for its opinion :—

"Whether on the facts of this case, the Appellate Tribunal was right in holding that the period, the profits of which were entitled to exemption from the payment of tax under section 25 (4) of the Indian Income-tax Act, 1939, was the period commencing from 1st July, 1938, and ending with 29th February, 1940."

The reference was heard by Satyanarayana Rao and Viswanatha Sastri, JJ., and they delivered divergent opinions on the question referred. Satyanarayana Rao, J., agreed with the conclusion of the Tribunal and answered the question in the affirmative, while Viswanatha Sastri, J., answered the question in the negative, with the result that under the provisions of the law the Tribunal's order was confirmed, it being in accordance with the opinion delivered by the senior Judge. Leave to appeal to this Court was granted and this appeal is before us on a certificate given by the High Court.

The principal question to decide in this appeal is whether on a true construction of section 25 (4) of the Act, and on the facts stated the period the profits of which were entitled to exemption from the payment of tax is the period between 1st July, 1939 to 29th February, 1940 (a period of eight months) or the period commencing from 1st July, 1938 and ending with 29th February, 1940 (a period of 20 months).

To decide this question it is necessary to set out the relevant provisions of the Act. Section 2 (11), which defines "previous year" in so far as it is relevant for purposes of this appeal is :—

"(11) (*a*) the twelve months ending on the 31st day of March next preceding the year for which the assessment is to be made, or, if the accounts of the assessee have been made up to a date within the said twelve months in respect of a year ending on any date other than the said 31st day of March, then at the option of the assessee the year ending on the day to which his accounts have so been made up."

Section 3 of the Act provides :—

"Where any Central Act enacts that income-tax shall be charged for any year at any rate or rates, tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of the total income of the previous year of every individual, Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or the members of the association individually."

This is the charging section. Section 25 of the Act makes different provisions to cover some special cases. The parts of the section relevant to this appeal provide as follows :—

"(1) Where any business, profession or vocation to which sub-section (3) is not applicable, is discontinued in any year, an assessment may be made in that year on the basis of the income, profits or gains of the period between the end of the previous year and the date of such discontinuance in addition to the assessment, if any, made on the basis of the income, profits or gains of the previous year.

(3) Where any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918 (VII of 1918), is discontinued, then, unless there has been a succession by virtue of which the provisions of sub-section (4) have been rendered applicable no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance, and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference.

(4) Where the person who was at the commencement of the Indian Income-tax (Amendment) Act, 1939 (VII of 1939), carrying on any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is succeeded in such capacity by another person, the change not being merely a change in the constitution of a partnership, no tax shall be payable by the first mentioned person in respect of the income, profits and gains of the period between the end of the previous year and the date of such succession, and such person may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and, if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference.

(6) Where an assessment is to be made under sub-section (1), sub-section (3), or sub-section (4) the Income-tax Officer may serve on the person whose income, profits and gains are to be assessed, or, in the case of a firm, on any person who was a member of such firm at the time of its discontinuance, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section."

For a proper construction of section 25 it is also necessary to set out the history and object of this enactment.

Under the Act of 1918 income-tax was levied on the income of the current year, *i.e.*, the year of assessment but as the income of that year could not be known till after the expiry of the year, the assessment was made on the basis of the income of the "previous year" but after the close of the assessment year an adjustment used to be made on the basis of the income of the assessment year. The Act of 1922 introduced a change in this respect. Under section 3 of the Act, the income of the previous year is made the subject of the charge and tax is levied on the income of the previous year though it is a tax for the assessment year. On the passing of the Act of 1922, the previous system of assessment was kept alive for one year. The result was that for the year 1922-23, there were two assessments, one under the Act of 1922 on the income of 1921-22 and another under the old system by way of assessment on the income of the same year 1921-22. In other words, the income of the year 1921-22 was assessed twice, once under the Act of 1918, and again under the Act of 1922. To remove this anomaly and in order to make the number of assessments tally with the number of years during which the business existed, section 25 (3) of the Act of 1922 was enacted exempting from tax the profits for the period between the end of the previous year and the date of discontinuance in the case of a business whose profits had been assessed to tax under the Act of 1918. There was no provision in section 25 as enacted in 1922 for giving any relief in cases of succession to a business which was taxed under the Act of 1918. In 1939 a provision was made to extend similar relief to cases of succession and with this object section 26 (2) of the Act was amended and section 25 (4) was added by the amending Act of 1939. The result of the amendment of section 26 (2) and the insertion of section 25 (4) is that upon a transfer of business the transferor, *i.e.*, the person who was succeeded in the business, would get the same relief as if the business had been discontinued by him.

The scheme of the Act is that by the charging section, *i.e.*, section 3, income-tax is levied for a financial year at the rate prescribed by the annual Finance Act on the total income of the previous year of every individual, etc. Each previous year's income is the subject of separate assessment in the relative assessment year. Though the year of assessment is the financial year, the previous year of an assessee need not necessarily be the previous financial year, for this expression is to be understood as defined by section 2 (11) (*a*) of the Act.

The respondents were duly assessed to tax for the year of assessment, *i.e.*, the financial year 1939-40 on the income of the previous year ending on 30th June, 1938. Their income of the accounting year ending 30th June, 1939, would in the ordinary course be liable to assessment in the financial year 1940-41, and the profits of the year ending 30th June, 1940, would be assessable in the financial year 1941-42. Succession took place in the accounting year 1939-40. Under sub-section (2) of section 26, as it stood before its amendment in 1939, the person succeeding to a business was liable to tax for the year of succession, as if he had been carrying on business throughout that year and had received the profits of the whole of that year. Thus Kasturi and Company Limited would have been liable to be assessed on the profits earned during the year ending 30th June, 1940, irrespective of the fact that actually they would have only received profits in that year for a period of four months. After the amendment in 1939 sub-section (2) of section 26 provides that the person succeeded and the person succeeding "each be assessed in respect of his actual share, if any, of the income, profits and gains of that year." Thus the profits of the year in which the succession occurs are to be apportioned between the predecessor and the successor according to the actual share of each in the year's profits, the predecessor and the successor are each liable to tax at the rate applicable to each and the profits of each have to be computed separately in accordance with the provisions of section 10 and other sections and each has to be granted the deductions and allowances appropriate to his case, assessment on each has to be separate and distinct. If the business was charged under the Indian Income-tax Act, 1918, and the person succeeded is exempt from tax under section 25 (4) he would not be charged in respect of the profits of the period from the end of the previous year up to the date of succession, while the person succeeding would be liable under sub-section (2) of section 26 in respect of the profits earned by him after the date of succession. The proviso to sub-section (2) lays down two exceptions to the general rule that the successor is not liable to tax in respect of the profits of the period prior to the date of succession. In two cases, namely, (1) when the predecessor cannot be found, or (2) when the tax assessed on the predecessor cannot be recovered from him, the successor is liable to pay the tax in respect of the profits of the year in which the succession took place up to the date of succession as well and further for the profits earned during the year preceding that year. In this case if either of those contingencies arose, Kasturi and Company Limited would have been liable to pay tax on profits of the whole accounting year ending 30th June, 1939, as well as of the whole of the accounting year ending 30th June, 1940 and end of the preceding year in this context would be 30th June, 1939. It is a question whether in this situation they would be entitled to the relief provided in section 25 (4).

On behalf of the Commissioner of Income-tax, Madras, the learned Attorney-General contended that Satyanarayana Rao, J., was in error in granting exemption to the firm from tax in respect of the profits earned during a period of 20 months and that under section 25, sub-section (4) the only relief permissible was in respect of profits earned during the period of 8 months from 1st July, 1939, to 1st March, 1940. It was said that the profits of the year of succession were liable to assessment in the usual course in the financial year 1941-42 and the Income-tax Officer had no power to make an accelerated assessment in order to give relief to the persons succeeded in the business and that being so, it was not right to hold that the expression "previous year" in section 25, sub-section (4) was co-related to the assessment year 1939-40, *i.e.*, the year in which the succession took place or to the assessment year 1941-42 in which in the ordinary course assessment for those profits would have been made but that on a true construction of this sub-section and having regard to the history of its enactment and the object for which it was inserted in section 25, the assessee firm was entitled to exemption from the payment of tax only for the period between 1st July, 1939 and 29th February, 1940, and to no more. It seems to us that there is force in this contention. Section 25 (4) was inserted in the Act of 1922 in the year 1939 at the same time as section 26 (2) was amended. On a plain reading of these two sections together, it is quite clear that the Income-

tax Officer is not empowered to make an accelerated assessment in the year in which succession occurs on the profits of that year, and prematurely assess the person succeeding to a business so that he may be able to give relief to the person succeeded. The exemption provided for in section 25 (4) and the apportionment mentioned in section 26 (2) have to be made in the assessment year in which the profits of the year of succession fall to be assessed under section 3 of the Act, and in this situation the end of the previous year in this case can, in no circumstance, be the end of the accounting year beginning 1st of July, 1937, and ending 30th of June, 1938, because the income, profits and gains of the accounting year of succession (*i.e.*, year beginning 1st July, 1939, and ending 30th June, 1940), which have to be apportioned between the predecessor and successor of the business under section 26 (2) and for which the assessor becomes liable in case the predecessor commits a default, could only be assessed in the assessment year 1941-42. The income, profits and gains of the accounting year beginning 1st July, 1938, and ending 30th June, 1939, for which the predecessor alone is liable in the first instance to tax fall for assessment in the assessment year 1940-41. The successor in business, in case of default by the predecessor, is also liable to pay the tax on the profits of that year as well. What sub-section (4) of section 25 provides is that when the profits of the year of succession fall to be assessed, the predecessor of a business can claim exemption from liability to pay tax on the profit earned from the end of the previous year to the date of succession, the "previous year" here meaning the completed accounting year immediately preceding the date of succession (in this case year ending 30th of June, 1939). He can further claim that the profits earned between 1st July, 1939 to 29th February, 1940, be deemed the profits of the accounting year 1st July, 1938, to 30th June, 1939 and if on those profits in assessment year 1940-41 tax in excess of what is chargeable on the profits of this broken period has been paid, he be given refund for the excess. Truly speaking, the firm was entitled to the relief provided for in section 25 (4) in the assessment year 1941-42 but the Income-tax Officer was prepared to give him that in the assessment year 1940-41 and on that score the assessee can have no grievance.

Satyanarayana Rao, J., held that the words "previous year" in sub-section (1) of section 25 refer to the year of account relevant to the year of assessment in which the discontinuance occurs, that the section authorises the Income-tax Officer to make a cumulative assessment in respect of the profits of the period between the end of the last accounting year of which the profits have been assessed before the date of discontinuance and that date, that

"sub-section (3) of section 25 is an exception to the general rule contained in sub-section (1) of that section, and that though the language employed in sub-section (3) does not correspond to the language employed in sub-section (1) indicating that in this sub-section also the assessment year should be taken to be the year in which the discontinuance occurs, all the same there is no reason to depart and to place a different interpretation on the expression 'previous year' in this sub-section from the one placed on sub-section (1)."

On the same line of reasoning the learned Judge gave the same meaning to the expression "previous year" in sub-section (4) of section 25 and as a result held that the firm was entitled to exemption from tax for profits earned between the 1st July, 1938 and 29th February, 1940, a period of 20th months.

Mr. Krishnaswami Aiyangar appearing for the respondents, was not prepared to support the whole of the reasoning of Satyanarayana Rao, J., but he contended strenuously that the conclusion reached by the learned Judge was the only one that could be reached on a true construction of the phraseology employed in the various sub-sections of section 25. In short, his argument was that sub-section (1) of section 25 confers an option on the Income-tax Officer, in case of discontinuance of a business which was not assessed under the Act of 1918, to make an accelerated assessment in the year of discontinuance itself on the income, profits and gains earned up to the period of discontinuance and not assessed before in any preceding assessment year; that the expression "previous year" in the context of this sub-section means the end of the accounting year the profits of which have

been last assessed to tax, which in this case means the year ending 30th June, 1938. It was further contended that any other meaning given to these words would create a hiatus and would lead to the result that on the date of discontinuance the Income-tax Officer would be entitled to assess the profits of the broken period without being entitled to assess the profits of a whole previous year that had expired, the profits of which in the usual course could not be assessed in the year of discontinuance and that such a construction would defeat the very purpose of the power given by the sub-section. On a parity of reasoning it was suggested that the words "between the end of the previous year and the date of such discontinuance" in sub-sections (3) and (4) should be given the same meaning as in sub-section (1), and that the assessee should be given exemption in respect of profits earned between the 1st July, 1938, and 29th February, 1940. It was said that the two terminals fixed for the purposes of assessment under section 25 (1) were the terminals fixed for exemption from tax in section 25 (3) and (4) and it would be wrong to hold that the assessment under section 25 (1) could be made for a period different from that for which relief could be given under section 25 (3) and (4). It was urged that the scope of the charge authorised by section 25 (1) was co-extensive with the extent of the relief provided for in sub-sections (3) and (4).

Before proceeding further it is convenient to make a few observations regarding the proposition stated by Satyanarayana Rao, J. that section 25 (1) provides for cumulative assessment in cases of discontinuance of business. The words of the section do not justify this conclusion. They do not empower the Income-tax Officer to make a cumulative assessment in respect of profits earned in two different accounting periods or entitle him to merge the profits of two years into one total sum and apply to them the rate of one of the financial years. All that the section authorizes the Income-tax Officer to do is that it gives him an option to make a premature assessment on the profits earned up to the date of discontinuance in the year of discontinuance itself instead of in the usual financial year. This assessment he is entitled to make in addition to the normal assessment for the financial year of discontinuance. Mr. Aiyangar very rightly conceded that the construction placed on sub-section (1) of section 25 by the learned Judge in this respect was not right.

As regards the main contention of Mr. Aiyangar based on the analogy of the language employed in sub-section (1) of section 25, we are of the opinion that this contention is based on a fallacy and cannot be sustained. As above pointed out, sub-section (1) of section 25 merely empowers the Income-tax Officer, if he so chooses to do, to make an accelerated assessment in case of discontinuance of business at the time of discontinuance to save loss of revenue by the disappearance of an assessee. In other words, the sub-section imposes a liability of premature assessment on the assessee. It confers no benefit on him. Sub-sections (3) and (4) of section 25 have a different end in view and are not in *pari materia* with sub-section (1). They are in the nature of substantive provisions intended to give relief from tax charged in certain cases. The mere circumstance of their being grouped together with sub-section (1) in section 25 cannot lead to the conclusion that the provisions therein contained are of the same nature and character as the provisions contained in sub-section (1). Satyanarayana Rao, J., was clearly in error when he held these two sub-sections were in the nature of exceptions to the rule laid down in sub-section (1). The truth of the matter is that it is sub-section (1) itself which is an exception to the general rule laid down in the charging section of the Act, namely, section 3. The object of sub-sections (3) and (4) is to provide relief to a business for the double assessment suffered by it in the financial year 1922-23 and it is entitled to this relief in the year of assessment in which the income and profits of the accounting period in which discontinuance or succession takes place fall to be assessed. The Income-tax Officer is not authorised to accelerate the relief by making a premature assessment on these profits. Not only is the language of these two sub-sections different from the language of sub-section (1), but they deal with two different categories of assessees. Sub-section (1) deals with a category of assessees who were never subjected to double tax, while sub-

sections (3) and (4) deal with that class who suffered assessment under the Act of 1918, and paid double tax. The liability for premature assessment imposed under 25 (1) on the former class of assessees has been imposed on considerations entirely different from those on which provision has been made for exemption to tax in sub-sections (3) and (4) for the other class. In these circumstances, such relief cannot be said to be co-extensive with the liability imposed. Moreover, the provisions of the Income-tax Act in respect to exemptions and deductions cannot be construed on the analogy of the provisions contained in the charging sections of the Act even if the language of these provisions is similar. Mr. Aiyangar's contention that sub-section (1) crystallizes the rights of the assessee on the date of discontinuance and that not only does it relieve him from being taxed after the date of discontinuance, but that it entitles him to further relief provided for in sub-section (3) does not seem to be well-founded. Sub-section (1) of section 25 confers no right of any kind on an assessee which can crystallize on the date of discontinuance and which cannot be varied subsequently to his disadvantage. On the other hand, as already said it imposes a premature burden on the assessee which but for this sub-section he could not be called upon to bear till the appropriate year of assessment was reached.

The learned Attorney-General was not prepared to accept the construction placed on sub-section (1) of section 25 by Mr. Aiyangar and contended that that sub-section did not authorise the Income-tax Officer to make an assessment in the year of discontinuance on the profits of an accounting year which had come to a close before the date of discontinuance, and that those profits had to be assessed in the usual way in the appropriate financial year, and that authority given to make an accelerated assessment only related to the broken period beginning with the end of the completed accounting year immediately preceding the date of discontinuance and ending with the date of discontinuance. In our opinion, it is not necessary for the purposes of deciding this case to finally express an opinion as to the true meaning of the words "between the end of the previous year to the date of discontinuance", used in section 25 (1) of the Act.

After a careful consideration of the different provisions of the Act relevant to this enquiry, we have reached the conclusion that the expression "end of the previous year" in sub-sections (3) and (4) of section 25 in the context of those sub-sections means the end of an accounting year (a period of full 12 months) expiring immediately preceding the date of discontinuance or succession, (in this case 30th June, 1939). We are satisfied that Viswanatha Sastri, J., was right when he held that having regard to the object of the Legislature in enacting sub-sections (3) and (4) of section 25 and having regard to the plain language of these sub-sections, the assessee's contentions could not be upheld. We are, however, unable to subscribe to the conclusion reached by the learned Judge that the expression "previous year" in sub-sections (3) and (4) of section 25 was co-related to the year of assessment 1940-41. The profits of the year of discontinuance could not, according to the scheme of the Act, be taxed till the financial year 1941-42 and the previous year co-related to that assessment year would be the accounting year ending 30th June, 1940. It is obvious that the end of the accounting year falling after the date of discontinuance could not appositely be said to be the end of the previous year preceding that date. The expression "previous year" substantially means an accounting year comprised of a full period of twelve months and usually corresponding to a financial year preceding the financial year of assessment. It also means an accounting year comprised of a full period of twelve months adopted by the assessee for maintaining his accounts but different from the financial year and preceding a financial year. For purposes of the charging sections of the Act unless otherwise provided for it is co-related to a year of assessment immediately following it, but it is not necessarily wedded to an assessment year in all cases and it cannot be said that the expression "previous year" has no meaning unless it is used in relation to a financial year. In a certain context it may well mean a completed accounting year immediately preceding the happening of a contingency. The construction we have placed on this expression in sub-sections (3) and (4) of section 25 is in

accord with the substance of the definition given in section 2 (11) of the Act. Any other construction of the section is bound to lead to a number of anomalies, the most glaring being that in case of persons whose year of account is the financial year, exemption from tax under section 25 (3) or (4) could never be given for a period of more than twelve months, while in case of persons who adopt different accounting year, exemption would become available for a period extending up to 24 months. Such could never have been the intention of the framers of the Act.

That the "previous year" in the context of section 25 (3) and (4) means a completed accounting year immediately preceding the discontinuance or succession is borne out by the provisions as regards non-liability for tax for the broken period and the claim to be made by the assessee that the income, profits and gains of the previous year shall be deemed to have been the income, profits or gains of the broken period. The intention of the Legislature being to give relief against double assessment for the year 1922-23, the assessee in the case of discontinuance or succession would be entitled to claim exemption from payment of tax for the broken period and also claim that the income, profits or gains of the previous year, *i.e.*, the year preceding the broken period should be treated as the income, profits or gains of the broken period.

Reference was made in the judgment of the Appellate Tribunal to the views of the Select Committee when clause (1) of section 25 was considered at the time of the draft Bill No. XXVI of 1921 in support of its conclusion, but it was rightly held by the High Court that it was not a permissible consideration in interpreting a statute and Mr. Aiyangar did not seriously press this matter before us. He, however, drew our attention to the directions contained in the Income-tax Manual in force for a number of years and contended that the department itself placed on sub-sections (3) and (4) of section 25 the same construction as was placed on them by the senior Judge in the High Court and that was the true construction of these two sub-sections. This argument, in our opinion, has no validity. The department changed its view subsequently and amended the manual. The interpretation placed by the department on these sub-sections cannot be considered to be a proper guide in a matter like this when the construction of a statute is involved.

The result is that we allow the appeal and hold that the answer given by the senior Judge to the question referred was wrong and that the answer given by Viswanatha Sastri, J., was the correct one. In the circumstances of this case we would make no order as to costs throughout.

Agent for Appellant : *G. H. Rajadhyaksha.*

Agent for Respondents : *M. S. K. Aiyangar.*

G.R./K.S. ——— *Appeal allowed.*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT :—MEHRCHAND MAHAJAN, S. R. DAS AND N. H. BHAGWATI, JJ.

The Commissioner of Income-tax, Madras .. *Appellant**

v.

MTT. AR. S. AR. Arunachalam Chettiar .. *Respondent.*

Income-tax Act (XI of 1922), sections 66 *and* 33—*Scope—Application under section* 66 (2) *and direction thereon under section* 66 (3) *to state a case—If can be made when there is no order which can be said to have been made by the Appellate Tribunal under section* 33 (4).

If there is no order which could properly be said to have been made by the Appellate Tribunal under sub-section (4) of section 33 of the Income-tax Act, out of which a question of law arose the Appellate Tribunal would have no jurisdiction to refer a case nor would the High Court have jurisdiction under sub-section (2) of section 66 to direct the Tribunal to do so. If a reference was incompetent both under section 66 (1) or section 66 (2) the High Court could decline to entertain it.

*Civil Appeals Nos. 10 and 10-A of 1952. 22nd December, 1952.

On appeal from the Judgment and Order dated the 11th January, 1950, of the High Court of Judicature at Madras in Case Referred Nos. 80 of 1946 and 38 of 1948.

M. C. Setalvad, Attorney-General for India (*G. N. Joshi* and *P. A. Mehta*, Advocates, with him), for Appellant.

S. Krishnamachariar, Advocate, for Respondent.

The Judgment of the Court was delivered by

Das, J.—These two consolidated appeals are directed against the judgment and order made on 11th January, 1950, by the High Court of Judicature at Madras in References No. 80 of 1946 and No. 38 of 1948, under section 66 of the Indian Income-tax Act whereby the High Court relying on its earlier decision in *The Commissioner of Income-tax, Madras* v. *R. RM. M. SM. Sevugan* alias *Manickavasagam Chettiar*[1], held that the references were incompetent and accordingly refused to answer the questions raised therein. The facts are shortly as follows.

The respondent who is a Nattukottai Chettiar had his headquarters at Karaikudi in India and also carried on his money-lending business at branches at Maubin, Kualalumpur and Singapore. He also had income from properties at Maubin and Singapore. For the Assessment year 1941-42 the Income-tax Officer calculated the assessee's accrued foreign income as Rs. 29,403 at Maubin, Rs. 27,731 at Kualalumpur and Rs. 34,584 at Singapore, in all Rs. 91,718. After deducting out of this amount Rs. 4,500 allowed under the 3rd proviso to section 4 (1) of the Act, the Income-tax Officer computed the total assessable foreign income at Rs. 87,218. Out of the total remittances of Rs. 84,352 the Income-tax Officer allocated Rs. 7,900 to the accrued income of Maubin and Rs. 62,315 to those of Kualalumpur and Singapore and the balance of Rs. 14,137 to the taxed income of earlier years. The Income-tax Officer disallowed the claim of the assessee to deductions under several heads. On the basis of the total foreign income of Rs. 67,218 and income from other sources, the Income-tax Officer calculated Rs. 23,266-8-0 to be due by the assessee on account of Income-tax, Super-tax and Surcharges thereon and by his assessment order dated 31st January, 1942, made this amount payable on or before 25th February, 1942. The assessee preferred an appeal to the Appellate Assistant Commissioner against the disallowance of the several items of his claim including the claim for replantation expenses amounting to $498 incurred at Kualalumpur and a bad debt of $15,472 at Singapore. The Appellate Assistant Commissioner by his order dated 25th May, 1942, allowed some of the several objections but disallowed the items of replantation expenses and bad debt and reduced the assessment to Rs. 22,548. The assessee took a further appeal before the Appellate Tribunal against the disallowance of the several claims by the Appellate Assistant Commissioner including the two items mentioned above. The Appellate Tribunal by its order dated 20th August, 1943, held that the replantation expenses " will be allowed to the appellant as expenses." As regards the bad debt the Tribunal held that it was permissible and that " the deduction claimed will, therefore, be allowed." The result was that the appeal was partly allowed.

The matter came back before the Income-tax Officer on 26th September, 1945. Deducting Rs. 778 on account of replantation expenses the Kualalumpur income was reduced to Rs. 26,953 and after deducting Rs. 24,175 on account of the bad debt the Singapore income came down to Rs. 10,409. These two reduced amounts together with Rs. 29,403 being the income from Maubin made up the total accrued income of Rs. 66,765. Out of this amount Rs. 4,500 was deducted on account of unremitted profits of Maubin under the 3rd proviso to section 4 (1) of the Act, leaving a balance of Rs. 62,265. Out of the remittances the Income-tax Officer allocated Rs. 7,000 towards the accrued income of Rs. 29,403 from Maubin and Rs. 37,362 against the total accrued income of Kualalumpur and Singapore. He also allocated Rs. 24,549 as remittances out of assessed profits of

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(1) (1948) 16 I.T.R. 59 : (1948) 1 M.L.J. 157 : A.I.R. 1949 Mad. 418.

previous years, leaving a balance of Rs. 13,541. This amount the Income-tax Officer considered as remittances out of earlier years' unassessed income and held it to be assessable to tax. After adding Rs. 13,541 to Rs. 62,265 being the net accrued income of the year from Maubin, Kualalumpur and Singapore the Income-tax Officer arrived at the total foreign income of Rs. 75,806. On the basis of this foreign income together with other income the Income-tax Officer recalculated the amount of Income-tax, Super-tax and Surcharges thereon at Rs. 22,802-6-0 and after giving credit for certain amounts found Rs. 21,211-14-0 as the balance due which by his order dated 26th September, 1945, was made payable in equal moiety on or before 30th September, 1947, and 31st March, 1948. He however, did not issue any notice of demand under section 29 of the Act.

Being aggrieved by the inclusion of Rs. 13,541 as the alleged unassessed foreign income of earlier years remitted to India during the year of account the assessee preferred an appeal before the Appellate Assistant Commissioner. The Appellate Assistant Commissioner was not satisfied that the assessee had any right of appeal under section 30 of the Act for there had been no assessment under section 23 and no notice of demand had been served on the assessee under section 29 of the Act. Accordingly the Appellate Assistant Commissioner by his order dated 19th November, 1945, declined to admit the appeal. He, however, expressed the view that the assessee's remedy might lie in a miscellaneous application to the Tribunal complaining that the Income-tax Officer had either misconstrued or had not given effect to the order of the Appellate Tribunal.

The assessee then brought a miscellaneous application to the Appellate Tribunal. The Appellate Tribunal held that the finding of the Income-tax Officer that the sum of Rs. 13,541 was to be assessed as untaxed profits of earlier years remitted to India in the accounting year did not arise in the course of giving effect to the Appellate Tribunal's order and by its order dated 20th February, 1946, cancelled that finding and directed the Income-tax Officer to revise the computation accordingly.

The last mentioned order having been served on the Commissioner of Income-tax, Madras, on 8th March, 1946, the latter on 1st May, 1946, made an application before the Appellate Tribunal under section 66 (1) of the Act and prayed that three questions formulated by him in his petition should be referred to the High Court. The contention was that the Appellate Tribunal had no jurisdiction in law to entertain, consider and pass the order which it did on the miscellaneous application seeing that it was neither an appeal under section 33 of the Income-tax Act nor could it be regarded as a rectification under section 35 of any mistake committed by the Bench. The Appellate Tribunal took the view that although no specific provision was made in the Act by which it could give effect to its order or explain any ambiguity in such an order by a later order in any miscellaneous application filed by any party, such power, nevertheless, was inherent in the Tribunal. The Tribunal accordingly thought that a point of law did arise and on 23rd August, 1946, referred the following question to the High Court, namely :—

"Whether in the facts and circumstances of this case the order of the Bench dated 20th February, 1946, in the miscellaneous application is an appropriate order and is legally valid and passed within the jurisdiction and binding on the Income-tax Officer."

The Tribunal declined to refer the other questions formulated by the Commissioner. This reference came to be numbered as Case Referred No. 80 of 1946. It appears that pursuant to an order made by the High Court on 30th March, 1948, on the application of the Commissioner of Income-tax under section 66 (2) of the Act the Tribunal referred the following question to the High Court :—

"If the answer to the question already referred to the High Court by the order of the Appellate Tribunal, dated 23rd August, 1946, is in the affirmative, whether in the circumstances and on the facts of the case, the recomputation made by the Income-tax Officer pursuant to the decision of the Appellate Tribunal in R.A.A. No. 53 (Madras) of 1942-43 was valid and correct "

The Appellate Tribunal made this further reference on 19th July, 1948, which came to be numbered as Case Referred No. 38 of 1948.

The two referred cases came up for consideration before a Bench of the Madras High Court and it was held that the reference under section 66 (1) was incompetent in view of the earlier decision of that Court mentioned above which they felt to be binding on them and accordingly the Bench declined to answer the questions. The Commissioner of Income-tax thereafter applied for and obtained leave to appeal to this Court from the decisions in both the references and obtained such leave on his undertaking to pay the costs of the assessee in any event. The two appeals were thereafter consolidated and have come up before us for final disposal.

Section 66-A (2) gives to the aggrieved party a right of appeal to this Court from any judgment of the High Court delivered on a reference made under section 66 in any case which the High Court certifies to be a fit one for appeal to this Court. Section 66 (5) provides that the High Court upon the hearing of any such case referred to it under section 66 (1) and (2) shall decide the questions of law raised thereby and shall deliver its judgment thereon containing the grounds on which such decision is founded. During the opening of the case by the learned Attorney-General a question arose as to whether the simple refusal of the High Court to hear the case on the ground that the reference was incompetent was a decision and judgment such as is contemplated by section 66 (5) of the Act from which alone a right of appeal to this Court is given. While maintaining that the decision and judgment of the Madras High Court fell within the meaning of section 66 (5), the learned Attorney-General for greater safety asked that the appeal may be treated as one on special leave granted by this Court under Article 136 of the Constitution. The learned Advocate appearing for the assessee-respondent did not object to this prayer and accordingly we gave leave to the appellant under Article 136 and treated this appeal as one filed pursuant to such leave. In the circumstances it is not necessary for us to express any opinion on the appealability of the order of the High Court under section 66-A of the Act.

The learned Attorney-General contends that the decision relied on by the High Court has no application to the facts of the present case. In that case the Tribunal by its order dated 11th July, 1944, allowed an appeal from the Appellate Assistant Commissioner and cancelled the assessment which it held to be illegal. This order was served on the Commissioner shortly thereafter. On 5th October, 1944, an application was made to the Tribunal by the Income-tax Officer under section 35 to correct a statement contained in the statement of facts in the order. More than 60 days after the date of the service on him of the order of 11th July, 1944, to wit on 7th October, 1944, the Commissioner made an application under section 66 (1) of the Act requiring the Tribunal to refer to the High Court the question as to the correctness of its decision embodied in the order of 11th July, 1944. Both the applications were disposed of on the same day, namely, 17th January, 1945, when the application for rectification was granted and a case was stated for the opinion of the Court as prayed. Section 66 (1) requires the application to be made within 60 days of the date on which the applicant is served with notice of an order under sub-section (4) of section 33. It was held that the granting of an application for rectification under section 35 and correcting the error in the order was not an order under section 33 (4) and, therefore, was not one in respect of which section 66 (1) permitted a case to be stated. It was further held that if the Appellate Tribunal improperly or incorrectly made a reference in violation of the provisions of the statute, the High Court was capable of entertaining an objection to the statement of the case and that, if it came to the conclusion that the case should not have been stated, the High Court was not compelled to express an opinion upon the question referred. In the case before us there is no question that the present application was not made within time, but the contention is that section 66 (1) only contemplates an application for a reference of a question of law arising out of "such order" which clearly means an order made under section 33 (4), and, therefore, if there is no valid order under that section no question of law can be said to arise out of "such order" and consequently the Appellate Tribunal can have no jurisdiction to make any reference to the High Court under section 66 (1). Section

66 (2) provides that if on any application being made under sub-section (1) the Appellate Tribunal refuses to state the case on the ground that no question of law arises, the assessee or the Commissioner may, within the time specified therein, apply to the High Court and the High Court may, if it is not satisfied of the correctness of the decision of the Appellate Tribunal, require the Appellate Tribunal to state the case and to refer it. The jurisdiction given to the High Court under this sub-section is conditional on an application under sub-section (1) being refused by the Appellate Tribunal. This clearly presupposes that the application under sub-section (1) was otherwise a valid application. If, therefore, an application under sub-section (1) was not well-founded, in that there was no order which could properly be said to be an order under sub-section (4) of section 33 then the refusal of the Appellate Tribunal to state a case on such misconceived application on the ground that no question of law arises will not authorise the High Court, on an application under sub-section (2) of section 66 to direct the Tribunal to state a case. The jurisdiction of the Tribunal and of the High Court is conditional on there being an order by the Appellate Tribunal which may be said to be one under section 33 (4) and a question of law arising out of such an order. The only question for our consideration, therefore, is whether in this case any question of law arose out of an order which can properly be said to have been made by the Appellate Tribunal under sub-section (4) of section 33, for if it did not, then the Appellate Tribunal would have no jurisdiction under sub-section (1) of section 66 to refer a case, nor would the High Court have jurisdiction under sub-section (2) of that section to direct the Tribunal to do so.

It was at one stage suggested by the learned Attorney-General that we should in the first instance remit the matter to the High Court for their decision on this question but as the question is one of law depending on the construction of the relevant sections of the Act it will save time if it is decided by us here and now. It is not disputed that we have the power, on the hearing of this appeal, to decide this question.

It will be recalled that when on 19th November, 1945, the Appellate Assistant Commissioner declined to admit the appeal, the assessee did not prefer any appeal but only made a miscellaneous application before the Appellate Tribunal. There is no provision in the Act permitting such an application. Indeed, in the statement of the case the Appellate Tribunal states that in entertaining that application and correcting the error of the Income-tax Officer it acted in exercise of what it regarded as its inherent powers. There being no appeal under section 33 (1) and the order having been made in exercise of its supposed inherent jurisdiction, the order cannot possibly be regarded as one under section 33 (4) and there being no order under section 33 (4) there could be no reference under section 66 (1) or (2) and the Appellate Court properly refused to entertain it.

The learned Attorney-General submits that this Court should not take such a narrow and technical view but should treat that miscellaneous application as really an appeal under section 33. Turning now to section 33 we find that any assessee objecting to an order passed by an Appellate Assistant Commissioner under section 28 or section 31 may appeal to the Appellate Tribunal within the time specified in sub-section (1) which time, however, may be extended by the Tribunal under sub-section (2-A). Under sub-section (4) the Appellate Tribunal is given power, after giving both parties to the appeal an opportunity to be heard, to pass such order thereon as it thinks fit. It is thus clear that the Appellate Tribunal can make an order under section 33 (4) only on an appeal from an order passed by the Appellate Assistant Commissioner under section 28 or section 31. If, therefore, there is no order which may properly be said to have been made by the Appellate Assistant Commissioner under section 28 or section 31 then there can be no appeal under section 33 (1) and consequently there can be no order under section 33 (4). Section 28 is not relevant for our present purpose. Section 30 provides for filing of appeals against assessments made under the Act. Sub-section (1) of that section prescribes the different decisions against which an appeal will lie. Sub-section

(2) prescribes the time within which the appeal is to be filed. Sub-section (3) prescribes the form in which the appeal is to be made. Then comes section 31 which gives power to the Appellate Assistant Commissioner to hear and dispose of such appeal. Sub-section (3) of section 31 empowers the Appellate Assistant Commissioner in disposing of an appeal under section 30 to make one or other order under one or other of the several clauses of that sub-section. It is, therefore, clear that in order that the Appellate Assistant Commissioner may exercise his jurisdiction and make an order under section 31, there must be an appeal as contemplated by section 30. The learned Attorney-General only relies on the opening part of sub-section (1) of section 30 and contends that the appeal before the Appellate Assistant Commissioner was with respect to the amount of income assessed under section 23 or section 27. It will be recalled that the Appellate Tribunal held that the two sums claimed by the assessee would be allowed to him and concluded by saying that the appeal was partly allowed. The power of the Appellate Tribunal under section 33 (4) is indeed wide, for on an appeal properly before it, it can make such order as it thinks fit. Therefore, the order made by the Appellate Tribunal in this case on 20th August, 1943, must be read and construed as a direction to the Income-tax Officer, to carry out the directions by allowing the two deductions in question. When the matter again came before the Income-tax Officer his function was only to carry out the order of the Appellate Tribunal. He could not otherwise reopen the assessment already made by him under section 23. Therefore, in carrying out the directions of the Tribunal and in doing what he did on 26th September, 1945, the Income-tax Officer cannot be regarded as having acted under section 23 or section 27 of the Act and that being the position no appeal lay from that order of the Income-tax Officer under section 30 (1) of the Act. The result of it was that there was no proper appeal before the Appellate Assistant Commissioner such as is contemplated by section 30 (1) and, therefore, the order made by the Appellate Assistant Commissioner cannot be regarded as an order made by him under section 31 (3), for an order under section 31 (3) can only be made in disposing of an appeal properly filed under section 30 and consequently no further appeal lay to the Appellate Tribunal under section 33 (1) so as to enable the Appellate Tribunal to make an order under sub-section (4) of that section. In the premises, there being no order which may properly be said to have been made under section 33 (4), no question of law can be said to arise out of an order made under section 33 (4) and consequently there can be no valid reference under section 66 sub-section (1) or sub-section (2). If, therefore, the reference was incompetent for want of jurisdiction both under section 66 (1) or section 66 (2) surely the High Court could decline to entertain it as it did.

Even if the order dated 26th September, 1945, made by the Income-tax Officer after the matter came back to him to give effect to the decisions of the Appellate Tribunal be regarded as an order made by him under section 23 or section 27 and as such appealable under section 30 (1) then the order made by the Appellate Assistant Commissioner on 19th November, 1945, declining to admit the appeal clearly amounted to a refusal on his part to exercise the jurisdiction vested in him by law. An order thus founded on an error as to his jurisdiction may conceivably be corrected by appropriate proceedings but it cannot certainly be regarded as such an order as is contemplated by any of the sub-sections of section 31. Such an order not coming within the purview of section 28 or section 31, no appeal lay therefrom to the Appellate Tribunal under section 33 (1) and if no such appeal properly came before the Appellate Tribunal it could not properly make an order under section 33 (4) and if there was no order under section 33 (4) there could be no reference under section 66, sub-section (1) or sub-section (2). It follows, therefore, that the order of the Appellate Tribunal correcting the order of the Income-tax Officer directing that the sum of Rs. 13,541 should not be included in the assessment cannot be regarded as an order passed by the Appellate Tribunal under section 33 (4) so as to attract the operation of section 66.

The learned Attorney-General urged that having under section 66 (2) of the Act directed the Appellate Tribunal to state a case the High Court could not afterwards refuse to answer the question thus referred to it. Whether the High Court was so precluded or not requires no decision on this occasion, for even conceding but not deciding that the High Court was so precluded, this Court, at any rate, can surely entertain the question of the competency of the reference.

The result, therefore, is that we dismiss these appeals with costs.

Agent for Appellant: *G. H. Rajadhyaksha.*

Agent for Respondent: *M. S. K. Aiyangar.*

G.R./K.S. *Appeals dismissed.*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT:—MEHRCHAND MAHAJAN, S. R. DAS, VIVIAN BOSE AND GHULAM HASAN, JJ.

Mohanlal Goenka .. *Appellant**

v.

Benoy Kishna Mukherjee and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *sections* 39 *and* 41—*Transferee Court sending under section* 41 *certificate of non-satisfaction to transferring Court—Subsequent application for execution without retransfer of decree or certificate—Jurisdiction of Court to execute—Failure to raise objection to jurisdiction—Bar of* res judicata *in subsequent proceedings.*

Per Das, J.—(*Mahajan, J. and Bose, J. concurring*).—The Civil Procedure Code does not prescribe any particular form for an application for tenasfer of a decree for execution to another Court. It is true that Order 21, rule 6, provides that the Court sending a decree for execution shall send a copy of the decree, a certificate setting forth that satisfaction of the decree had not been obtained by execution within the jurisdiction of the Court and a copy of the order for the execution of the decree but omission to send a copy of the decree or an omission to transmit to the Court executing the decree the certificate referred to in clause (*b*) does not prevent the decree-holder from applying for execution to the Court to which the decree has been transmitted. Such omission does not amount to a material irregularity within the meaning of Order 21, rule 90 and as such cannot be made a ground for setting aside a sale in execution.

Where after sending a certificate of non-satisfaction by the transferee executing Court under section 41, Civil Procedure Code, there has been no retransfer a second application for execution is made in the transferee Court the omission to retransfer the decree is a mere irregularity and does not affect the jurisdiction of the Court to execute the decree.

Per *Hasan, J.* (*Mahajan, J. and Das, J. agreeing with him*).—Where neither at the time when the execution application was made and a notice served upon the judgment-debtor, nor in the applications for setting aside the sales made by him did the judgment-debtor raise any objection to execution being proceeded with on the ground that the execution Court had no jurisdiction to execute the decree, the failure to raise such an objection which went to the root of the matter precludes him from raising the plea of jurisdiction on the principle of constructive *res judicata* after the property has been sold to the auction-purchaser who has entered into possession.

On appeal from the Judgment and Decree, dated the 10th February, 1950, of the High Court of Judicature at Calcutta (Harries, C.J. and Sarkar, J.) in Appeal from Original Order, No. 95 of 1945, arising out of Judgment and Order, dated the 30th January, 1945, of the Court of the Subordinate Judge at Asansol of Zillah Burdwan in Misc. Case No. 70 of 1941.

N. C. Chatterjee, Senior Advocate, (*B. C. Roy* and *A. K. Mukherjea*, Advocates, with him) for Appellant.

N. C. Sen Gupta, Senior Advocate (*B. L. Pal*, Advocate, with him), for Respondent No. 1.

The Court delivered the following Judgments:—

Mahajan, J.—In our opinion, the decision can be rested on either of the grounds which have been raised by our brothers Das and Ghulam Hasan respectively. We would therefore allow the appeal on both the grounds.

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* Civil Appeal No. 139 of 1951. 9th December, 1952.

Das, J.—I have had the privilege of perusing the judgment delivered by my learned brother Hasan and I agree with his conclusion that this appeal should be allowed. I would, however, prefer to rest my decision on a ground different from that which has commended itself to my learned brother and as to which I do not wish to express any opinion on this occasion.

The relevant facts material for the purpose of disposing of this appeal have been very clearly and fully set forth in the judgment of Hasan, J. and I need not set them out in detail here. Suffice it to say that on 12th June, 1931, the High Court, Original Side, which is the Court which had passed the decree, transmitted the same for execution to the Asansol Court through the District Judge of Burdwan and that the Asansol Court thereupon acquired jurisdiction to execute the decree against properties situate within its territorial limits. The application for execution made by the decree-holder which was numbered 296 of 1931 was, however, on 27th February, 1932, dismissed for default and on 11th March, 1932, the Asansol Court sent to the High Court what in form purported to be a certificate under section 41 of the Code. There is no dispute, however, that the Asansol Court did not return to the High Court the certified copy of the decree and other documents which had been previously transmitted by the High Court. The decree-holder on 24th November, 1932, filed in the Asansol Court another petition for execution of the decree against the same judgment-debtors with the same prayer for the realisation of the decretal amount by sale of the same properties as mentioned in the previous execution case. The application was registered as Execution Case No. 224 of 1932. The judgment-debtors' contention is that the certificate sent by the Asansol Court to the High Court on 11th March, 1932, was and was intended to be in form as well as in substance a certificate under section 41 of the Code, and that thereafter the Asansol Court ceased to have jurisdiction as the executing Court and that as there was no fresh transmission of the decree by the High Court the Asansol Court could not entertain Execution Case No. 224 of 1932 and consequently all subsequent proceedings in the Asansol Court were void and inoperative for lack of inherent jurisdiction in that Court. This contention was rejected by the Subordinate Judge of the Asansol Court in his judgment delivered on 30th January, 1945, in Misc. Case No. 70 of 1941, but found favour with the High Court in its judgment delivered on 10th February, 1950, which is now under appeal before us.

It appears that on 17th March, 1933, the decree-holder took out a Master's summons in the Original Side of the High Court being the Court which passed the decree in Suit No. 1518 of 1923 praying, *inter alia*, that the Official Receiver be discharged from further acting as Receiver in execution, that leave be given to the Asansol Court to sell the Colliery in execution of the decree dated 25th June, 1923, and the order dated 7th February, 1924 and that leave be given to the plaintiff to bid for and purchase the Sripur Colliery. This summons was supported by an affidavit affirmed by one Pramatha Nath Roy Chowdhury, an assistant in the employ of the plaintiff. This affidavit refers to the consent decree of 25th January, 1923, passed in the said suit and the additional terms of settlement embodied in the order of 7th February, 1924, the payments made by the judgment-debtors from time to time amounting to Rs. 30,437-8-0 besides a sum of Rs. 3,500 which had been paid on account of settled costs and states that the balance of the decretal amount was still due and that there had been no other adjustment of the decree. It refers to a previous application by tabular statement for execution of the decree by the appointment of a Receiver and by the sale of the Sripur Colliery which was charged under the order of 7th February, 1924, and to the order made by the High Court on that tabular statement on 21st June, 1926, appointing the Official Receiver of the High Court as Receiver of the Sripur Colliery. The affidavit then recites that the Official Receiver who had been given liberty to sell the Colliery on certain terms took steps to put up the same to sale but had been prevented from actually doing so by reason of an injunction obtained by one of the judgment-debtors Benoy Krishna Mukherjee in Suit No. 843 of 1928 filed by him. The affidavit further refers to the fact that the said Suit No. 843 of 1928 had since

then been dismissed and that no appeal had been preferred against that decree of dismissal and that no order had been made for stay of execution of the said decree. Paragraph 13 of the affidavit then states as follows :—

"That the plaintiff was advised that charge should be enforced and Sripur Colliery should be sold in execution of the said order by the Asansol Court in the local jurisdiction of which the Colliery is situate and the plaintiff accordingly by an order made on the 15th of April, 1931, obtained leave of the Court to execute the decree against Basantidas Chatterjee, Srimantodas Chatterjee and Bholanath Chatterjee as sons, heirs and legal representatives of the deceased Prankristo Chatterjee and the other defendants judgment-debtors and caused the certified copies of the decree dated 25th June, 1923 and the order, dated 7th February, 1924, to be transmitted to the District Judge at Burdwan who in his turn sent the decree to the Subordinate Judge of Asansol to execute the decree. Such execution proceedings are now pending before the Asansol Subordinate Judge's Court being Execution Proceedings, No. 224 of 1932."

In the circumstances the plaintiffs asked for directions on the lines mentioned in the summons. The summons was duly served on all the judgment-debtors as mentioned in the affidavit of service filed in Court and referred to in the order made by the Court on the Master's summons on 27th March, 1933. The operative part of the said order of the High Court was as follows :—

"It is ordered that Official Receiver of this Court who was appointed the Receiver in this suit of the Sripur Colliery pursuant to the said order dated the 21st day of June, 1926, be and he is hereby discharged from further acting as such Receiver as aforesaid. And it is further ordered that the said Receiver do pass his final accounts before one of the Judges of this Court and it is further ordered that the Subordinate Judge of Asansol be at liberty in execution of the said decree and order dated the 7th day of February, 1924, to sell either by public auction or by private treaty to the best purchaser or purchasers that can be got for the same provided the said Subordinate Judge shall consider that a sufficient sum has been offered the Sripur Colliery aforesaid charged under the said order dated the 7th day of February, 1924. And it is further ordered that the plaintiff be at liberty to bid for and purchase the said Colliery at the said sale and if declared the purchaser to set off the amount of the purchase money *pro tanto* against the balance of his claim under the said decree. And it is further ordered that the plaintiff be also at liberty to add his costs of and incidental to this application to be taxed by the Taxing Officer of this Court to his claim under the said decree."

The order sheet of execution case No. 224 of 1932 has not been printed *in extenso*, but there can be no doubt that this order of the High Court was communicated to the Asansol Court, for it was after this order that the Asansol Court proceeded with the execution case and the Sripur Colliery was sold for the first time on 9th June, 1933 and the decree-holder purchased the same for Rs. 20,000. This sale of course was eventually set aside but this order made by the High Court on the Original Side being the Court which passed the decree in Suit No. 1518 of 1923 appears to me to involve and imply, and may well be regarded as in substance amounting to, an order for transmission of the decree to the Asansol Court for execution under section 39 of the Code of Civil Procedure. The Civil Procedure Code does not prescribe any particular form for an application for transmission of a decree under section 39. Under sub-section (2) of that section the Court can even *suo motu* send the decree for execution to another Court. It is true that Order 21, rule 6 provides that the Court sending a decree for execution shall send a copy of the decree, a certificate setting forth that satisfaction of the decree had not been obtained by execution within the jurisdiction of the Court and a copy of the order for the execution of the decree but there is authority to the effect that an omission to send a copy of the decree or an omission to transmit to the Court executing the decree the certificate referred to in clause (*b*) does not prevent the decree-holder from applying for execution to the Court to which the decree has been transmitted. Such omission does not amount to a material irregularity within the meaning of Order 21, rule 90 and as such cannot be made a ground for setting aside a sale in execution. Further, the fact remains that the certified copy of the decree and the certificate of non-satisfaction which had been sent by the High Court to the Asansol Court on 15th April, 1931, through the District Judge of Burdwan who forwarded the same to the Subordinate Judge at Asansol were still lying on the records of that Court and the sending of another certified copy of the decree and a fresh certificate of non-satisfaction by the High Court would have been nothing more than a formality. In the circumstances, the omission to send those documents over again to the Asansol Court was a mere irregularity

which did not affect the question of jurisdiction of the executing Court. In my opinion, after the order made by the High Court on 27th March, 1933, had been communicated to the Asansol Court the Asansol Court became fully seized of jurisdiction as the executing Court and none of the proceedings had thereafter in that Court can be questioned for lack of inherent jurisdiction.

I would, therefore, on this ground alone accept this appeal and concur in the order proposed by my learned brother.

Ghulam Hasan, J.—This case is illustrative of the difficulties which a decree-holder has to encounter in recovering the money in execution after he has obtained the decree of Court. It is one of those cases, by no means rare, in which the execution proceedings in the Courts below have dragged on to inordinate lengths and led to consequent waste of public time and expense to the parties.

The decree in the present case was passed upon a compromise in suit No. 1518 of 1923 on the original side of the Calcutta High Court as long ago as 25th June, 1923, in favour of one Nagarmull Rajghoria against Pran Krishna Chatterjee and five others, hereinafter referred to as the Chatterjees. The decree was for a sum of Rs. 75,000 with interest at twelve per cent. per annum with quarterly rests. The Chatterjees hypothecated their Koradanga Colliery as security for the payment of the decretal amount. Subsequent to this decree the Chatterjees entered into an agreement with one Benoy Krishna Mukherjee hereinafter referred to as Mukherjee on 24th January, 1924, appointing the latter as Managing Agent of the aforesaid Colliery whereby he became entitled to receive royalty of another Colliery called Sripur Colliery. The decree was adjusted on 18th March, 1924, by making Mukherjee liable as surety and by the Chatterjees charging their Sripur Colliery as additional security. The hypothecated properties were situate at Asansol and Nagarmull obtained an order from the High Court for permission to execute the decree at Asansol with the direction that a certified copy of the decree, a copy of the order of transmission and a certificate of partial satisfaction of the decree should be transferred to the Court of the Subordinate Judge at Asansol. This order was passed on 15th April, 1931, and the three documents aforementioned were sent to the transferee Court at Asansol through the District Judge, Burdwan, on 12th June, 1931 (Order 21, rule 6, Civil Procedure Code).

On 20th August, 1931, Nagarmull filed his first application for execution of the decree by sale of Sripur Colliery. The execution case is numbered as 296 of 1931. Notices under Order 21, rule 22, rule 54 and rule 66 of the Civil Procedure Code were issued and served on various dates. The case was fixed for 16th February, 1932. On this date Nagarmull applied for time to prove service of the notices and the case was adjourned to 23rd February, 1932. He again applied for time on that date and the case was adjourned to 27th February, 1932. On this latter date Nagarmull was again not ready and asked for more time. But this was refused, and the execution case was dismissed for default without any amount being realized under the decree. The transferee Court sent to the High Court what purported to be a certificate under section 41 of the Civil Procedure Code, stating that the execution case was dismissed for default on 27th February, 1932. Neither the copy of the decree, nor any covering letter as required by the rules of the High Court was sent along with the certificate. The certificate was received by the High Court on 11th March, 1932.

It appears that the decree-holder filed a second application for execution of the decree on 24th November, 1932, by sale of the Sripur Colliery. This case was numbered as execution case 224 of 1932. Notices under Order 21, rule 22 and rule 66 of the Civil Procedure Code were duly served and the executing Court ordered the issue of a sale proclamation fixing 3rd April, 1933, as the date of the sale. It appears that the decree-holder received only partial satisfaction of the decree out of the sale proceeds of Koradanga Colliery which had been sold at the instance of the superior landlords and by certain cash payments. He applied for execution of the decree by appointment of a Receiver and by sale

of the Sripur Colliery. The Receiver was appointed on 21st June, 1926, and he was directed to sell the Sripur Colliery to the highest bidder permitting the decree-holder at the same time to bid for and purchase the property, but he was restrained from proceeding with the sale by an order of Court passed in a certain suit filed by Mukherjee against the decree-holder. This suit was dismissed by the High Court. Accordingly the decree-holder applied on 17th March, 1933, to the High Court praying that the Receiver be discharged and leave be given to the executing Court to sell the Sripur Colliery in execution of the decree of 25th June, 1923, in which execution proceedings, No. 224 of 1932 were pending at the time. He also asked that leave be given to him to bid for and to purchase the property. Notices of this application were duly served on the parties and on 27th March, 1933, the High Court granted all the prayers (Exhibit F-5). The property was sold on the 9th of June, 1933, and was purchased by the decree-holder for Rs. 20,000. Mukherjee, however filed an application on 7th July, 1933, under section 47 and Order 21, rule 90 of the Civil Procedure Code for setting aside the sale. The application was numbered as Miscellaneous Case No. 53 of 1933. The Chatterjees also started two miscellaneous cases Nos. 54 and 55 of 1933 on 8th July, 1933. During the pendency of the three miscellaneous cases, the appellant Mohanlal Goenka purchased the decree on 10th January, 1934. Miscellaneous Case No. 53 of 1933 was allowed and the sale was set aside on 29th January, 1934, and Cases Nos. 54 and 55 of 1933 were dismissed for default. The result of these miscellaneous cases was communicated to the High Court in a document which purports to be a certificate under section 41 of the Civil Procedure Code and was received on 1st February, 1934. Two appeals were preferred by the decree-holder on 18th April, 1934, but the order setting aside the sale was confirmed and resale of the Sripur properties was ordered by the High Court. The properties were again sold on 22nd August, 1936, and were purchased by the decree-holder for Rs. 12,000. Mukherjee filed an appeal in the High Court and during the pendency of the appeal he filed an application under section 47 and Order 21, rule 90 of the Civil Procedure Code for setting aside the sale. The appeal was disposed of by consent of parties and it was agreed that the application under Order 21, rule 90 be heard by the executing Court. Accordingly the application was heard and the sale set aside. Mukherjee then applied under section 47 on 4th April, 1938, stating that Mohanlal Goenka could not continue the proceedings started by Nagarmull but the application was dismissed and 22nd May 1938, was fixed for the sale of the property. He filed an appeal in the High Court which was dismissed under Order 41, rule 11 of the Civil Procedure Code. The property was sold for the third time and was purchased by the decree-holder for Rs. 2,50,000 on 27th May, 1938. Mukherjee applied under section 47 and Order 21, rule 90 of the Civil Procedure Code for setting aside this sale on 27th June, 1938 (Exhibit E-4)—(Miscellaneous Case No. 76 of 1938). The application was dismissed on 30th June, 1938, and the sale was confirmed. Execution Case No. 224 of 1932 was dismissed for part satisfaction. The executing Court on 9th July, 1938, sent to the High Court a certificate under section 41 of the Civil Procedure Code, accompanied with a covering letter communicating the result of the execution case. This was received by the High Court on 12th July, 1938. Mukherjee carried the matter in appeal to the High Court but the appeal was dismissed on 5th August, 1940 (Exhibit F). Mukherjee filed an application for review under Order 47, rule 1 of the Civil Procedure Code against the aforesaid order on 25th November, 1940 (Exhibit B). He also filed on 28th November, 1940, an application for leave to appeal to the Privy Council (Exhibit A). The review application was dismissed on 8th May 1941, and leave was refused on 16th June, 1941. On 12th May, 1941, Mukherjee filed an application under sections 47 and 151 of the Civil Procedure Code (Miscellaneous Case No. 70 of 1941) and it is this application which has given rise to the present appeal before us. The application was supported by an affidavit filed on 26th May, 1941.

The present appellant filed an objection on 5th July, 1941, to the application. The application was dismissed by the Subordinate Judge on 30th January, 1945,

but the order was set aside on appeal by the High Court on 10th February, 1950. Leave to appeal to this Court was granted by the High Court on 28th July, 1950.

The case put forward by Mukherjee before the Subordinate Judge was that after the dismissal of Execution Case No. 296 of 1931 on 27th February, 1932, and the sending of a certificate under section 41 to the High Court, the decree was never again transferred to the Asansol Court for execution. According to him, the decree-holder fraudulently detached the certificate of non-satisfaction from the Execution Case No. 296 of 1931 and attached it to the second Execution Case No. 224 of 1932, inducing the Court to believe that the certificate had been obtained from the High Court for taking fresh proceedings in execution. Mukherjee has instituted title suit No. 3 of 1936 to recover some money and to enforce a charge against the Sripur Colliery and for permission to redeem the charge declared in favour of the decree-holder if it was prior to his own claim. The suit was dismissed but on appeal the High Court allowed him to redeem the charge in favour of the decree-holder. In order to ascertain the amount of the charge Mukherjee instructed his attorney to search the record of suit No. 1518 of 1923 and he came to know for the first time on 23rd August, 1940, that after the dismissal of the first application a certificate under section 41 of the Civil Procedure Code had been sent by the Asansol Court to the High Court and the latter never re-transferred the decree for execution. Accordingly his case was that the Asansol Court had no jurisdiction to entertain Execution Case No. 224 of 1932, and all the proceedings in connection therewith were null and void. He therefore urged that the auction sale should be set aside. The present appellant denied the allegations of the judgment-debtor. He pleaded that no certificate under section 41 of the Civil Procedure Code was sent to the High Court in Execution Case No. 296 of 1931 and the Execution Court retained jurisdiction throughout, that the High Court had authorised the sale of the property in execution of the decree and that no fresh certificate of non-satisfaction was required to give jurisdiction to the Asansol Court to proceed with Execution Case No. 224 of 1932. The judgment-debtor was aware that the copy of the decree and the certificate of non-satisfaction were not sent to the High Court and he could not possibly have laboured under a wrong impression that a fresh certificate had been sent by the High Court for taking execution proceedings and that the decree-holder practised no fraud upon him. He also pleaded that the application was barred by limitation, that it was barred by the principle of *res judicata* as the objection now raised had previously been made and either not pressed, or rejected and that the judgment-debtor was fully aware of all the proceedings that had taken place in connection with the decree. The Subordinare Judge framed the following three main issues in the case :—

1. Is this Miscellaneous Case maintainable under section 151 of the Civil Procedure Code?

2. Did this Court act in accordance with section 41, Civil Procedure Code? If so, was the decree-retransmitted to this Court for fresh execution in 1932? If not, had this Court jurisdiction to execute the decree again in 1932?

3. Is this Miscellaneous Case barred according to the principle of *res judicata*?

Upon the first point the learned Subordinate Judge held that the executing Court did not lose jurisdiction to execute the decree, that the allegation about the detaching of certificate of non-satisfaction from the records in the custody of the Court and its surreptitious insertion in Execution Case No. 224 of 1932 constitute grounds for a suit, and a fresh application under section 151 of the Civil Procedure Code was not maintainable. Upon the second point the Court held that having regard to the circumstances of the case, no certificate of non-satisfaction of the decree as required by section 41 was sent by the executing Court to the High Court, that no re-transmission of the decree by the High Court was required to start Execution Case No. 224 of 1932 and that the executing Court retained seisin of the execution and could execute the same without a further direction from the High Court. Upon the third point, the learned Subordinate Judge held that Mukherjee has alleged in paragraph 15 of his petition in Miscellaneous Case No. 53 of 1933 that the decree and the certificate were not sent by the High Court for

starting the Execution Case afresh, but this objection to jurisdiction was not pressed at the time of the hearing. Again in paragraph 20 of his petition in Miscellaneous Case No. 76 of 1938 he had urged the same point but it was not pressed. Mukherjee admitted in his evidence as P.W. 4 that all his applications were drawn up according to his instructions but despite this fact he did not press the allegations made in the Miscellaneous Cases. It was accordingly held on the authority of *Annada Kumar Roy* v. *Sheik Madan*[1] and *Mahadeo Prasad Bhagat* v. *Bhagwat Narain Singh*[2] that the principle of constructive *res judicata* is applicable to execution proceedings. The view taken by the Court was that having made the allegations in the Miscellaneous Cases and then abandoned them, the judgment-debtor was precluded from raising the plea of jurisdiction of the Court to execute the decree. Mukherjee preferred an appeal to the High Court. The matter came up before Harries, C.J. and Sarkar, J. The learned Chief Justice held that the Asansol Court not only sent what purported to be a certificate under section 41 of the Civil Procedure Code to the High Court, but intended such certificate to be a certificate of non-satisfaction. He did not agree with the Subordinate Judge that the document was not intended to be a certificate and was merely an intimation that the first attempt at execution had failed. In the view of the learned Chief Justice there was no need for the Court at Asansol to send any intimation at all. The learned Chief Justice agreed that upon a true construction of section 41, failure to execute the decree at the first attempt for non-appearance of the decree-holder was not the total failure to execute the decree as contemplated in that section. He, however, held that the fact that the certificate was sent when it should not have been sent cannot affect the question if, as he held, the certificate was intended to be a certificate of non-satisfaction. The learned Chief Justice referred to a number of authorities in support of his conclusion. He accordingly held that the Asansol Court had ceased to have jurisdiction to execute the decree and was not entitled to entertain the second application for execution. Upon the question of *res judicata* the learned Chief Justice observed that

"a judgment delivered by a Court not competent to deliver it cannot operate as *res judicata* and the order of the Subordinate Judge of Asansol, being wholly without jurisdiction cannot be relied upon to found a defence upon the principle of *res judicata*."

He went on to say :

"It is true that the appellant could and should have raised the question in the second execution case that the Asansol Court had no jurisdiction in the absence of a certificate of non-satisfaction from the High Court to entertain the application. But in my view though this point was neither made nor pressed, these orders of the learned Subordinate Judge in the second execution application cannot be urged as a bar to the present application under the doctrine of *res judicata*. It is true that section 11 of the Code of Civil Procedure does not apply to execution proceedings, but it has been held by their Lordships of the Privy Council that the principles of the law relating to *res judicata* do apply to execution proceedings and Mr. Atul Gupta has urged that the present application is barred by *res judicata*. . . ."

He drew a distinction between the case of an irregular assumption of jurisdiction and want of inherent jurisdiction and holding that the order of the Subordinate Judge at Asansol fell under the latter category, he came to the conclusion that the order is wholly null and void and cannot be pleaded in bar of the application on the principle of *res judicata*.

It has been contended before us on behalf of the appellant (assignee decree-holder) that the execution Court at Asansol never lost jurisdiction over the execution proceedings and that what purported to be a certificate under section 41 of the Civil Procedure Code was no more than a mere intimation to the High Court that the execution case had been dismissed only for default, that it was no failure to execute the decree within the meaning of section 41 of the Civil Procedure Code, that in any case the subsequent orders of the High Court passed from time to time in the presence of the parties conferred jurisdiction upon the execution Court to proceed with the execution and that in any event the question whether the execution Court had or had not jurisdiction to execute the decree was barred

1. (1933) 38 C.W.N. 141. 2. A.I.R. 1938 Patna 427.

by the principle of *res judicata*. Having heard learned counsel for the parties, we are of opinion that the appeal can be disposed of on the ground of *res judicata* without entering into other questions.

It cannot be disputed that the transferee Court was invested with jurisdiction by the High Court when its decree was transferred to it for execution. The first application for execution of the decree was dismissed for default on 27th February, 1932, and a document purporting to be a certificate of non-satisfaction under section 41 of the Civil Procedure Code was sent by the execution Court to the High Court. The decree was admittedly not retransmitted for execution by the High Court. Despite this fact the decree-holder made a second application for execution on 24th November, 1932 (Execution Case No. 224 of 1932). Notice was duly served upon the judgment-debtor but he preferred no objection before the execution Court that it had no jurisdiction to execute the decree. This is the first occasion on which he could have raised the plea of jurisdiction. The second occasion arose when the decree-holder filed an affidavit (Exhibit C) before the High Court on 17th March, 1933, praying that certain directions should be given to the execution Court for the sale of Sripur properties and for an order discharging the Receiver. Notice was duly served upon the judgment-debtors, including Mukherjee (Exhibit 13) and the order granting the prayers of the decree-holder was passed on 27th March, 1933 (Exhibit F-5). The judgment-debtor could have pointed out that the Asansol Court was *functus officio* after sending the certificate under section 41 and had no further jurisdiction to sell the property in execution but no such objection was raised. This order clearly recites that notice was sent to the Chatterjees as well as to Mukherjee and was proved by an affidavit to have been duly served upon them. The decree-holder's prayer was granted and in pursuance of the order of the High Court the property was sold and was purchased by the decree-holder for Rs. 20,000, whereupon Mukherjee started Miscellaneous Case No. 53 of 1933, for setting aside the sale. In this application (Exhibit E) the judgment-debtor raised the question of jurisdiction in para. 19 which runs thus:—

"As the said decree has not been sent to this Court for execution nor has any certificate come to this Court therefore the execution proceedings and the auction sale are wholly irregular, illegal, fraudulent and collusive."

The order of the Subordinate Judge dated 29th January, 1934, by which he set aside the sale does not mention that the plea raised in para. 19 of the application was pressed. The decree-holder who was aggrieved by this order preferred two appeals Nos. 254 and 255 of 1934. The order of the High Court (Exhibit F-2) dated 11th July, 1935, shows that the decision of the Subordinate Judge setting aside the sale was confirmed. It appears that the judgment-debtors had raised the question that the decree could not be executed without the decree-holder applying for making the decree absolute. In view of this dispute the learned Judges added in the order that although they were confirming the order of the Subordinate Judge setting aside the sale, the judgment-debtors will not be entitled to raise any objection as to the nature of the decree which in their opinion was executable under the terms of the compromise arrived at by the parties concerned. Here again no objection was raised by the judgment-debtors that the execution Court had no jurisdiotion to execute the decree and sell the property.

The next occasion when the objection to jurisdiction should have been raised was when the property was to be resold. Mukherjee started Miscellaneous Case No. 52 of 1936 on 2nd April, 1936 (Exhibit I) in which he raised all sorts of objections to the execution but nowhere stated that the execution Court had no jurisdiction to sell the property after the certificate under section 41, of the Civil Procedure Code, had been sent to the High Court. The property was sold for the second time and was purchased by the decree-holder on 22nd April, 1936. Mukherjee preferred an appeal No. 238 of 1936 and at the same time started a Miscellaneous Case No. 80 of 1936 in the execution Court to set aside the sale. No plea of jurisdiction was raised either in the grounds of appeal to the High Court or in the application for setting aside the execution sale. The appeal was disposed of

by consent of parties with the direction that Miscellaneous Case No. 86 of 1936 should be reheard by the execution Court. The sale was set aside on rehearing. Mukherjee then started Miscellaneous Case No. 40 of 1938 under section 47 of the Civil Procedure Code on 4th April, 1938. The objection of lack of jurisdiction in the execution Court was again missing in this application. The application was dismissed and the appeal against it was also dismissed on 25th May, 1938.

When the property was sold for the third time, Mukherjee started Miscellaneous Case No. 76 of 1938 on 27th June, 1938, for setting aside the sale (Exhibit E-4). In para. 20 of his application he stated —

"That this Court has no jurisdiction to entertain this application for execution without a fresh certificate (*sic*) the Court passing the decree under execution. The previous certificate creating jurisdiction in the present Court has long expired after the dismissal of the previous execution case. The whole proceeding and the sale thereunder not only illegal and materially irregular but is absolutely void for want of jurisdiction."

This plea was apparently not pressed and the Miscellaneous Case was dismissed on 30th June, 1938. Mukherjee filed an appeal F.M. A. No. 262 of 1938 (Exhibit F) on 23rd August, 1938, but the appeal was dismissed on 5th August, 1940, on the ground that there was no material irregularity in publishing the sale and the colliery had not been sold at an inadequate price on account of any such irregularity. This again shows that no question of jurisdiction was raised before the learned Judges of the High Court. Then followed the review application (Exhibit B) presented on 25th November, 1940, to the High Court. Paras. 11, 12 and 13 of this application are important and they run as follows :—

"11. That after passing the judgment in F.A. No. 246 of 1937 on 13th August, 1940, your petitioner got the records of Suit No. 1518 of 1923 of the Original Side of this Hon'ble Court searched for ascertaining the amount due under the decree of the said suit and came to know for the first time on 23rd August, 1940, that after dismissal of the old Execution Case No. 296 of 1931 by the Subordinate Judge of Asansol on 27th February, 1932, the result of the said execution case was sent to the Original Side of this Hon'ble Court under section 41, Civil Procedure Code and that was received on 11th March, 1932, and that no fresh certificate of non-satisfaction of the decree was sent by the Original Side of this Hon'ble Court for fresh execution and so there was no basis on which the Execution Case No. 224 of 1932 could be started in the Court of the Subordinate Judge of Asansol.

12. That your petitioner submits that the copies of the decree and certificate of non-satisfaction were taken by the decree-holder on detaching the same from the records of old used Execution Case No. 296 of 1931 and fraudulently used afterwards in Execution Case No. 224 of 1932 by practising fraud upon the Court.

13. That your petitioner further begs to submit that he was misled by order of the Court of the Subordinate Judge which runs as follows :—

Register. Let the certificate of non-satisfaction received be annexed to the record."

This application was rejected on 8th May, 1941, and the order of the learned Judges which is brief may be reproduced in full :—

"The ground for review is that after the dismissal of the said appeal the petitioner discovered that the execution proceedings in which the sale took place was held by the executing Court although that Court did not receive any certificate of non-satisfaction from the Court which passed the decree under execution. This objection does not properly come for investigation in a proceeding under Order 21, rule 90, Civil Procedure Code. Even if the allegation of the petitioner about the discovery of new matter is correct, it cannot affect the decision of the appeal which we have dismissed."

The foregoing narrative of the various stages through which the execution proceedings passed from time to time will show that neither at the time when the execution application was made and a notice served upon the judgment-debtor, nor in the applications for setting aside the two sales made by him did the judgment-debtor raise any objection to execution being proceeded with on the ground that the execution Court had no jurisdiction to execute the decree. The failure to raise such an objection which went to the root of the matter precludes him from raising the plea of jurisdiction on the principle of constructive *res judicata* after the property has been sold to the auction-purchaser who has entered into possession. There are two occasions on which the judgment-debtor raised the question of jurisdiction for the first time. He did not, however, press it with the result that the objection must be taken to have been impliedly overruled. One such occasion was when the property was sold for the second time and was purchased by the

decree-holder for Rs. 20,000. In paragraph 19 of his application dated 7th July, 1933 (Exhibit E) to set aside the sale he challenged the jurisdiction of the Court, but the order of the Court dated the 29th January, 1934, does not show that the plea was persisted in. The second occasion was when the property was sold for the third time and in his application (Exhibit E-4) dated 27th June, 1938, for setting aside the sale he raised the question in para. 20. The objection application was dismissed but there is no trace of the judgment-debtor having pressed this objection. When he preferred an appeal to the High Court, he did not make the plea of jurisdiction a ground of attack against the execution of the decree and the appeal was dismissed on other points. Finally he filed a review application and in paras. 11, 12 and 13 he raised the objection to execution in more elaborate words, but the application was rejected by the High Court on the ground that such an objection did not fall within the purview of Order 21, rule 90 of the Code of Civil Procedure. This order therefore became final. The judgment-debtor admitted that the two applications (Exhibits E and E-4) were prepared according to his instructions. It is not possible therefore for the judgment-debtor to escape the effect of the above orders which became binding upon him.

That the principle of constructive *res judicata* is applicable to execution proceedings is no longer open to doubt . . . . See *Annada Kumar Roy and another* v. *Sheik Madan and others*[1] and *Mahadeo Prasad Bhagat* v. *Bhagwat Narain Singh*[2]. In the first case an application was made by a certain person for execution of a decree and no objection was raised that the decree was not maintainable at the instance of the applicant and the application was held to be maintainable. It was held that no further objection on the score of the maintainability of a fresh application for execution on the part of the same applicant could be raised. In the second case a money decree had been obtained on the foot of a loan which was the subject-matter of a mortgage and the property was sold in execution. The judgment-debtor raised the question of the validity of the execution proceedings and objected that the execution Court had no jurisdiction to sell the property in execution of a money decree as no sanction of the Commissioner had been obtained under section 12-A, Chota Nagpur Encumbered Estates Act. The objection was not decided but the objection petition was dismissed with the result that the property came into the possession of the auction-purchaser. In an action for a declaration that the sale to the purchaser was void for want of sanction of the Commissioner it was held that as the point was raised, although not decided in the objection petition under section 47, it was *res judicata* by reason of Expl. 4 to section 11.

The Privy Council as early as 1883 in *Ram Kirpal Shukul* v. *Mussamat Rup Kuari*[3], held that the decision of an execution Court that the decree on a true construction awarded future mesne profits was binding between the parties and could not in a later stage of the execution proceedings be set aside. Their Lordships ruled that the binding force of such a decision depends upon general principles of law and not upon section 13, Act X of 1877, corresponding to section 11 of the present Code. In that case the Subordinate Judge and the District Judge had both held that the decree awarded mesne profits, but their decision was reversed by the Calcutta High Court. The Full Bench of that Court also held that the law of *res judicata* did not apply to proceedings in execution of the decree. This decision was reversed in appeal by the Privy Council. At page 43 Sir Barnes Peacock, who delivered the judgment of the Board, observed :—

"The High Court assumed jurisdiction to decide that the decree did not award mesne profits but, whether their construction was right or wrong, they erred in deciding that it did not, because the parties were bound by the decision of Mr. Probyn, who, whether right or wrong, had decided that it did ; a decision which, not having been appealed, was final and binding upon the parties and those claiming under them."

In *Raja of Ramnad* v. *Velusami Tevar and others*[4], an assignee of a partially executed decree applied to the Subordinate Judge to be brought on the record

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1. (1933) 38 C.W.N. 141.
2. A.I.R. 1938 Pat. 427 at 428.
3. (1883) L.R. 11 I.A. 37 : I.L.R. 6 All. 269 (P.C.).
4. (1920) 40 M.L.J. 197 : L.R. 48 I.A. 45 (P.C.).

in place of the decree-holder. The judgment-debtor denied the assignment and the liability of certain properties to attachment and alleged that the right to execute the decree was barred by limitation. The Subordinate Judge recognised the assignment, allowed the assignee to execute the decree and gave his permission to file a fresh application for attachment. This order was not appealed against. In the final proceedings the Subordinate Judge permitted the judgment-debtors to raise again the plea of limitation. In the course of the judgment Lord Moulton observed as follows :—

> " Their Lordships are of opinion that it was not open to the learned Judge to admit this plea. The order of 13th December, 1915, is a positive order that the present respondent should be allowed to execute the decree. To that order the plea of limitation, if pleaded, would according to the respondents' case have been a complete answer, and therefore it must be taken that a decision was against the respondents on the plea. No appeal was brought against that order, and therefore it stands as binding between the parties. Their Lordships are of opinion that it is not necessary for them to decide whether or not the plea would have succeeded. It was not only competent to the present respondents to bring the plea forward on that occasion but it was incumbent on them to do so if they proposed to rely on it, and moreover it was in fact brought forward and decided upon."

Sha Shivraj Gopalji v. *Edappakath Ayissa Bi and others*[1] : In this case the decree-holder in the earlier execution proceedings could have raised a plea that the judgment-debtor had an interest in certain property which could be attached under his decree but the plea was not raised through his own default and the execution was dismissed. It was held under such circumstances that the dismissal operates as *res judicata* in the subsequent execution proceedings and even apart from the provisions of section 11 of the Civil Procedure Code, it is contrary to principle to allow the decree-holder in fresh proceedings to renew the same claim merely because he neglected at a proper stage in previous proceedings to support his claim by the argument of which he subsequently wishes to avail himself.

There is ample authority for the proposition that even an erroneous decision on a question of law operates as *res judicata* between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as *res judicata.* A decision in the previous execution case between the parties that the matter was not within the competence of the executing Court even though erroneous is binding on the parties : see *Abhoy Kanta Gohain* v. *Gopinath Deb Goswami and others*[2].

The learned Chief Justice concedes that the principle of *res judicata* applies to the execution proceedings but he refused to apply it to the present case on the ground that there was lack of inherent jurisdiction in the execution Court to proceed with the execution. He relied upon *Ledgard and another* v. *Bull*[3]. This case is distinguishable upon the facts. This was a suit instituted before the Subordinate Judge for infringement of certain exclusive rights secured to the plaintiff by three Indian patents. Under the Patents Act the suit could be brought only before the District Judge. The defendant raised an objection to the jurisdiction of the Court. It appears that subsequently the defendant joined the plaintiff in petitioning the District Judge to transfer the case to his own Court. This was done. The suit was transferred under section 25 of the Civil Procedure Code. It was admitted that the suit could not be transferred unless the Court from which the transfer was sought to be made had jurisdiction to try it. The defendant adhered to the plea of jurisdiction throughout the proceedings but it was urged that by his subsequent conduct he had waived the objection to the irregularity in the institution of the suit. Their Lordships held that although a defendant may be barred by his own conduct from objecting to the irregularity in the institution of the suit, yet where the Judge had no inherent jurisdiction over the subject-matter of the suit, the parties cannot by their mutual consent convert it into a proper judicial process. This decision has no bearing upon the present case as no question of constructive *res judicata* arose in that case.

1. (1949) 2 M.L.J. 493 : A.I.R. 1949 P.C. 302 : 54 C.W.N. 54 (P.C.).
2. A.I.R. 1943 Cal. 460.
3. (1886) L.R. 13 I.A. 134: I.L.R. 9 All. 191 (P.C.).

The cases of *Gurdeo Singh* v. *Chandrikah Singh* and *Chandrikah Singh* v. *Rashbehary Singh*[1] and *Rajlakshmi Dasee* v. *Katyayani Dasee*[2], are both distinguishable as they did not involve any question of constructive *res judicata*.

Two cases of the Allahabad High Court (1) *Lakshmichand and others* v. *Madho Rao*[3], (2) *Raghubir Saran and another* v. *Hori Lal and another*[4] were also relied upon in the judgment under appeal. The first was a case of the grant of assignment of the land revenue of a village in favour of the grantee. He mortgaged it and a suit brought on foot of the mortgage was decreed. In a subsequent suit for a declaration that the previous decree of the Court was null and void by reason of the fact that the suit was not cognizable in the absence of a certificate from the Collector as required by the Pensions Act authorizing the trial of such a suit, it was held that the decree was one without jurisdiction and that it did not operate as *res judicata* in the subsequent suit for which the certificate was obtained. It was obvious that the statutory provisions of the Act forbade the trial of any suit without the certificate of the Collector. There was, therefore, an initial lack of jurisdiction to try the case and the case is inapplicable to the facts of the present case. The second case which involved the question of territorial jurisdiction was in our view not correctly decided. There a suit against a minor for enforcement of the mortgage was decreed in respect of property which was beyond the territorial jurisdiction of the Court passing the decree. When the decree was transferred for execution to the Court within whose jurisdiction the property was situate, it was objected that the decree was a nullity. The objection was overruled and the objector was referred to file a regular suit. In the regular suit filed by him it was decided that an independent suit was maintainable for avoiding the decree although no objection was raised to jurisdiction in the Court passing the decree. It was also held that the bar of section 11, Explanation 4 of the Code of Civil Procedure did not apply to the case. We think that although section 21 of the Code of Civil Procedure did not apply in terms to the case, there is no reason why the principle underlying that section should not apply even to a regular suit. The objection to jurisdiction must be deemed to have been waived and there was no question of inherent lack of jurisdiction in the case. The suit was clearly barred by the principle of *res judicata* and was wrongly decided. The question which arises in the present case is not whether the execution Court at Asansol had or had not jurisdiction to entertain the execution application after it had sent the certificate under section 41 but whether the judgment-debtor is precluded by the principle of constructive *res judicata* from raising the question of jurisdiction. We accordingly hold that the view taken by the High Court on the question of *res judicata* is not correct.

We allow the appeal, set aside the judgment and the decree of the High Court and restore that of the Subordinate Judge dismissing the application of the judgment-debtor. The appellant will be entitled to his costs here and hitherto.

Agent for Appellant: *P. K. Chatterjee.*

Agent for Respondent No. 1 : *R. R. Biswas.*

G.R./K.S.

Appeal allowed.

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1. (1907) I.L.R. 36 Cal. 193.
2. (1910) I.L.R. 38 Cal. 639.
3. (1930) I.L.R. 52 All. 868.
4. (1931) I.L.R. 53 All. 560.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATARAMA AIYAR.

Nagarathna Mudali and others .. *Petitioners**

v.

Mayandi Venkatesa Mudali and others .. *Respondents.*

Court-Fees Act (VII of 1870), section 7 (v) and Article 17-B—Suit by coparcener for partition of joint family properties—Some members of the coparcenary adjudicated insolvents—Official Receiver in possession of the properties—Proper Court-fee payable.

In a suit for partition of family properties by one branch of the joint family and where certain members of the joint family have been adjudicated insolvent and the Official Receiver as representing their interests was authorised to sell the properties the proper Court-fee payable is under Article 17-B of the Court-fees Act and not under section 7 (v). The effect of the insolvency is not to put an end to the joint possession of the coparceners and whatever the rights of the Official Receiver might be, the coparceners must be deemed to be in possession at least constructively of all the joint family properties.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Chittoor, dated 12th February, 1952, in O.S. No. 105 of 195 .

S. Somasundaram and *N. V. Sundaram* for Petitioners.

S. V. Venugopalachari for Respondents.

The Court delivered the following

JUDGMENT.—The question that arises in this revision petition is as to the court-fee payable on the plaint in O.S. No. 105 of 1951 on the file of the Court of the Subordinate Judge of Chittoor. There was a joint family consisting of two branches, one branch being represented by the second defendant and the other branch being represented by defendants 1 and 3. In I.P. No. 69 of 1935 on the file of the Sub-Court, Chittoor, defendants 1 and 2 were adjudicated insolvents. The third defendant then filed a suit for partition, O.S. No. 163 of 1937 on the file of the Court of the District Munsif of Sholinghur, and a decree was passed therein, the terms of which are set out in paragraph 7 of the plaint. In substance, the Official Receiver as representing the interests of defendants 1 and 2 was authorised to sell the properties and discharge the debts. The present suit has been filed by the sons of defendants 1 and 2 for partition of their shares in the joint family properties. An objection was taken as to the court-fee payable on the plaint.

The plaintiffs paid a fixed court-fee of Rs. 100 under Article 17-B of the Second Schedule of the Court-Fees Act which of course should be the proper article applicable if the plaintiffs were in possession of the joint family properties actually or constructively. The Official Receiver did not contest the position that the plaintiffs and defendants 1 and 2 should be regarded as members of a joint undivided Hindu family. Indeed he claimed that that being the position he was entitled to sell the properties under the Hindu law for discharging proper debts. The Subordinate Judge has however held that there was no proof that the plaintiffs were in possession of the properties along with the Official Receiver and therefore directed the plaintiffs to pay court-fee as in a suit for ejectment under section 7, clause (v) of the Court-fees Act. In my opinion this is wrong. The effect of the insolvency is not to put an end to the joint possession of the coparceners and whatever the rights of the Official Receiver might be, the coparceners must be deemed to be in possession at least constructively of all the joint family properties. In this view the court-fee paid by the plaintiffs must be held to be correct and the order of the lower court must be reversed. There will be no order as to costs in this revision petition as the objection as regards court-fee was not taken by the Official Receiver.

R.M. *Order reversed.*

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* C. R. P. No. 368 of 1952. 7th November, 1952.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Ayya Nadar .. *Petitioner.**

Civil Procedure Code (*V of* 1908), *section* 11, *Explanation IV*—Res Judicata—*Might and ought.*

There can be no doubt that the plea of 'might and ought' can be extended to the extent of compelling a litigant to set up incongruous pleas in order to exhaust all the possible permutations and combinations of attacks or defences which might be evolved. If a matter could have been set up as a ground of attack or defence in a former suit and if its introduction into that suit was *necessary* for the complete and final decision of the right claimed by the plaintiff therein, it will be deemed to be a matter which *ought* to have been made a ground of attack or defence in that suit, It cannot be said of any matter that it *ought* to have been set up as a ground in a former suit, if its introduction would have been *incongruous* to the matter of that suit.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order and judgment of the District Munsif's Court, Koilpatti, dated 21st October, 1952, in O.S. No. 42 of 1952.

P. S. Chandrasekhara Aiyar and *P. S. Ramachandran* for Petitioner.

The Court delivered the following:

JUDGMENT.—This is a Civil Revision Petition which is sought to be filed against the finding given by the learned District Munsif, Koilpatti, on a preliminary issue regarding *res judicata* raised in O.S. No. 42 of 1952.

The facts necessary for understanding this finding are : The plaintiff Subbiah Nadar and the defendant Ayya Nadar are brothers. This plaintiff had purchased from his mother Shenbagathammal the eastern portion of a land 2·98 acres in extent and for which the sale deed stood in the name of that Shenbagathammal. The vendee was obstructed from taking possession of the property and therefore he filed O.S. No. 98 of 1949. In that suit the defendant-brother raised the plea that though the sale deed stood in the name of the mother, in reality the property had been purchased with the funds of the joint family and that the sale deed had been taken *benami* in the name of the mother and that the plaintiff was not entitled to the eastern half of the property claimed by him as vendee. This suit was dismissed and there was an appeal therefrom in A.S. No. 127 of 1950 on the file of the Sub-Court, Tuticorin, and therein the findings of the lower Court were confirmed and the appeal was dismissed.

The plaintiff has therefore filed this suit for partition and reducing into separate possession of his half share in the aforesaid entire property, *viz.*, the eastern and western portions.

The contention of the defendant among other things was that the present suit was barred by the principle of *res judicata* and that this plaintiff might and ought to have put forward this claim in the previous suit.

The learned District Munsif rejected this contention on the ground that the plaintiff was not bound to put forward this claim in the prior suit because if he had done so, it would have resulted in putting forward incongruous pleas and that this is not contemplated by the line of cases on the subject.

There can be no doubt that the plea of "might and ought" cannot be extended to the extent of compelling a litigant to set up incongruous pleas in order to exhaust all the possible permutations and combinations of attacks or defences which might be evolved. Just as the provisions relating to "might and ought" have been engrafted in section 11, Civil Procedure Code, in order to avoid multiplicity and protraction of proceedings by wilful keeping back of grounds of attack or defence in order to furnish ammunition for fresh rounds of litigation, and to put an end to causes becoming infinite when the lives of men are finite, and to prevent litigants from becoming so many Sisyphuses the non-necessity to put forward incongruous pleas, even though by not putting them forward a litigant would not exhaust all his possible claims, is based upon the common sense principle that no man can be

* C. R. P. No. 2228 of 1952. 9th December, 1952.

compelled to come to court in order to advance pleas which will work out their mutual destruction. The absurdity of compelling a party to put forward such incongruous pleas is well brought out in two well-known stories possibly apocryphal of pleadings in American Courts. The first was a suit filed for damages in regard to a domestic utensil, namely, a kettle which had been lent and not returned in the good condition it was when it was lent. The alternative defences set up by the defendant and put forward by his counsel to the court were : " May it please your Honour ", said Counsel,

> " In the first place we contend that the kettle in dispute was cracked when we borrowed it ; secondly, that it was whole when we returned it ; and thirdly, that we never had it."

The second is a case where damages were claimed for arson. The alternative defences put forward in that case and pleaded by the defending counsel were :

> " I shall first prove to the Jury (civil trials are by jury) that the defendant is incapable of such an act; if that does not convince you I shall show that my client was insane when the act was committed ; if that fails I shall prove an absolute *Alibi*; and as a last resort, may it please the Court, I shall show that the building was over-insured and consequently there was no loss and that this alleged crime was only a neighbourly kindness to the owner of the building."

In the instant case if this plaintiff had put forward both the claims it would certainly have been incongruous and would have brought about their mutual destruction without any effort on the part of the defendant. His case was that he had paid hard cash for the purchase of the property whose title and possession were with his mother and that that title and possession had passed to him under that sale deed. If he were to advance the plea that he should get a half share in the property in any event, would any court believe the payment of consideration or the *bona fides* of the sale or the title and possession set up in the mother supported by a sale deed in her name, etc.? Only a suicidal client and a lunatic advocate would put forward such incongruous pleas in court, the evidence in support of which will be such that it might be destructive of the other plea and unite causes of action leading to inconsistency and confusion.

In fact though in the immortal language of Mr. Bumble, the law may be an ass, it is not so assinine as to impose such patent hardships on the prospective litigant. The question whether a matter might have been made a ground of attack or defence in the former suit, rarely presents any difficulty. Whether it ought to have been made a ground of attack or defence depends upon the facts of each case. If a matter could have been set up as a ground of attack or defence in the former suit, *and* if its introduction into that suit was necessary for a complete and final decision of the right claimed by the plaintiff therein, it will be deemed to be a matter which *ought* to have been made a ground of attack or defence in that suit *Muthu Vijaya Tevar* v. *Kathamma Nachier*[1] ; *Pershad Singh* v. *Doorga Kunwari*[2], unless where the evidence in support of one ground is such as may be destructive of the other ground and in such a case two grounds need not be set up in the same suit. The reason given is that the test of determining whether both the grounds ought to have been set up in the same suit is afforded by the provisions of Order 2, rule 1, Civil Procedure Code and the provisions of that rule as to the framing of suits are only to be applied as far as practicable. It is clear therefore that it cannot be said of any matter that it *ought* to have been set up as a ground in the former suit, if its introduction would have been incongruous to the matter of that suit ; *Masilamani* v. *Thiruvengadam*[3], *Ramaswami* v. *Vythinathan*[4], *Rangaswami* v. *Appalaswamy*[5], *Anant* v. *Mahabaleswar Bhat*[6], *Deputy Commissioner of Kheri* v. *Khanjan Singh*[7], *Lala Soni Ram* v. *Kanhaiya Lal*[8], *Diwanchand* v. *Hari Chand*[9], *Aishan* v. *Muhammad Din*[10], *Kameshwar Pershad* v. *Rajkumari Ruttan Koer*[11] *U Sein* v. *Ma Ma Lay*[12], *Ningayya Bharamanna* v.

1. (1866) 11 M.I.A. 50 : 2 Suth. 46.
2. (1878) L.R. 5 I.A. 149 : I.L.R. 4 Cal. 190, 196 (P.C.).
3. (1908) I.L.R. 31 Mad. 385.
4. (1903) 13 M.L.J. 448 : I.L.R. 26 Mad. 760.
5. 1916 M.W.N. 286.
6. (1930) 32 Bom.L.R. 1473.
7. (1907) 17 M.L.J. 233 : L.R. 34 I.A. 72 : I.L.R. 29 All. 331 (P.C.).
8. (1913) 25 M.L.J. 131 : L.R. 40 I.A. 74 : I.L.R. 35 All. 227 (P.C.).
9. (1914) 24 I.C. 636.
10. (1916) 37 I.C. 119.
11. (1892) 19 I.A. 234 : I.L.R. 20 Cal. 79, 85, 86 (P.C.).
12. A.I.R. 1941 Rang. 118.

Gurappa[1], *Krishnaswami* v. *Manikka*[2], *Debendra Nath* v. *Nagendranath Datta*[3]. Thus, a person claiming property on the allegation that it is wakf property and that he is the manager thereof is not bound to claim the same property in the same suit alternatively in his own right in the event of its being held that the property was not wakf property. Having asserted that the property is wakf property, he could not have consistently claimed the same property as his personal property except possibly in an alternative form. He was however not under an obligation to adopt the latter course. The mere fact that he could have claimed the property in the alternative as his own property is no ground for saying that he ought to have done so. Again, Explanation IV to section 11, Civil Procedure Code does not apply unless the parties are litigating under the same title. Thus, if *A* sues *B* for a declaration that he was the owner of certain property he is not bound to plead in the alternative that if he is not the owner he is a permanent tenant. In the instant case the plaintiff having asserted in the previous suit that the property was the separate property of his mother and which she was competent to dispose of in any manner she liked, he could not have pleaded in the alternative that it was joint family property and that he is entitled by birth to take a half share therein along with his brother subject to the rights, if any, of the mother. Therefore, Explanation IV to section 11, Civil Procedure Code is not applicable to this case as has been found to be on the facts by the learned District Munsif.

I shall now briefly refer to three decisions cited by the learned advocate for the petitioner. In *Muhammad Rowther* v. *Abdul Rehman Rowther*[4], a person instituted a suit against a trespasser in possession, for partition and recovery of his share in certain lands on the footing that he was a co-owner under a joint purchase made by himself and his two deceased brothers. But his claim was dismissed on the ground that the purchase was not a joint one but the sole purchase of one of the deceased brothers. The former instituted a subsequent suit to recover his share as one of the heirs of the deceased purchaser. It was held that the suit was barred by the rule of *res judicata* as the plaintiff ought to have joined his subsequent ground of title in the former suit under section 11, Explanation IV, Civil Procedure Code. This decision proceeded on the footing that the joining together of the two claims one under the purchase and the other as a heir would not lead to any confusion or any embarrassment. That is not the case here. The second decision is *Goshawarlali* v. *Adhiklal Sahu*[5] wherein the facts were : In 1928 *M* executed a mortgage in favour of *T* in respect of plot 1. In 1929 he executed another mortgage in favour of *S* in respect of plots 1, 2 and 3. In 1931 *M* executed another usufructuary mortgage bond in favour of *P* in respect of plots 1, 2 and 3 of which *P* was put in possession. In February, 1934, *M* executed a sale in favour of *D* in respect of plots 1 and 2. *M* executed in March 1934, another sale deed in favour of *P* in respect of plots 1, 2 and 3. *P* was dispossessed in 1937 by *D* on the strength of his purchase. *P* instituted a suit for possession on the strength of his purchase. The suit was dismissed on the ground that *D* was entitled to possession on account of his prior purchase. *P* instituted another suit for ejectment of *D* as trespasser. In this suit *P* based his claim on the usufructuary mortgage bond of 1931. It was held (1) that the cause of action in this suit was the same as in the previous suit; (ii) that *P* was litigating under the same title in both the suits and (iii) that therefore the suit was barred by constructive *res judicata* under section 11, Explanation IV, Civil Procedure Code. It will be seen that this is not the case of a person litigating under different titles but a case of suing twice on identical cause of action. The third decision is *Venkataramayya* v. *Lalbibi Saheba*[6], where a former suit by the wife of a last male holder against some purchasers in a court sale by a mortgagee, alleging the suit properties had been gifted to her by her husband and that no title passed to the alienees under the court sale was dismissed and a later suit was filed by the daughters of the last male holder for partition of the suit properties, and the wife, the plaintiff in the former suit, claimed her right to a share in the properties and the question

1. A.I.R. 1931 Bom. 187.
2. A.I.R. 1931 Mad. 268.
3. (1933) I.L.R. 60 Cal. 1158 : A.I.R. 1933 Cal. 900.
4. (1922) I.L.R. 46 Mad. 135.
5. (1946) I.L.R. 26 Pat. 24 : A.I.R. 1948 Pat. 302.
6. (1934) 67 M.L.J. 709.

was, whether the matter, which not only might but also ought to have been made a ground of attack in the former suit by her, could not be availed of now by the rule of *res judicata* it was held that the claim of a share by the wife was barred by *res judicata*. The facts of the instant case are very different and I have already pointed out how the introduction of the present plea into the former suit was not necessary for a complete and final decision of the right claimed by the plaintiff in that suit and that in fact if it had been introduced, it would have been incongruous and a wholly supererogatory task taken upon himself by the plaintiff in order to destroy his own case.

I cannot more fittingly close this matter than in the words of Lord Penzance :

"Procedure is but the machinery of law after all—the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when in place of facilitating, it is permitted to obstruct, and even to extinguish, legal rights, and is thus made to govern where it ought to subserve". *Kendall* v. *Hamilton*[1].

In the result, this revision petition is dismissed.

R.M. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

M. Narayanaswami Kone .. *Petitioner**

v.

Arigonda Narayanaswami Mudaliar and others .. *Respondents.*

Provincial Insolvency Act (*V of* 1920), *section* 54—'*Within three months after the date thereof*'—*Computation—Transfer of property—When complete in cases where Registration is required—Registration Act* (*XVI of* 1908), *section* 75 (3).

It is obvious that before section 54 of the Provincial Insolvency Act can be availed of there must be a transfer which is legally complete and which the law will recognise and take notice of.

Where the law enjoins that before a transfer can be effective, the document in question must be registered, the transfer would become complete in the eye of the law only on the date the document is registered.

In the expression "date thereof" the word "thereof" relates to "transfer" so that time must be computed not from the date which the instrument bears but from the date when the instrument becomes effective as a transfer.

Under section 75 (3) of the Registration Act the date of presentation of the document for registration is the date of valid registration irrespective of the fact when the registration is completed. For the purposes of section 54 of the Provincial Insolvency Act therefore the transfer would become complete on the date of presentation of the document for registration. Considerations which would be relevant under section 44 of the Registration Act have no application under section 75 (3) of the same Act.

Petition under section 75 (1) (i) of the Provincial Insolvency Act, praying that the High Court will be pleased to revise the decree and judgment of District Court, Chittoor, dated 3rd October, 1951, in C.M.A. No. 9 of 1951 on appeal from the judgment and order of Subordinate Judge's Court, Chittoor, dated 14th October, 1950, in I.P. No. 9 of 1948.

K. Umamaheswaram for Petitioner.

K. M. Bashyam, N. R. Sesha Ayyar, T. S. Narasinga Rao and *M. Balachandrudu* for Respondents.

The Court delivered the following

JUDGMENT.—On 5th August, 1947, one Narayanaswami Mudaliar and his younger brother Ramakrishna Mudaliar executed two mortgage deeds one for Rs. 10,000 and the other for Rs. 27,500 in favour of one Sundararaja Iyengar. Both these documents were presented for registration on 19th November, 1947. They were registered so far as one of the mortgagors, Ramakrishna is concerned, on 8th December, 1947 and it was compulsorily registered as regards the other mort-

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1. (1879) L.R. 4 A.C. 504 at page 525.

* C. R. P. No. 1138 of 1952. 13th November, 1952.

gagor Narayanaswami on 17th February, 1948. On 14th April, 1948, that is to say, more than three months after the date on which the documents were presented for registration, but less than three months from the date on which the documents were registered as regards Narayanaswami, two creditors filed a petition under section 9 of the Provincial Insolvency Act to adjudicate Narayanaswami, Ramakrishna and three other members of their family as insolvents. This petition was dismissed by the learned Subordinate Judge on the ground that so far as Ramakrishna was concerned the petition has been presented more than three months after the date of the registration of the document. He dismissed the petition so far as Narayanaswami is concerned on the ground that he had already been adjudicated insolvent in the Sub-Court, of Guntur. On appeal the learned District Judge agreed with the conclusion of the learned Subordinate Judge that the documents must be deemed to have been registered on 19th November, 1947 and since, computing from that date, the petition had been presented more than three months later, it was out of time.

Mr. Umamaheswaram, the learned advocate for the petitioning creditors contended that this view of the court below is wrong. According to him the date from which time must be computed is 17th February, 1948, the date on which the document was registered so far as Narayanaswami the first respondent, is concerned. I shall examine how far this contention is sound. Section 54 of the Provincial Insolvency Act provides :

> "Every transfer of property . . . . . made . . . . . by any person unable to pay his debts as they become due from his own money in favour of any creditor . . . . . shall if such a person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against . . . ."

Now it is obvious that before this section can be availed of there must be a transfer which is legally complete and which the law will recognise and take notice of. It follows, therefore, that where the law enjoins that before a transfer can be effective, the document in question must be registered, the transfer would become complete in the eye of the law only on the date the document is registered. It will be noticed that in the expression "the date thereof" the word "thereof" relates to "transfer" so that time must be computed not from the date which the instrument bears, but from the date when the instrument becomes effective as a transfer. If authority were required for this position it may be found in *Iswarayya* v. *Subbanna*[1] and *Venkatadri Somappa* v. *Official Receiver, Bellary*[2]. These decisions lay down that if the date of the execution of the document is different from the date on which it is registered, then the date on which it is registered shall constitute the starting point for the computation of time.

The difficulty in this case arises out of the fact that the date of registration is different not merely from the date of the execution of the document but also from the date on which the document was presented for registration. In such a case from what point should time be computed ? Section 75 (3) of the Registration Act provides, it seems to me, clear guidance in this matter. Dealing with cases where compulsory registration is ordered by the District Registrar, this sub-section provids that such registration shall take effect as if the document had been registered when it was first duly presented for registration. The effect of this provision is that the statute fixes the date of presentation as the date of valid registration. On that date the transfer would become complete. For purposes of section 54 of the Provincial Insolvency Act, the date of the transfer referred to in it, would therefore, be the date on which the document is presented for registration, which date by force of the statute is deemed to be the date of the registration. Authority for this position is to be found in *Venkatadri Somappa* v. *Official Receiver of Bellary*[2]. In that case a mortgage was executed on the 5th of March, 1933. The document was presented for registration on the 27th of June. The mortgagor denied registration and the Sub-Registrar refused to register the document. The District Registrar directed the document to be registered and this was finally done on

1. (1934) 67 M.L.J. 380 : I.L.R. 58 Mad.166. 2. (1938) 2 M.L.J. 362.

the 11th of December, 1933. After referring to the provisions of section 75 (3) of the Registration Act, the Court held that the mortgage deed must be deemed to have been registered on the 27th June.

Mr. Umamaheswaram argued that section 47 of the Registration Act provides that a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required and not from the time of its registration. The decisions of this Court, said Mr. Umamaheswaram have refused to apply the principle of section 47 of the Registration Act when computing the three months' time referred to in section 54 of the Provincial Insolvency Act. Consistently with that, he argued, this Court must refuse to compute time retrospectively for the purpose of section 75 also. I am unable to see any logical connection between these two provisions. Considerations which would be relevant under section 47 of the Registration Act have no application to section 75 (3) of the same Act.

The question, for decision here is this : was the transfer complained of made within three months preceding the date on which the insolvency petition was filed ? In order to find out when the transfer was made, we have to ascertain when the transfer became complete. That date must be the date on which the document was actually registered or deemed by the law to have been registered. Section 75 of the Registration Act provides that registration shall take effect from the time when the document was first duly presented for registration. It follows that the time must be computed from the date of the presentation of the document for registration which in this case was 19th November, 1947. As the petition was filed only on 14th April, 1948, it is clearly out of time. The decision of the Court below is correct and this civil revision petition is dismissed with costs. Advocate's fee two sets.

R.M. — *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

Sainambu .. *Appellant* (*Accused*) (*Prisoner*).*

Criminal Procedure Code (V of 1898), sections 164, 364 and 533—Scope—Failure to warn confessing accused that it was not intended to take him as approver—Effect—Madras Criminal Rules of Practice, Rule 85

As a general rule of practice where there are more than one person charged with a crime and one of such persons wants to make a confession statement, it is the duty of the magistrate to specifically warn the person making the confession that it was not intended to take him or her as an approver. But where it is quite clear from the circumstances that only one person is involved in the crime and such a person wants to confess, the failure to warn the person regarding the fact that it was not intended to take him as an approver would not amount to a serious irregularity. It may be a matter of decision on the facts of a particular case whether the failure to strictly comply with the provisions is a matter which has caused prejudice to the accused.

Govinda Subbaramayya v. *Emperor*, (1937) 1 M.L.J. 750; *Venkata Reddy*, In re, (1950) 2 M.L.J. 298 and *Ramaswami*, In re, (1951) 2 M.L.J. 630, considered and criticised.

Appeal against the Order of the Court of Session of the Ramanathapuram division at Madurai in Case No. 36 of the Calendar for 1952 on 26th July, 1952.

B. Prasada Rao Amicus Curiae for the accused and

The Assistant Public Prosecutor (*A. C. Muthanna*) and *M. A. Mandanna* on behalf of the State.

The Judgment of the Court was delivered by

Govinda Menon, J.—The appellant has been found guilty of an offence under section 302, Indian Penal Code, for having murdered, on 6th August, 1951, a girl by name Umal Regina, aged 7 years, by cutting her with an aruval, and sentenced to transportation for life by the learned Sessions Judge of Ramanathapuram division.

* Crl. Appeal No. 416 of 1952. 12th December, 1952.

The prosecution case is briefly as follows:

The girl left her house after taking her mid-day meal for attending her classes in the school. At about 4 or 4-30 P. M., she and two other school children by name Mahariba and Ibrahim were seen going to the house of the accused and a little later Mahariba and Ibrahim returned, but the deceased girl did not return. At the time of sunset that evening, the girl was seen in the house of the accused. That night she did not return and persons who went in search of her could not trace her. The next day her dead body was seen in a channel with cut injuries. Her ear-rings had been removed. At about 12-15 P.M., on the 7th August, 1951, a complaint was given to the police at Tiruvadanai, by P.W. 1, a relation of the deceased. The Sub-Inspector P.W. 13 reached the village at 4 P.M., and took up the investigation. He also examined witnesses. The body was sent for *post-mortem* examination and the medical evidence shows that she had as many as twelve wounds on her person which were very serious in character and the doctor was of opinion that death was due to shock and haemorrhage. On 18th August, 1951, P.W. 13 arrested the appellant at about 9 A.M., and examined her. When she dug out and produced a pair of ear-rings M.Os. 1 and 1 (*a*) from near a fence adjacent to her house. On 19th August, 1951, she was produced before the Sub-Magistrate, P.W. 6, for the purpose of recording her confession. It might also be mentioned that after the appellant was arrested, another woman by name Amina Bivi was also arrested by P.W. 13, but this woman was not sent to the Sub-Magistrate at all. A confession was recorded by P.W. 6 which is marked in the case as Ex. P-5. P.W. 6 deposes that he warned the accused that she was not bound to make a confession and that if she made one it would be used as evidence against her. Then she was given time to reflect till the next day and was kept out of the influence of the police. The questions put to the accused and the answers given by her before the confession was recorded are contained in Ex. P-5 from which it is seen that she was not informed that it was not intended to take her as an approver. In her confession statement, the accused admitted having assisted Amina Bivi in murdering the child and according to the statements contained in the confession it was Amina Bivi who cut the deceased. The ear-rings M.Os. 1 and 1 (*a*) were identified by P.W. 2, the mother of the deceased as having been worn by the deceased when she left her house for school. The learned Sessions Judge found that the evidence against the accused was sufficient for finding her guilty of the offence of murder. No proceedings were taken against Amina Bivi at all, as according to the police officer, the evidence against her was insufficient. Both before the committing magistrate and the learned Sessions Judge, the appellant retracted the confession and stated that she was induced by the Sub-Inspector, P.W. 13, and by P.W. 1, to make the confession on the promise that she would be taken as an approver.

It is argued in this Court by the learned advocate for the appellant that the confession should not have been admitted in evidence because the necessary requirement under rule 85 of the Criminal Rules of Practice to the effect that the magistrate, before recording the confession, should tell the person making the confession that it is not intended to take him or her as an approver, has not been complied with in this case, and hence the confession is invalid and illegal. Two decisions of this Court have been cited in support of this argument. In *Govinda Subbaramayya* v. *Emperor*[1], Pandrang Row, J., took the view that a confession which does not strictly conform to the procedure laid down by rule 85 of the Criminal Rules of Practice was not admissible in evidence even as against the maker. The learned Judge has considered the historical reasons for the promulgation of rule 85 and was clearly of opinion that if the magistrate did not warn the accused that it was not intended to take him as an approver, the necessary pre-requisites for the validity and legality of the confession have not been complied with. This decision was followed by a Bench of this Court in *Venkata Reddi*, In re[2], which is to the effect that the omission to warn the accused who was about to make a confession that it was not intended to take him as an approver is fatal to the admissibility of the confession, as it causes grave doubt on the voluntary nature of the confession. The learned Judges point

1. (1937) 1 M.L.J. 750.
2. (1951) 2 M.L.J. 298.

out that especially in cases where there are more than one accused, there will be reasonable grounds for supposing that confessions might have been made on the assumption that the person confessing will be taken as an approver and would escape punishment. In a more recent case in *Ramaswami*, In re[1], a Bench of this Court, consisting of Mack and Krishnaswami Nayudu, JJ., was not prepared to go to the extent to which the previous decisions went but was of opinion that failure to warn the accused that it was not intended to take him as an approver would not render the confession inadmissible. There is therefore some difference of opinion in this Court regarding the admissibility of a confession which did not conform strictly with the requirements of rule 85 of the Criminal Rules of Practice. It may be mentioned that rule 85 is not a rule which has the force of a statute but is one promulgated by the Government under the powers conferred on them under the Criminal Procedure Code for the purpose of regulating the procedure in Criminal Courts. Rule 85 amplifies the provisions of section 164, Criminal Procedure Code and lays down what the magistrate should do when recording statements and confessions under section 164, Criminal Procedure Code. All these decisions do not seem to have taken note of section 533 of the Criminal Procedure Code which lays down that if any of the provisions of section 164 or section 364 of the Criminal Procedure Code with regard to the recording of a confession have not been complied with by the magistrate recording the statement, evidence has to be taken that such person has duly made the statement recorded and that such statement shall be admitted in evidence if the error has not injured the accused as to his defence on the merits. It may be a matter of decision on the facts of the particular case whether the failure to strictly comply with the provisions is a matter which has caused prejudice to the accused. In the present case we feel that since the police had arrested another person in connection with this crime at the very beginning, it is possible that the complicity of that person also should have been properly investigated. On the facts of the present case we feel that it was the duty of the magistrate to have warned the accused that it was not intended to take her as an approver. As a general rule of practice we wish to point out that where there are more than one person charged with a crime and one of such persons wants to make a confession statement, it is the duty of the magistrate to specifically warn the person making the confession that it was not intended to take him or her as an approver. But where it is quite clear from the circumstances that only one person is involved in the crime and such a person wants to confess, the failure to warn the person regarding the fact that it was not intended to take him as an approver would not amount to a serious irregularity. The distinction arises only when there is a plurality of accused and not in cases of single delinquents. Therefore it seems to us that a hard and fast rule cannot be laid down regarding the compulsory nature of the warning to be given. Considering the facts of the present case, we feel that the magistrate should have told the accused that it was not intended to take her as an approver. Her statement throughout has been that P.Ws. 1 and 13 had told her that she would be taken as an approver and pardoned. If true, this was an inducement and the confession cannot be considered to be a voluntary one. In such circumstances we rule out the confession from the record.

The question then arises whether the other evidence in the case is sufficient to convict the accused. M.Os. 1 and 1 (*a*), the pair of ear-rings worn by the deceased girl when she left the house, have been produced by the accused after having dug out the same from a place near the fence of her house. These were recovered as a result of a statement made by her under section 27 of the Evidence Act. It seems to us that the production of these material objects would not by itself be sufficient to charge the accused with the crime of murder. The evidence of P.Ws. 3, 5, 9 and 10 is not sufficient to show that it was due to the act of the accused that the deceased came by her death. We are therefore of opinion that the offence of murder has not been brought home to the appellant. We therefore set saide the conviction and sentence under section 302 of the Indian Penal Code. But in our opinion the appellant has to be convicted under section 404 of the Indian Penal

1. (1951) 2 M.L.J. 630.

Code for having dishonestly misappropriated property knowing that such property was in the possession of the deceased person at the time of that person's death, and that it has not since been in the possession of any person legally entitled to it. If we believe the evidence of P.W. 2 that the deceased was wearing M.Os. 1 and 1 (*a*) at the time she went out of the house to school and if we believe the other evidence that the deceased and other girls had gone to the house of the accused, the inference is irresistible that at the time she came by her death, these jewels were on her person. Moreover, the fact that when the dead body was seen, the ear-lobes were found cut, is sufficient for us to infer that whoever removed the jewels, must have done so at the time when death took place or immediately thereafter. The materials on record are ample, in the absence of any satisfactory explanation on the part of the accused, to find her guilty of an offence under section 404, Indian Penal Code. We therefore convict the appellant of an offence under section 404, Indian Penal Code, and sentence her to rigorous imprisonment for three years.

R.M. ——— *Conviction and sentence modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

J. Natesa Sastri and another .. *Appellants**

v.

K. S. Sundaram Chettiar (died) and others .. *Respondents.*

Execution—Judgment-debtor's widow, heir-at-law—Legatees preventing execution—Unauthorised taking of legacy by legatees—Judgment-creditor's claim to execute by seizing property—Executor de son tort—*Section 303, Indian Succession Act.*

Where a judgment-debtor having died his widow was brought on record as the legal representative and the execution was to be proceeded with by seizure of a house belonging to the estate of the deceased judgment-debtor, but in the meanwhile certain persons claiming as legatees under a will of the judgment-debtor contested the execution proceedings as no longer proper and the only way for the judgment-creditor to realise his debt was by suit because of the decision of the High Court in a connected appeal, *Natesa Sastrigal* v. *Alamelu Achi*, (1950) 1 M.L.J. 476, under which the legatees were found not legal representatives under section 2 (11), Civil Procedure Code, on the question whether the judgment-creditor could claim the amount due to him from the legatees in execution.

Held, (1) that whatever may be the position in other cases, where the legacy had not been distributed by the executor or administrator in this case the execution was valid and the property could be seized even as against the legatees, the defendants.

(2) The legatees who had helped themselves to the legacy unauthorisedly would be executors *de son tort* within the meaning of section 303, Indian Succession Act, as they by their action had intermeddled with the estate and so liable to be proceeded against in execution of the decree as legal representatives of the deceased judgment-debtor. Definition of section 2 (11) of the Civil Procedure Code would apply to such a case as it is a case of intermeddling by persons claiming the property.

Appeal against the decree of the Court of the Sub-Judge of Kumbakonam in A.S. No. 99 of 1947, preferred against the decree of the Court of the District Munsiff of Kumbakonam in O.S. No. 54 of 1945.

G. R. Jagadisan for Appellants.

T. R. Srinivasan for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal is by defendants 1 and 2 against the decision of the Subordinate Judge of Kumbakonam affirming the decree granted in favour of the plaintiff by the District Munsiff setting side a claim order. The dispute concerns the estate of one late Sivaramakrishna Ayyar and he became liable to pay costs to one Sivagangai Achi as per the decree in O. S. No. 40 of 1928, Sub-Court, Mayavaram. The present plaintiff obtained an assignment of that decree on 22nd October, 1931. Thereafter, the plaintiff applied to the Sub-Court, Mayavaram, for recognising the assignment in his favour and to transmit the decree for execution to the District Munsiff's Court, Kumbakonam. By that time, the judgment-debtor died and his widow, Darmambal, was impleaded as the legal

* S. A. No. 614 of 1948. 24th November, 1952.

representative. The decree was transmitted to the District Munsiff's Court, Kumbakonam, and the suit house was attached on 2nd April, 1942. Thereafter in E. A. No. 750 of 1942, the present defendants who are the sons of one Kuppalu Ammal, the sister-in-law of Sivaramakrishna Ayyar claimed that the property could not be attached as they obtained the property as a legacy under the will of the late Sivaramakrishna Ayyar dated 1st December, 1918 (Ex. D-1). Under this will, Dharmambal was given a life interest and it was alleged by the defendants that she had surrendered the property to Kuppalu Ammal in 1933. The District Munsiff who heard the claim petition held that the surrender was not proved and valid and that the decree-holder could proceed only against the life interest of Dharmambal in execution of the decree. There was an appeal against the order of the Sub-Court, Kumbakonam. Treating the order as one under section 47, Civil Procedure Code, the appeal was allowed and the matter was remanded to the District Munsiff's Court on 16th August, 1943, for proper inquiry under section 47. Against the order of remand, the defendants preferred an appeal to the High Court and the High Court held on 25th August, 1944, that the matter does not fall under section 47. The plaintiff therefore instituted the suit to set aside the claim order and claiming that he was entitled to attach not only the life interest but the property itself. It might be mentioned that Kuppalu Ammal died in 1940 during the pendency of the proceedings and the sons were sought to be impleaded as legal representatives. But it was held by the Court that they were mere legatees. The execution, however, was proceeded with on the basis of the prior attachment during the lifetime of Dharmambal, the heir-at-law of Sivaramakrishna Ayyar who would have taken the estate in the absence of a will.

In the suit, the defendants raised various pleas; but the principal and the only question which is now outstanding is whether the suit properties could be proceeded against in execution of the decree in O. S. No. 40 of 1926, without filing a separate suit against the defendants. Both the Courts held that execution could proceed against the house in the hands of the defendants.

In this second appeal, the sole question for decision therefore is whether the remedy of the decree-holder to realise his decree amount is only by way of a suit against the defendants or the execution could be proceeded with against the property in their hands.

In a connected proceeding between the same parties the question whether legatees of part of the estate who have taken possession of the property could be deemed to be legal representatives within the definition of section 2 (11) of the Code of Civil Procedure came up before a Bench consisting of Horwill and Balakrishna Iyer, JJ., in *Natesa Sastrigal* v. *Alamelu Achi*[1]. That was a Letters Patent Appeal against the judgment of Govindarajachari, J., and the learned Judges, reversing the decision of Govindarajachari, J., held that they could not be deemed to be legal representatives within the meaning of section 2 (11), Civil Procedure Code. It is on this decision that strong reliance was placed on behalf of the appellants (defendants 1 and 2) by Mr. Jagadisa Aiyar, their learned Advocate, the contention being that as the defendants are not the legal representatives of the judgment-debtor, execution could not be levied against the properties in their hands which they held as heirs of the legatee of a portion of the estate of Sivaramakrishna Ayyar. He does not, however, dispute and indeed he could not dispute, that the legatees are liable to pay the debts of the testator, since before the estate is distributed between 12 legatees by the executor or administrator the debts must be paid first. Even if the executor or administrator overlooking the claim of a creditor, distributes the estates to the legatees, there is the right of the creditor recognised under section 361 of the Indian Succession Act to call upon a legatee who has received payment of the legacy to refund, whether the assets of the testator's estate were or were not sufficient at the time of his death to pay both debts and legacies; and this is irrespective of the question whether the payment of the legacy by the executor or administrator was voluntary or not. But this claim can be enforced only by a suit

1. (1950) 1 M.L.J. 476.

and cannot be enforced in execution of a decree, as such a legatee who had received payment of the legacy cannot be treated as a legal representative of the deceased testator. So much is not in dispute. But the question in the case is whether in view of the peculiar facts of this case the asset could not be seized in execution.

Apart from the question whether the legatees who have helped themselves into possession could be treated as legal representatives or not, in this case there is a complete answer to the contention of the appellants, as the decree itself was obtained against the testator and by the time of the attachment the person who lawfully represents the estate in the absence of a testament, namely, the widow, Dharmambal, was impleaded as legal representative in the execution proceedings, and the property was attached. The rights of the attaching creditor therefore have to be determined, it is not disputed and it is established law, as on the date of the attachment. If the assets came into possession of the legatees unauthorisedly, it would not affect the rights of the execution creditor to seize the property in execution of the decree. Courts, at any rate in this Presidency, have gone to the length of holding that a true legal representative will be bound by a decree passed against the wrong legal representative, if the plaintiff decree-holder acted *bona fide* without fraud or collusion and the wrong legal representative was impleaded as representing the estate in ignorance of the true facts. An heir-at-law is undoubtedly a legal representative within the meaning of the definition of section 2 (11) of the Code of Civil Procedure, as he in law represents the estate of the deceased person. It has been held in this Court in *Sivasankara* v. *Amaravathi*[1], that the entire estate, both moveable and immoveable of a deceased person vests in the heir-at-law until an administrator is duly constituted and that such an heir-at-law is even competent to maintain a suit on behalf of the estate to recover possession. It was held in that case that a widow, the heir of the deceased was competent to maintain a suit to recover possession of the estate left by the husband including properties not specifically bequeathed to her. The attachment therefore was validly made in the present case at a time when the estate was fully represented by Dharmambal and the rights of the execution creditor should be worked out as on the date of attachment by bringing the properties to sale in pursuance of that attachment. The mere fact that subsequently the property vested under the will upon other persons is in my opinion of no consequence. Whatever may be the position, therefore, in other cases in which the legatees alone who have not received the legacy from the executor or administrator who is charged with duty of distributing the estate after discharging the liabilities on it, may be, in the present case, in my opinion the execution is valid and the property could be validly seized in execution of the decree so as to bind even the defendants; this is enough to dispose of the appeal.

It has, however, been urged on behalf of the respondent that the decision of the Bench in *Natesa Sastrigal* v. *Alamelu Achi*[2], overlooks the important circumstance that a legatee under a will who helps himself by taking possession of the estate of the deceased in satisfaction of his own legacy is an executor *de son tort* within the meaning of section 303 of the Succession Act, as the illustration to the section clearly shows. In the said decision the learned judges while referring to section 303 containing the definition of an executor *de son tort* overlooked the illustration to that section. It is established law that until the executor or administrator assents to a legacy, the legatee's title is not perfected. It is an inchoate title heritable and transmissible and also vests from the moment indicated by the will as interpreted in accordance with the sections of the Succession Act. But the executor's assent is necessary to perfect the title of the legatee. The assent, however, does not create a new title. If there is no executor or administrator, it has been held in this Court that it is open to a legatee to sue for recovery of his legacy, vide *Rajah Parthasarathy Appa Rao* v. *Rajah Venkatadri Appa Rao*[3]. (The actual decision was reversed by the Privy Council in *Venkatadri Appa Rao* v. *Parthasarathy Appa Rao*[4], but this point was not touched by it.) The executor or

1. I.L.R. (1938) Mad. 533.
2. (1950) 1 M.L.J. 476.
3. (1922) 43 M.L.J. 486 : I.L.R. 46 Mad. 190.
4. (1925) 48 M.L.J. 627 : L.R. 52 I.A. 214 : I.L.R. 48 Mad. 312 (P.C.).

the administrator, before delivering the legacies, has to pay the funeral and testamentary charges and discharge the debts and then only pay the legacies. After, distribution, as stated above, if there is a debt which was not discharged, the creditor has a right to follow the assets in the hands of the legatee under section 361 of the Succession Act, by calling upon him to refund an amount to satisfy the debt. If, however, the legatee unauthorisedly lays his hands and takes possession of the estate of the deceased testator to satisfy his legacy, such an act is treated as an act of intermeddling, which act in law pertains to the office of an executor, as the distribution of the legacy is the function of the executor and belongs to that office. It is for that reason the illustration to section 303 says that if *A* uses or gives away or sells some of the goods of the deceased to satisfy his own debt or legacy, he is an executor of his own wrong. Though the learned Judges in *Natesa Sastrigal* v. *Alamelu Achi*[1], correctly defined an executor *de son tort* as a person who takes upon him an office of executor by intrusion, not being so constituted by the testator, overlooked the fact in the case, these very defendants took unauthorised possession of the estate of the deceased to satisfy the legacy and therefore were persons who intermeddled with the estate and therefore, became executors *de son tort* as provided in the illustration. Out of curiosity, I have called for the judgment of Govindarajachari, J., in order to find out whether that learned Judge noticed the illustration. I find that he based his judgment on the illustration and quoted it in his judgment; but somehow, the learned Judges on appeal did not consider the illustration at all and did not even refer to the fact that Govindarajachari, J., relied upon the illustration to establish that the legatees were executors *de son tort* as they intermeddled with the estate.

In Williams on Executors, 12th Edition, Vol. I, at page 155, the learned author enumerates the acts which constitute an executor *de son tort* :—

"A very slight act of intermeddling with the goods of the deceased will make a person executor *de son tort*. Thus it is said, that milking the cows, even by the widow of the deceased, or taking a dog, will constitute an executorship *de son tort*. So, in one case the taking a Bible and in another a bedstead, were held sufficient inasmuch as they were the *indicia* of the person so interfering being the representative of the deceased. So, if a man kills the cattle, or uses or gives away, or sells any of the goods or if he takes the goods to satisfy his own debt or legacy: or if the wife of the deceased takes more apparel than she is entitled to, she will become executrix *de son tort*. And there may be a *tort* executor of land, as where a man enters upon the land leased to the deceased, and takes possession, claiming the particular estate."

So that in that respect, the nature of the property whether it is moveable or immoveable does not matter, so long as there are acts of intermeddling which make the person an executor *de son tort*. These acts are really functions belonging to the office of an executor, and if the possession usurps the functions unauthorisedly, he is within the definition of executor *de son tort*. Had it been necessary to rely upon the decision of the Bench in *Natesa Sastrigal* v. *Alamelu Achi*[1], I would have been inclined to refer the matter to a fuller Bench for further consideration, but in the view I take of the case, it is unnecessary to do so

Reliance was placed for the position that the remedy of the creditor is only to institute a suit, on the decision of the Calcutta High Court in *Jayachandra Ray* v. *Satischandra Ray*[2]. But that case it must be noticed is a case in which the administrator of the estate of the testator with the will annexed had put the legatees in possession of the property. Therefore, the administrator assented to the legacy and the legatee's title was perfected. Of course, in such a case the only remedy of the creditor to follow the assets into the hands of the legatee can only be by a suit. He cannot in execution of the decree seize the property which was delivered to the legatee by the duly constituted representative of the estate, as he is in no sense the legal representative of the deceased. The decisions of the English Courts, relied on in that case support this view. At page 172, the learned Judges were considering the right under section 361 of the Succession Act for they observed:

"It is a right to call upon the legatee to refund. That right may be exercised by a creditor who remains unpaid."

1. (1950) 1 M.L.J. 476. 2. (1930) I.L.R. 58 Cal. 170.

The English authorities referred to, on an examination it will be found, were cases in which the legacy was duly delivered by the legal personal representative of the testator. They were really claims for refund and not attempts to seize the property in execution. The legatees title became perfected. It is unnecessary to subject those decisions to a detailed examination. The decision In re *Eustace*[1], decided by Swinfen Eady, J., was also a case where the estate was distributed and afterwards the creditor put forward the claim. Notwithstanding the considerable delay in the claim that is put forward by the creditor, it was held that he was entitled to follow the assets of the deceased into the hands of the legatees who have been fully paid. Those classes of cases stand altogether apart and have nothing to do with cases in which the legatees did not receive the payment in due course of administration of the estate either by the executor or administrator or even in a properly constituted administration suit, but helped themselves to the legacies by unauthorised taking possession. In such a case undoubtedly they will be executors *de son tort*, within the meaning of section 303 as they intermeddled with the estate and are liable to be proceeded against in execution as the legal representatives of the deceased judgment-debtor. The definition in section 2 (11) of the Civil Procedure Code will apply to such a case, as it is a case of intermeddling by a person claiming title to the property. For these reasons, the second appeal must be dismissed with costs.

No leave.

K.C. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

The Public Prosecutor .. *Appellant**

v.

Sarisetty Venkatasubbiah .. *Respondent.*

Madras General Sales Tax Act (IX of 1939), *section* 15 (b) *and section* 16-A—*Commission agent—If liable to be punished for non-payment of tax.*

The term 'dealer' will take in a commission agent also in certain cases and he will be an assessee falling within the scope of the Act and non-payment of tax by such a person will entail a punishment under section 15 (*b*) of the Act. *Radhakrishna Rao* v. *Province of Madras*, (1952) 1 M.L.J. 494 : I.L.R. (1952) Mad. 571 (F.B.), followed.

Appeal under section 417, Criminal Procedure Code, against the acquittal of the aforesaid respondent (accused) by the Sub-Divisional First Class Magistrate (Judicial) of Gudur in C. C. No. 45 of 1951 on his file.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for Appellant.

Respondent not represented.

The Court made the following

ORDER.—This is an appeal preferred by the State against the order of acquittal of the respondent by the learned Sub-Divisional Magistrate, Gudur, in C. C. No. 45 of 1951. The facts are :

The respondent is a dealer in chillies in Sulurpet taluk. He was assessed to sales-tax by the Deputy Commercial Tax Officer for the year 1948-49, that is to say, for the transactions from 1st April, 1948, to 31st March, 1949, on a turnover of over Rs. 30,515-5-1. Ex. P-1 is the assessment order. Ex. P-2 is the demand notice served on the respondent on 10th February, 1950. Ex. P-3 is the return in Form A submitted by the respondent. The respondent, accused not having paid the assessment as per the demand he has been charge-sheeted for an offence under section 15 (*b*) of the Madras General Sales Tax Act, 1939. On these facts being affirmatively proved by the prosecution the accused, respondent, stated that he was never a dealer purchasing and selling chillies, that he had no business

1. (1912) 1 Ch. 561.

* Criminal Appeal No. 384 of 1952. 12th January, 1953.

of his own and that he was doing the business on behalf of the ryots and that he did not commit any offence as charged.

The learned Sub-Divisional Magistrate in this particular case, and this is not the first instance of this kind, has taken upon himself the supererogatory task of deciding that the observations of the Appellate Commercial Tax Authority are binding on the Deputy Commercial Tax Officer whereas these observations are absolutely irrelevant in a prosecution for non-payment of tax and with which alone the Sub-Divisional Magistrate was concerned. In order to get over section 16-A the accused alleged that he was not a dealer but a commission agent and the Sub-Divisional Magistrate came to the conclusion that the accused is not therefore a dealer and that he is not liable to pay the tax and so he cannot be prosecuted. In coming to this conclusion he committed an error because it has been held by a Full Bench of this Court in *Radhakrishna Rao* v. *Province of Madras*[1], that the term "dealer" will take in a commission agent also as in the instant case.

Therefore, the Court below ought to have found that the accused is an assessee falling within the scope of the Act and that he is liable to pay the tax.

In the result, the order of acquittal of the lower Court is set aside and the accused is convicted as charged and he is fined in a sum of Rs. 50. The tax is also made recoverable from him as if it were a fine. Time to pay the fine and the tax amount three weeks from the date of the receipt of this order in the lower Court.

R.M. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

The Public Prosecutor .. *Appellant**

v.

Pattu Narasimhulu A. .. *Respondent.*

Madras Prevention of Adulteration Act (III of 1918), *section* 5 (d)—*Rules—Scope—Employee working in shop—Liability as person offering for sale.*

A son who is working in the shop of his father as his employee is certainly one who will come within the meaning of a "person offering for sale" the article exhibited there and liable to conviction.

Appeal under section 417, Criminal Procedure Code, against the acquittal of the aforesaid respondent-accused by the Court of the Stationary Sub-Magistrate, Badvel, in C. C. No. 1811 of 1951 on his file.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for Appellant.

G. Gopalaswami for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal preferred by the State against the acquittal by the learned Sub-Magistrate, Badvel, in C. C. No. 1811 of 1951.

The facts are : On information received the Health Inspector, P.W. 1 went to the bazaar at Badvel on 29th June, 1951, at about 9 A.M. and inspected the house and shop of the accused and his father and on finding the accused there asked him to keep open the godown which is situated a little away from the shop and he among other things found there smooth pea flour with which we are now concerned here. The Health Inspector took sample of the pea flour and sent it to the Public Analyst for analysis and it was declared as adulterated with lak dhall flour (kesari dhall). It was a mixture of lak dhall of about 80 per cent. with Bengal gram flour of 20 per cent. and it also contained an artificial water-soluble yellow colouring matter derived from coal tar. Inasmuch as sale or possession for the purpose of sale under any description of artificially coloured Bengal gram flour and red-gram-flour is an offence punishable under rule 29 read with rule 28-A of the Madras Prevention

1. (1952) 1 M.L.J. 494 : I.L.R. (1952) Mad. 571 (F.B.).

* Crl. Appeal No. 378 of 1952. 12th January, 1953.

of Adulteration Rules issued in G. O. No. 680 P.H., dated 24th February, 1950, as amended in G. O. No. 1613 Health dated 5th May, 1950, this accused was charged for an offence punishable under rule 29 read with rule 28-E of the Madras Prevention of Adulteration Rules issued in G. O. No. 3082 Health, dated 1st September, 1950.

The two points taken before me for sustaining the acquittal are that the father of the accused was the owner of the shop and not the accused and that the proper person who should be proceeded against is the father and not the son.

In my opinion this contention cannot be accepted, because under sub-clause (*d*) of section 5 of the Madras Prevention of Adulteration Act every person who offers for sale any food which is not up to the standard of purity prescribed by the (Provincial Government) is punishable. So what we have to see in the present case is whether this accused stored or offered for sale this substance in controversy. A person who is working in a shop on behalf of the owner as his employee is certainly one who will come within the meaning of the

> " person offering for sale the articles exhibited there."

It is not stated that the accused was there for his health. On the other hand he must have been in the shop for the purpose of carrying on sales on behalf of his father and as his servant. It has been laid down in a long line of decisions the most notable of which is the English decision of *Sherras* v. *De Rutzen*[1], in which Wright, J., has collected and classified the interesting English decisions on the subject and the Supreme Court decision of *Hari Prasada Rao* v. *The State*[2]. The entire case-law on the subject has been set out by me in *Kasi Rajah* v. *State*[3]. *See* also *Barker* v. *Levinson*[4] (Goddard, C.J.): A servant is equally liable because if the law were otherwise every master would try to keep himself out of the way and escape liability. The argument that the accused has passed his school final examination and that there are differences between him and his father in private life are neither here nor there. On the particular date in question this accused was working in the shop on behalf of his father. Therefore the accused is certainly a person coming within the meaning of sub-clauses (*b*) and (*d*) of section 5 of the Act.

Therefore the acquittal by the Sub-Magistrate cannot be supported and is hereby set aside and the accused is convicted as charged. Taking into consideration the various mitigating circumstances the accused is sentenced to pay a fine of Rs. 35. Time for payment of the fine is six weeks from the date of the receipt of this order in the lower Court.

R.M. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AYYAR.

Jami Appanna .. *Appellant**

v.

Jami Venkatappadu and others .. *Respondents.*

Limitation Act (IX of 1908), Articles 91 and 144—Applicability—Suit to set aside a document which is void and inoperative.

Article 91 of the Limitation Act has no application where the instrument sought to be cancelled is void and inoperative as the article presupposes that a suit is necessary under the law to set aside the instrument. In the case of an invalid instrument which is void, there is no need to move the Court to set it aside and only voidable instruments require a decree of Court to set it aside. To such a suit the period of limitation applicable is under Article 144 and not Article 91. If in such a suit there is a prayer for cancellation of the instrument it can only be regarded as ancillary to the substantive prayer for possession and can be treated as surplusage.

Case-law reviewed.

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1. (1895) 1 Q.B. 918, 921.
2. (1951) S.C.J. 296 : (1951) 1 M.L.J. 612 (S.C.).
3. (1952) 2 M.L.J. 848.
4. (1950) W.N. 465 : (1950) 2 All E.R. 825.

* Appeal No. 115 of 1949. 17th November, 1952.

Where a deed of one character is executed on a representation that it is of different character then it is wholly void and inoperative. Such a deed does not require to be set aside under Article 91 and a suit to recover possession of the properties comprised therein would be governed by Articles 142 and 144 of the Limitation Act.

Appeal against the decree of the Court of Sub-Judge, Srikakulam, dated 30th September, 1948 in O.S. No. 2 of 1947.

C. V. Dikshitulu and *Rajeswara Rao* for Appellant.

B. V. Subramaniam for Respondent.

The Judgment of the Court was delivered by

Venkatarama Ayyar, J.—This is an appeal by the plaintiff against the judgment and decree in O.S. No. 2 of 1947 on the file of the Court of the Subordinate Judge, Chicacole. The properties which are comprised in this suit belonged to one Vaddi Varahalu, the mother of the plaintiff, as her stridhana and on the death of Vaddi Varahalu about the year 1914 the plaintiff became entitled to them as her stridhanam heir. She was then a minor aged about 8 years. It is stated in the plaint that as her father was a man of weak intellect, the first defendant and his brother Kamanna who are her maternal uncles took possession of her properties and entered into the management thereof on her behalf. The plaintiff was subsequently married to the first defendant. On 16th August, 1925, she executed a deed of settlement Exhibit B-3 whereby she transferred all the suit properties to the first defendant and his brother Kamanna by way of gift. It is this deed that is the subject-matter of attack by the plaintiff in this action. The plaintiff alleges that the first defendant and his brother represented to her that the deed was a general power of attorney authorising them to manage the estate, that she did not read it nor was it read to her and that she executed it in the thought and belief that it was only a power-of-attorney. She goes on to state that she lived with her husband till 1939, that in that year he drove her and her children out of the house and that she became aware of the fraud practised on her only on 29th August, 1944. In paragraph 10 of the plaint it is stated that the settlement deed, dated 16th August, 1925, was vitiated by fraud and misrepresentation of the first respondent and his brother and as such it confers no title on them to the plaint properties" and that the suit is laid for recovery of possession with mesne profits. Conformably to these allegations, the plaintiff prays for a declaration that the settlement deed, dated 16th August, 1925, is vitiated by fraud and undue influence and misrepresentation and that it confers no title on the respondents; for an order that the suit settlement deed be set aside and for a decree for possession and mesne profits. The second defendant is the widow of Kamanna who is the brother of the first defendant and one of the donees under Exhibit B-3. Both the defendants contest the suit on the merits and they also plead that it is barred by limitation. On these pleadings, the following issues were framed :

1. Whether the settlement deed, dated 16th August, 1925, was got executed by the plaintiff by the exercise of fraud, undue influence and misrepresentation?
2. Whether the plaintiff has been in possession of the suit properties within 12 years prior to suit?
3. Whether the suit is in time?
4. To what mesne profits, past and future, is the plaintiff entitled, if any?
5. What relief?

At the hearing of the suit issue No. 3 was taken up first for trial. The notices that passed between the parties in 1944 were marked and arguments were addressed on the question of limitation. The learned Subordinate Judge held that the suit was governed by Article 91 of the Limitation Act and that as the plaintiff had admitted in her notice dated 10th August, 1944, that she had knowledge of the fraud in 1940, the suit which was instituted on 25th April, 1946, was barred by limitation. On this finding, he dismissed the suit *in limine*. Against this decision the plaintiff prefers this appeal.

The only point for determination in this appeal is whether the suit is barred by limitation under Article 91 of the Indian Limitation Act. The answer to this

question depends on the application of two principles both well settled, that Article 91 does not apply when the instrument sought to be cancelled is void and inoperative and that when a person executes a deed of one character under a misrepresentation that it is of a different character, it is void.

Article 91 of the Limitation Act provides for a period of three years for a suit to cancel or set aside an instrument not otherwise provided for. This article presupposes that a suit is necessary under the law to set aside the instrument. But, where under the law there is no duty cast on the person to get an instrument set aside, this article does not impose any obligation on him to get it set aside. We must, therefore, have recourse to the substantive law to ascertain whether a party to an instrument should get that cancelled or not. Now the authorities have established that for this purpose there is a distinction between voidable and void transactions and that while the former class of transactions should be set aside the latter need not be. The reason for this distinction is that in the case of a voidable transfer the title to the properties vests in the transferee on the execution of the deed and that it can revest in the transferor only by a decree of Court rescinding the transfer on grounds such as coercion, undue influence or fraud. To such a suit, Article 91 prescribes the period of limitation and if no suit is filed within the time limited thereby the transferor loses his right to avoid the sale and the title of the transferee becomes unimpeachable. Thereafter, it is not open to the transferor to sue for possession of the properties ignoring the deed because the right to possession is an adjunct to the title to the properties and that had passed to the transferee and had become unimpeachable by the operation of Article 91. But different considerations arise when the instrument of transfer is void and does not operate to vest the title in the transferee. In that case the transferor continues to be the owner of the properties even after the execution of the instrument precisely as before. There is no need in such a case for the transferor to move the Court for setting aside the deed because there is no transfer which the Court has to rescind and if the transferor has to recover possession of the properties covered by the deed, he can ignore the deed and recover on the strength of his own title. To such a suit, the period of limitation applicable is under Article 144 and not Article 91. If in such a suit there is a prayer for cancellation of the instrument, it can only be regarded as ancillary to the substantive prayer for possession and can be treated as mere surplusage.

Turning now to the authorities : in *Petherperumal Chetty* v. *Muniandy Servai*[1] the question for determination was whether a suit to recover properties which had been transferred by a person benami in the name of another was governed by Article 91 of the Limitation Act. In holding that that article had no application, the Privy Council observed :

"As to the point raised on the Indian Limitation Act, 1877, their Lordships are of opinion that the conveyance of the 11th June, 1895, being an inoperative instrument, as, in effect, it has been found to be, does not bar the plaintiffs' right to recover possession of his land and that it is unnecessary for him to have it set aside as a preliminary to his obtaining the relief he claims. The 144th, and not the 91st, article in the second schedule to the Act is, therefore, that which applies to the case, and the suit has consequently been instituted in time".

In accordance with this decision, it has been held that where the transaction is sham and nominal, there is no need to get it set aside and Article 91 has no application to such cases ; vide *Subbaroya Chetty* v. *Nagappa Chetty*[2], *Krishnaswami Ayyangar* v. *Kuppu Ammal*[3], *Mohammad Nazir* v. *Zulaikha*[4] and *Sangawa* v. *Huchan Gowda*[5]. In *Narasa Gowda* v. *Chawa Gowda*[6] it was held that a sale deed executed by a minor being void, he was entitled to recover possession of the properties and that the suit was not governed by Article 91 and he was not bound to have the deed set aside. In *Narayanan* v. *Lakshmanan*[7] certain trustees had transferred their right to manage a temple in favour of the defendants and put them in possession of the

1. (1908) 18 M.L.J. 277 : L.R. 35 I.A. 98 : I.L.R. 35 Cal. 551 (559-60) (P.C.).
2. (1927) 53 M.L.J. 311 (323).
3. (1929) 30 L.W. 796, 798.
4. (1928) I.L.R. 50 All. 510.
5. (1923) I.L.R. 48 Bom. 166.
6. (1918) 42 Bom. 638.
7. (1915) 28 M.L.J. 571 : I.L.R. 39 Mad. 456.

temple properties. In a suit to recover possession of the properties, the defendants pleaded that it was barred by limitation under Article 91 as it was instituted more than three years after the date of the transfer. It was held by Wallis, C.J. and Coutts Trotter, J. that as the deed of transfer was void, it did not require to be set aside and that Article 91 had no application and they observed :

"The Limitation Act merely prescribes within what periods suits must be brought and cannot be construed as of itself creating an obligation to sue where none existed."

In *Banku Behari* v. *Krishto Govinda Joardar*[1] Banerjee and Geidt, JJ. observed :

"That a document which was never intended by the executant to be operative does not require to be set aside or cancelled in order to entitle any person to the possession of the property covered by it as against the person in whose favour it stands, has been held by this Court in the cases of *Sham Lalit Mitra* v. *Amarendra Nath Bose*[2] and *Raghubar Dayal Sahu* v. *Bhikya Lal Misser*[3]."

The position is thus stated by Richardson, J. in *Saratchandra Gupta* v. *Kanai Lal Chakrabarty*[4].

"If a plaintiff comes into Court to have a particular written instrument set aside or cancelled then *prima facie* the article of the schedule of the Limitation Act applicable is Article 91 whether the ground on which the claim is made is fraud or some other ground.

The Courts, however, draw a distinction between void and voidable instruments and hold that Article 91 does not apply to instruments which are void *ab initio* so as not to require setting aside. When the instrument is voidable it is presumably valid, and binding on the plaintiff until it is set aside, and any further relief which may be sought depends on the removal of the instrument from the plaintiff's path. In such a case Article 91 applies.

But if the facts alleged by the plaintiff raise a case that the instrument, whether executed by the plaintiff himself or by some third party through whom he claims is null and void *ab initio*, then, as I understand the matter, Article 91 ceases to be appplicable and the circumstances may entitle the plaintiff to the benefit of the longer period of limitation allowed by some other article, such as Article 120 or Article 144."

These observations are well supported by authority and it may now be taken as firmly established that where the instrument which is relied in bar of the plaintiff's claim is void and inoperative, there is no need for setting aside such an instrument and Article 91 does not bar the plaintiff from claiming such reliefs as he might be entitled to on the basis that the instrument is void.

The question next arises whether Exhibit B-3 is a deed under which title passed to the transferees, though it was liable to be displaced on proof of undue influence or fraud or whether it was a void instrument under which there was no transfer of title. If the complaint of the plaintiff had been that by the fraudulent representation of the donees she was induced to enter into the transaction of whose nature however she was aware or that there had been fraud with reference to the terms of the deed and its contents, there can be no doubt that title would pass to the transferees, and that the only remedy of the plaintiff would be to sue to set aside the deed on the ground of fraud. But the complaint here is something different. The plaintiff states that it was represented to her that the deed which she was executing was a power-of-attorney, whereas in truth it was a deed of gift and that she signed Exhibit B-3 thinking and believing that it was only a power of attorney. That also is what she stated in the notice Exhibit B-2. Now, the authorities have made a distinction between misrepresentations as to the character of the deed and misrepresentations as to its contents. With reference to the former, it has been held that the transaction is void, while in the case of the latter, it is voidable. In *Foster* v. *Mackinnon*[5], the action was by the endorsee of a bill of exchange. The defendant pleaded that he endorsed the bill on a fraudulent representation by the acceptor that he was signing a guarantee. In holding that such a plea was admissible, the Court observed :

"It (signature) is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signor did not accompany the signature ; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.

1. (1903) I.L.R. 30 Cal. 433.
2. (1895) I.L.R. 23 Cal. 460.
3. (1886) I.L.R. 12 Cal. 69.
4. (1922) 26 C.W.N. 479 (482-3).
5. (1869) L.R. 4 C.P. 704 (711, 713).

. . . . The defendant never intended to sign that contract or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the *actual contents* of the instrument."

This decision has been followed in numerous authorities in the Indian Courts. In *Sanni Bibi* v. *Siddik Hussain Munshi*[1], the suit was for recovery of possession of certain properties in respect of which the plaintiff had executed a deed of sale. The plaintiff also prayed for cancellation of the deed on the ground that it was represented to her that the deed was a *jimbanama* for her maintenance and that she did not know or believe that she was executing a deed of sale. That was found as a fact by the District Munsiff. Nevertheless, he held that the suit was barred by limitation under Article 91 of the Limitation Act. Newbould and Panton, JJ. held that on that finding, the principle of the decision in *Foster* v. *Mackinnon*[2] would apply and that the deed would be void and that Artice 91 would be inapplicable to such a case. In *Sarat Chandra Gupta* v. *Kanai Lal Chakravarthy*[3], already cited, the allegations in the plaint were that the defendant had taken a deed of gift and exchange from the plaintiff Rengamoni Devi on a representation that it was a power-of-attorney for the management of the estate and that she executed the document without knowledge of its true character. The suit was dismissed by Buckland, J. as barred by limitation under Article 95. On appeal, Sanderson, C.J. and Richardson, J. held, following the decision in *Foster* v. *Mackinnon*[2] that if the allegations in the plaint were established the transaction would be void and that neither Article 95 nor 91 would apply to that case. Richardson, J. observed :

"In the present case, as I read the plaint, plaintiff raises the plea known to English lawyers as *non est factum*.

If she should succeed in establishing that plea, then the instrument in question would be altogether void. It would not require setting aside and the prayer to set it aside would be therefore superfluous, so that Article 91 would be inapplicable."

In *Brindaban* v. *Dhruba Charan*[4], the third defendant who had executed a deed of gift in favour of the second defendant sold the property subsequently to the plaintiff alleging that the gift deed was executed by her on a representation by the second defendant that it was a power-of-attorney and the suit was by the purchaser to recover possession. It was pleaded by the second defendant that it was barred under Article 91 of the Limitation Act. In rejecting this contention, Cumming and Pearson, JJ. observed :

"On the other hand in the case of *Sanni Bibi* v. *Siddik Hussain*[1]. a decision directly in point, it has been held that when it is established that the plaintiff by defendant's misrepresentation was induced to execute a deed of sale believing the same to have been a deed of a different kind the transaction is void and not voidable only, and Article 91, Limitation Act, has no application to his suit to recover the property. It will be seen that that decision is directly in point, because in this case the plaintiff sues as the transferee of defendant 3 and stands in her shoes. Defendant 3 was induced by the misrepresentation of defendant 2 to execute a deed of a different kind to what she thought she was executing. It has been found that she thought that she was executing a power of attorney when she was really executing a deed of gift."

In the result, the decree for possession was affirmed. In *Raja Singh* v. *Chaichoo Singh*[5], one Titai Singh sued to recover possession of the properties comprised in a deed of gift executed by him on the 18th of June, 1931, on the ground that it was represented to him that the deed was an instrument of lease and that it was, therefore, void. The suit was instituted on 3rd August, 1935. The question was, whether it was barred by limitation under Article 91. It was held by Fazl Ali and Meredith, JJ. that if the facts pleaded in the plaint were established, Article 91 would have no application as the deed would then be void and not merely voidable. Meredith, J. observed :

"If Titai executed the document under the impression that it was a lease, when in fact, it was a deed of gift, then I think there was no real execution since Titai's mind would have been directed to one thing whereas what he put his hand to was something altogether different in character. The executant's mind was not with his hand. If there was no real execution, the document was wholly

1. (1919) 23 C.W.N. 93.
2. (1869) L.R. 4 C.P. 704 (711, 713).
3. (1922) 26 C.W.N. 479 (483).
4. A.I.R. 1929 Cal. 606 (607).
5. A.I.R. 1940 Pat. 201 (203).

void and not merely voidable. . . . . . . The learned advocate for the appellants argued on the basis in *Howatson* v. *Webb*[1], that *Foster* v. *Mackinnon*[2], was no longer good law. But, in fact, what the later rulings really lay down is that a misrepresentation as to the contents of a document will make it voidable, and only a misrepresentation as to its character will make its execution absolutely void. . . . . It seems to me that a representation that a document was a lease when it was in fact a deed of gift, would be a misrepresentation as to the nature of the document and not merely as to its contents. Obviously the line of distinction might sometimes be a fine line. I can conceive cases where it might be very difficult to say whether the document signed and the document fraudulently represented actually differed in nature or merely in contents ; but I feel no doubt that as between a lease and a deed of gift, there is a difference of nature and not merely a difference of contents. Where the document is wholly void *ab initio* any prayer to set it aside is unnecessary and redundant."

In *Bibi Saleha* v. *Zakariya Khan*[3] the allegation was that a deed of gift was executed under the impression that it was a *mukhtarnama* and that was found as a fact. With reference to a plea of limitation based on Article 91 the Court observed :

" It is now well established that this article applies to suits in which it is sought to cancel or set aside an instrument which is voidable, and has no application where the instrument which is challenged is void *ab initio*."

The plea of limitation was accordigly overruled :

Mr. B. V. Subramaniam, the learned advocate for the respondents, argued that the distinction, made in the decisions quoted above between misrepresentation as to the character of a deed and misrepresentation as to its contents was untenable in view of the pronouncement of the Privy Council in *Parikh Atmaram Maniklal* v. *Bai Hira*[4]. There, a widowed daughter-in-law living with her father-in-law had executed on 12th June, 1926, a deed relinquishing her rights over the properties inherited by her from her husband. On 14th October, 1930, she instituted a suit for setting aside the deed on the ground that the defendant got her to execute the document while she was in distress and under his protection, influence and control and without allowing her an opportunity for independent advice or legal aid ; that when she signed, she did not grasp the import of the document and that it was only when the document was explained to her that she understood that it purported to be a relinquishment of her rights over the property which she had inherited from her husband. There were concurrent findings of the Courts in India that at the time when the deed was executed the plaintiff was under the influence and protection of the defendant, that she had no independent advice, that owing to mental distress she was not fit to understand how adversely her rights were affected and that in fact she did not understand its meaning and legal consequences. Before the Board it was argued that the suit will be barred by Article 91, as the plaintiff had been given a copy of the deed in 1926 and more than three years had elapsed from that date. In answer to this, the Privy Council observed :

" When the ground for setting aside the instrument is that the plaintiff did not appreciate its true nature and legal consequences, it has been said by this Board, and it was not disputed in this case, that the limitation begins to run from the date when the plaintiff became aware of the true nature and legal consequences of the instrument."

And again

" It is for him (the defendant) to prove the date at which she in fact came to understand the true nature of the transaction which ought to have been explained to her by him and it is not enough for him to show merely that she had an opportunity of reading the document and that its terms were not complex or obscure ".

The respondent argues that this decision is an authority for the position that Article 91 would apply even when the misrepresentation was as to the nature of the document. But the context clearly shows that their Lordships had in mind the effect of the deed on the rights of the parties and not about the character of the deed. On the other hand, the decision in *Someshwar Dutt* v. *Tribhawan Dutt*[5], recognises that suits in which deeds are impugned on the ground that they were executed under a misrepresentation as to their character stand on a separate footing from suits to

1. (1907) 1 Ch.D. 537.
2. (1869) L.R. 4 C.P. 704.
3. A.I.R. 1950 Pat. 247.
4. (1948) L.R. 75 I.A. 108 : I.L.R. (1948) Bom. 148 (P.C.).
5. (1934) 67 M.L.J. 7 : L.R. 61 I.A. 224 : I.L.R. 9 Luck. 178 (P.C.).

set aside deeds on the ground of undue influence. In that case, the plaintiff had on 15th May, 1914, executed a deed of gift in favour of the defendant. He subsequently filed a suit to recover possession of the properties covered by the deed on the ground that the defendant represented to him that it was a deed of management that he had signed it without knowing that it was a deed of gift and that the suit was not barred by limitation, as it was filed within twelve years of the transaction. It was found that there was no misrepresentation and that the plaintiff had executed the deed with full knowledge of its contents. The substantive case put forward by the plaintiff, therefore, failed. It was then sought to be argued on behalf of the plaintiff that a case of undue influence had also been raised in the plaint and that the suit was within time as one to set aside a deed under Article 91. As to this the Privy Council observed that the only substantive case put forward in the plaint was that the deed had been executed under a misrepresentation as to its character, that allegations as to undue influence were made only as ancillary to that case and that there was no independent and substantive plea of undue influence put forward in the suit. It was also remarked that a suit for relief based on undue influence would be governed by three years limitation whereas according to the allegations in the plaint, the suit would be governed by 12 years limitation.

The authorities thus establish that when a deed of one character is executed on a representation that it is of a different character, then it is wholly void and inoperative. Such a deed does not require to be set aside under Article 91 and a suit to recover possession of the properties comprised therein would be governed by Articles 142 and 144 of the Limitation Act. The fact that there is a prayer for a declaration that the deed is void or that it should be set aside does not affect the position, such prayers being ancillary to the substantive prayer for possession. As observed in the decisions already cited, such prayers might be regarded as mere surplusage. We accordingly hold on issue No. 3 differing from the lower Court that the suit is not barred by limitation under Article 91.

In the result the appeal is allowed and the suit is remanded for disposal on all the issues excepting issue No. 3. As the appeal has been filed in *forma pauperis* no order is necessary for refund of court-fee. The costs of this appeal will abide the result of the suit.

R.M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Gurunatha Pillai (" A " Party) .. *Petitioner.**

v.

State of Madras and another .. *Respondents.*

Criminal Procedure Code (V of 1898), sections 145 and 146—Rival claimants scrambling for possession and adducing equally doubtful and equally dishonest evidence—Magistrate unable really to decide possession—Order for attachment leaving parties to establish their rights in a Civil Court—Propriety.

Where the parties scramble for possession and seek to establish their version by unrealiable and manufactured evidence, section 146, Criminal Procedure Code, can be resorted to. In such cases the Magistrate has merely to wind up the proceedings before him by attaching and leaving it open to both parties to approach the civil Court and obtain relief. It is not incumbent on the Magistrate to find possession of either party when because of the adduction by both sides of equally doubtful and equally dishonest evidence he was unable really to decide possession one way or the other.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Additional First Class Magistrate of Kumbakonam, dated 18th September, 1951, in M.C. No. 2 of 1951.

S. Krishnamachariar for the Petitioner.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) and *M. Ranganatha Sastri* for Respondents.

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*Criminal Revision Case No. 122 of 1952. 8th August, 1952.
(Criminal Revision Petition No. 113 of 1952).

The Court made the following

ORDER.—This Criminal Revision Petition is preferred against the order made by the Additional First Class Magistrate of Kumbakonam in M.C. No. 2 of 1951 directing that the properties involved in S. 145, Criminal Procedure Code, be attached under section 146, Criminal Procedure Code.

2. The short facts are: The question which fell to be considered by the Additional First Class Magistrate was as to who was in possession of S. No. 457/3 after 20th April, 1950, on 9th March, 1951, that is whether the field had come to be in the possession of Veerappa Chettiar or had continued to remain in the possession of Kandaswami Pillai.

3. The learned Additional First Class Magistrate has discussed in paragraph 14 of his judgment the reasons for his inability to be satisfied as to who was in possession of the property. The learned Magistrate after setting out the evidence adduced before him on this point has stated:

> "The oral evidence let in by both sides to prove possession after 20th April, 1950, is thus unreliable and unworthy of being acted upon. In fact the Sub-Inspector of Police, P.W. 9, stated in reply to a question from the Court that he had no idea when he asked for orders under section 144, Criminal Procedure Code, as to who had raised the crop on the land and that both parties claimed to have raised that crop."

In other words, the learned Additional First Class Magistrate found that it was a case where the two sides were scrambling for possession and that he was unable on the evidence on record to satisfy himself whether the one party or the other was in effective possession on the crucial date.

4. Jurisdiction to attach arises only when adjudication is impossible, that is to say when the Magistrate is unable to satisfy himself as to which of the party was in actual possession. Inability to find must be after full enquiry as has been in this case. See In re *Somnath Madhavji*[1]; In re *Sanganbasawa*[2]. *Neelamegam Pillai* v. *Mooroogappa Mudali*[3]; In re *Mukhoda Dossee*[4]; *Sheikh Manzar Ali* v. *Matiullah*[5]; In re *Venkatarama Hedge*[6]; *Brigpal Singh* v. *Ram Naresh Singh*[7]; *Parandhamayya* v. *Virayya*[8]; *Joyantikumar Mookerjee* v. *Middleton*[9]; *Thakurcharan Roy* v. *Shital Chandra Nahar*[10]. This provision is not meant to relieve the magistrate from the duty of deciding on merits and which has not been the case here. There is no obligation on the Magistrate to make independent enquiry if parties given opportunities have not adduced clinching evidence as to possession. (*Bengali Parida* v. *Banchhanidhi*[11].) There is no such invariable rule that justice must ultimately be done. Cases occur where a matter is left in doubt and real justice is not done. It is inadvisable that in following such a will-o'- the wisp as absolute justice parties should be put to enormous expense and the time of Magistrate should be wasted (*Debi Datt Tewari* v. *King Emperor*[12]). In fact it is to meet such contingencies namely where the parties scramble for possession and seek to establish their version by unreliable and manufactured evidence that section 146, Criminal Procedure Code, has been enacted. *The Katras Jherriah Coal Co.* v. *Sibkrishta Daw & Co.*[13]; *Sadar Ali* v. *Abdul Karim*[14]; *Alagiriswami Naidu* v. *Chinna Veerammal*[15]. In such cases the Magistrate has merely to wind up the proceedings before him by attaching and leaving it open to both parties to approach the civil Court and obtain reliefs.

5. Therefore, the only point in this case which has to be considered is whether the Magistrate was merely trying to evade from discharging his duties or whether

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1. (1904) 6 Bom. L.R. 723.
2. (1904) 7 Bom. L.R. 18.
3. 2 Weir 110.
4. 18 W.R. Crl. 4.
5. (1908) 8 Crl. L.J. 202.
6. (1930) 31 Crl. L.J. 933 : A.I.R. 1930 Bom. 172.
7. (1931) 33 Crl.L.J. 157 : A.I.R. 1932 All. 325.
8. 1930 M.W.N. 771.
9. (1900) I.L.R. 27 Cal. 785.
10. (1910) 14 C.W.N. xci.
11. (1929) 30 Cr.L.J. 893 : A.I.R. 1930 Pat. 29.
12. (1928) 26 A.L.J. 1327 : 29 Cr.L.J. 784 : A.I.R. 1928 All. 548.
13. (1894) I.L.R. 22 Cal. 297.
14. (1901) 5 C.W.N. 710.
15. (1948) 2 M.L.J. 642.

he was unable really to decide possession one way or the other. There can be no doubt that in this case both these parties, veteran litigants, who seem to have a long record of dispute between them, have gone in for a scramble for possession. But each has been brought to a standstill by the other as it was a case of Greek meeting Greek (Madras version, Kumbakonam *v.* Kumbakonam). The result was adduction by both sides of equally doubtful and equally dishonest evidence.

6. Therefore the Magistrate could not but decide that he was unable to satisfy himself and I see no reason to hold that he took an abbreviated view of his own functions. The order of the lower Court is correct and I decline to interfere. In dismissing this petition, I am confronted by the thought that the appellant before us was only a lessee for one year and his lease period has also expired.

K.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE VENKATARAMA AYYAR.

S. V. Ganapathy and others .. *Appellants.**

v.

Tiffin's Barytes, Asbestos and Paints, Ltd. and others .. *Respondents.*

*Specific Relief Act (I of 1877), section 45—Scope of—*Mandamus—*Writ of—Newly elected Directors of company—Documents etc. in possession of others not removed from office of Managing Agents—Whether writ directing delivery of documents lies.*

Where the appellants were duly elected Directors of the first respondent company and they filed an application for a writ of *mandamus* for an order directing the respondents to deliver to them all the records, documents, vouchers and other properties in their possession and the respondents contested the application on the ground that the managing agents appointed under the Articles of Association of the Company had not been validly removed from office as to enable appellants to get the documents in their possession.

Held: that the writ of *mandamus* was misconceived and the proper remedy was by way of a suit under section 45 of the Specific Relief Act. An application for a writ of *mandamus* was barred both under provisos (*b*) and (*d*) to section 45 of the Specific Relief Act.

Even if the managing agents are really in office the application for *mandamus* would fail on the merits.

In re Albert Mills Co., Ltd., Nasarvanji v. *Shivji Manikbhai*, (1872) 9 B.H.C.R. 438; *Bank of Bombay* v. *Suleman Sonaji*, (1908) 18 M.L.J. 355 : L.R. 35 I.A. 130 : 32 Bom. 466 (P.C.), Referred to.

Appeal against the judgment and decree of the Hon'ble Mr. Justice Krishnaswami Nayudu, dated 22nd January, 1952 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 1471 of 1951.

G. Vasanta Pai for Appellants in O.S.A. No. 66 of 1952.

O. Radhakrishnan, R. Rangachariar, K. Rajah Ayyar and *P. C. Parthasarathy Ayyangar* for Respondents in O.S.A. No. 66 of 1952.

R. Rangachariar for *K. Rajah Ayyar, V. Seshadri* and *K. S. Ramamurthi* for Appellants in O.S.A. No. 56 of 1952.

O. Radhakrishnan, G. Vasanta Pai S. Mohankumaramangalam and *V. Venkataraman* for Respondents in O.S.A. No. 56 of 1952.

The Judgment of the Court was delivered by

Venkatarama Ayyar, J.—This appeal arises out of an application for *mandamus*, Application No. 1471 of 1951 filed by the appellants under section 45 of the Specific Relief Act. The first respondent is a company called "The Tiffin's Barytes Asbestos and Paints, Ltd."

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*O.S.A. Nos. 66 and 56 of 1952. 16th October, 1952.

The third respondent's company are the managing agents and the second respondent is the manager of the third respondent and ex-officio director of the first respondent company. At an annual meeting of the company held on 26th February, 1951, the appellants were duly elected directors. This application, Application No. 1471 of 1951, was filed by them as such directors for an order directing the respondents to deliver to them all the records, documents, vouchers and other properties of the company in their possession. The respondent contested the application on the ground that the managing agents (respondent three) appointed under the articles of association had not been validly removed from their office and that, therefore, they were the persons entitled to be in possession of the documents and of the properties of the company. It was also contended that section 45 of the Specific Relief Act would be inapplicable as the rights sought to be enforced in the application were not of a public character. Mr. Krishnaswami Nayudu, J., upheld these contentions and dismissed the application and this appeal is directed against that order.

We agree with Mr. Krishnaswami Nayudu, J., that the application for *mandamus* was misconceived and that the proper remedy of the appellants was by way of a suit. Section 45 of the Specific Relief Act in so far as it is material for this case is as follows:

"Any of the High Courts of Judicature at (Calcutta, Madras and Bombay) may make an order requiring any specific act to be done or forborne within the local limits of its ordinary original civil jurisdiction, by any person holding a public office whether of a permanent or a temporary nature, or by any corporation or inferior court of judicature provided;

(*b*) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person or court in his or its public character or on such corporation in its corporate character; and

(*d*) that the applicant has no other specific and adequate legal remedy."

The question whether the third respondent company have been validly removed from their office as managing agents is in controversy between the parties. If they have been validly removed, as is contended by the appellants, then their possession of the documents and all the properties of the company would be without any title and unlawful. There can then be no question of their being directed to do or forbear from doing anything in their public character. The appropriate remedy of the appellants would in that case be to institute a suit against them as trespassers to recover possession of the properties. An application for *mandamus* would be barred both under proviso (*b*) and (*d*) to section 45 of the Specific Relief Act. In the alternative if the third respondent's company are validly in office then Article 71 which vests the management of the company in them entitled them to maintain the possession of the documents and of the properties and the only right which the directors possess is under Article 77 to have inspection of them at all times. The articles do not provide for the directors themselves maintaining accounts, at least when there are managing agents. The application for *mandamus* should in this alternative fail on the merits.

The learned advocate for the appellants referred us to the decision in In re *The Albert Mills Co., Ltd., Nasavarvanji* v. *Shivji Manikhbhai*[1]. There it was observed that when the directors of a joint stock company who are duly elected are prevented from exercising their rights or prevented from exercising their functions by the company acting through its other directors then a *mandamus* can be issued against the company as there was no other remedy. But in this case though the first respondent is the company, effective relief is prayed against respondents 2 and 3 in their individual character and it is also indisputable that there is another remedy open to the appellants for the enforcement of their rights. Reliance was also placed on the decision in *Bank of Bombay* v. *Suleman Somji*[2] where in an action by a shareholder claiming a right to inspect the register of shareholders and make extracts therefrom the Privy Council observed that the principles applicable would be those

1. (1872) 9 B.H.C.R. 438.
2. (1908) 18 M.L.J. 355 : L.R. 35 I.A. 130 : I.L.R. 32 Bom. 450 (P.C.).

regulating an application for a writ of *mandamus* and that it was incumbent on the applicant to show clearly that he has "a specific legal right to enforce which he asks for interference of the Court." We do not see how this decision advances the case of the appellants. If the third respondent company are treated as still validly in office then the only specific right which the applicants can enforce is under Article 77 for inspection of the documents if that is refused. That, however, is not what the applicants want and indeed the respondents have offered to give inspection of the documents. We do not find any valid ground for interfering with the order of Krishnaswami Nayudu, J. The remedy of the appellants is by way of an independent suit. We do not express any opinion on the merits of the points in dispute. This appeal is accordingly dismissed but in the circumstances without costs.

K.C. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Thirugnanasambandham Pillai, Managing Trustee of Nangur Sri Narayanaswami Sannidhi Dwadasi Kattalai .. *Appellant**

v.

Ramachandram Pillai and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 92—Suit by Managing Trustee against other trustees for accounts—Sanction of Advocate-General—Necessity.

A suit by one Managing Trustee for rendition of accounts against the other trustees during the period of his turn would be maintainable without the sanction of the Advocate-General.

Appeal against the decree of the Court of the Subordinate Judge, Mayuram, in A.S. No. 122 of 1947, preferred against the decree of the Court of the District Munsif, Sirkali, in O.S. No. 297 of 1946.

S. Sitarama Aiyar and *S. Rajaraman* for Appellant.

K. Venkataramani for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of O.S. No. 297 of 1946, a suit instituted by the appellant for rendition of accounts for the period from 13th April, 1945 to 13th April, 1946, by the first defendant of the plaint kattalai and to direct the first defendant to hand over to the plaintiff the amount due to the kattalai and also the moveables, documents, vessels and accounts belonging to the kattalai and possession of the kattalai building and for costs of suit.

The Vellalars of Nangur have been conducting a Dwadasi kattalai for a number of years. On 19th May, 1922, an arrangement was arrived at for the due management of the kattalai and it was embodied in an agreement, Exhibit P-1. Under that agreement five persons, Ayyaru Pillai, Swaminatha Pillai, Kanakasabai Pillai, Selvanayagam Pillai and Thyagaraja Pillai, were constituted as Vicharanakartas of the said kattalai. One of the material terms of the agreement was that

> "all transactions relating to the said charity, receipts and expenditure shall be conducted and done by Ayyaru Pillai and Ramachandra Pillai on behalf of Kanakasabai with our consent and, as between the two, as per the lot cast to-day, Ayyaru Pillai shall first manage and then Ramachandra Pillai, each managing for one year by turns."

It was also provided that the managing trustee of the charity should, on the New Year day of every year, in the Sannadhi of Narayanaswami and at the assembly of all the members of their community, render account of the receipts and expenditure to all the members of the community and hand over all the articles, accounts and records to the managing trustee of the next year. If any one of the aforesaid five members died, the agreement provided that the eldest member of the family of the deceased should accept it at the end of the year and manage and he should conduct himself according to the terms of the aforesaid agreement.

* S.A. No. 510 of 1949. 10th December, 1952.

Subsequent to the agreement, Ayyaru died. After the death of Ayyaru, the management of the kattalai was carried on in turns of one year each by the eldest member in the family of the said Ayyaru and Ramachandra Pillai. It is not disputed that after Ayyaru's death, the eldest member of the family, Rajagopala Pillai, managed during his lifetime, and after his death, the then eldest member of the family, Ganapathia Pillai, managed during his lifetime, and thereafter Gnanasambandham Pillai, the plaintiff, became the trustee. All the aforesaid three persons managed the kattalai during the turn allotted to their ancestor, Ayyaru Pillai. The last turn of the plaintiff expired on 13th April, 1945. The next year, the kattalai was in the management of the first defendant. The next turn, according to the arrangement, was the turn of Ayyaru. If the previous practice was followed, the plaintiff should be in the management during that year. But the other trustees issued a notice to him on 5th June, 1946, informing him that he had no right to manage. The suit was therefore filed for directing the first defendant to render a true account for one year of his turn and for delivery of possession of the building. Both the courts held that the plainriffs failed to establish that he was the managing trustee for the year in question. They also held that, even on the assumption that he was the managing trustee, the suit was not maintainable, as the sanction of the Advocate-General was not obtained under section 92 of the Civil Procedure Code. They also expressed the view that, even if the plaintiff's case was true, as the year had run out, he would not be entitled to take possession of the building. In the result, the suit was dismissed. The plaintiff preferred the above appeal.

The first question therefore is, whether, under Exhibit P-1, the plaintiff would be entitled to manage the kattalai during 1946-47. Under the agreement, the five persons mentioned therein was constituted Vicharanakartas. Ayyaru and Ramachandra were constituted managing trustees by turns. If any one of the five trustees died, the eldest member of the family would succeed to his office. He should conduct himself according to the terms of the aforesaid agreement. There is no express recital in the document indicating who should take over the turn of Ayyaru Pillai or Ramachandra Pillai, if any of them happened to die. But, in my view, a reasonable interpretation should be put on the document consistent with the express words used so as to avoid any lacuna. If the interpretation of the learned Judge be accepted, there would be an obvious lacuna. If Ayyaru or Ramachandra Pillai died, there would not be any provision for taking over the turn of the deceased manager. On the other hand, a fair reading of the entire document shows that the intention of the parties was to provide for the eldest member of the family of the deceased getting into the shoes of the deceased. He was directed to conduct himself according to the terms of the aforesaid agreement. One of the terms was that Ayyaru and Ramachandra Pillai should manage by turns The member succeeding Ayyaru or Ramachandra would therefore be entitled to manage the kattalai in accordance with the turns provided under the agreement. That this must have been the intention of the parties to Exhibit P-1 is obvious from the conduct of the parties after the death of Ayyaru. For about 25 years, the parties interpreted the document to mean that the persons succeeding Ayyaru should also succeed to his rights to manage the charity during his turn. I would therefore differing from the courts below, hold that the plaintiff was entitled to his turn of management under Exhibit P-1. It is not disputed that, if the terms of Exhibit P-1 were followed, as interpreted by me the plaintiff would be entitled to manage from 13th April, 1946 to 13th April, 1947. But the courts beolw were right in not decreeing to him possession of the house, as the year of his turn had run out.

I cannot agree with the view of the learned Subordinate Judge that the suit was bad because the sanction of the Advocate-General was not obtained. This was a suit by one managing trustee for rendition of accounts against the other trustee during the period of his turn. The learned Judge relied upon a judgment which had been overruled. In *Tirumalai Tirupati Devasthanams Committee* v. *Krishnayya*[1],

1. (1942) 2 M.L.J. 785: I.L.R. (1943) Mad. 819.

it has been held that a suit of that character would be maintainable without the sanction of the Advocate-General.

The decree of the lower Court is therefore modified and the first defendant is directed to render accounts to the plaintiff for his management of the kattalai from 13th April, 1945 to 13th April, 1946. The appeal is allowed with half costs here. The parties will bear their own costs in the Courts below.

No leave.

R.M. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

Annasami Mudaliar .. *Appellant**

v.

Ekambari Ammal .. *Respondent.*

Civil Procedure Code (V of 1908), sections 151 and 153—Court acting under inherent powers—Orders not appealable—Different provision of law also mentioned in the petition additionally—If would make the order appealable—Practice and procedure.

When a provision of law cannot have any kind of application to a particular proceeding by the mere fact that it is stated in the petition it cannot be said that such a provision will be applicable.

Where the lower Court has invoked the inherent powers vested in it and sets aside an order it is an order passed under section 151, Civil Procedure Code and no appeal lies from such an order to the High Court. Merely because in the petition before the lower Court the petitioner has also mentioned Order 23, rule 3, Civil Procedure Code, as applicable to the case, which provision is clearly inapplicable to that case, the order does not become appealable.

Appeal against the order of the Court of the Subordinate Judge, Vellore, dated 3rd December, 1951, in I.A. No. 245 of 1951 in O.S. No. 71 of 1947.

A. Sundaram Aiyar for Appellant.

S. Muthiah Mudaliar and *M. Chockalingam* for Respondent.

The Judgment of the Court was delivered by

Govinda Menon, J.—A preliminary objection is raised by Mr. Muthiah Mudaliar who appears for the contesting respondent that the order of the lower Court is not appealable ; and in order to appreciate the point raised by the learned counsel it is necessary to set forth a few facts.

Original Suit No. 71 of 1947 on the file of the Court of the Subordinate Judge, Vellore, is a suit by one Ekambari Ammal, daughter of one Lokanatha Mudaliar, for partition and recovery of possession of her share in the properties which belonged to her father. Defendants 1 to 3 are the surviving brothers of Lokanatha Mudaliar, and the fourth defendant, Manikkammal, is a sister of the plaintiff and a daughter of Lokanatha Mudaliar. According to the plaintiff, it was stated that before the death of Lokanatha Mudaliar there was a division in status of the joint family properties between Lokanatha Mudaliar and his three brothers but that there was no separation by metes and bounds and the property remained joint on that score. The plaintiff therefore stated that in the properties which were the joint family properties, Lokanatha Mudaliar had a one-fourth share and plaintiff as one of the two daughters of Lokanatha Mudaliar is entitled to 1/8th in the whole of the properties.

The suit was contested mainly by the first defendant on the ground that before the death of Lokanatha Mudaliar he executed a will by which a fair proportion of his properties was bequeathed in favour of the first defendant. The first defendant admitted that there was a division between Lokanatha Mudaliar and the three brothers and further stated that the division had been completed by metes and bounds with the result that properties were handed over to Lokanatha Mudaliar who had bequeathed them under the will.

* A.A.O. No. 29 of 1952. 23rd January, 1953.

The suit went to trial; and the first defendant who propounded the will examined a witness or two. At that stage a compromise was entered into which was signed by the plaintiff and the first defendant as well as by the advocates appearing for them. It is also seen from the original compromise that the second defendant has signed the compromise. When that was filed in Court, the Court passed an order to the effect that as the plaintiff and defendants 1 and 2 appeared at the time of the petition coming on for hearing, a decree in terms of the compromise has been passed. No mention has been made of the fourth defendant in the compromise or of her rights. Subsequently, the fourth defendant filed an application under Order 9, rule 13, Civil Procedure Code, to set aside the decree passed *ex parte* against her and the plaintiff filed another application purporting to be under Order 23, rule 3 and section 151, Civil Procedure Code, praying that the decree passed in terms of the compromise filed in Court should be set aside. Various grounds are alleged in the application for setting aside the compromise by the plaintiff but it is unnecessary to re-state them in this appeal. Had it become necessary for us to find out whether a valid compromise had been entered into by the plaintiff and the first defendant, we would probably have gone deeper into that question but then the course which this litigation has taken has rendered it unnecessary for us to delve deep into that matter.

The learned Judge holding that in a partition suit every defendant must be deemed to be a plaintiff and every plaintiff reciprocally must be deemed to be a defendant, on the ground that all the parties entitled to a share in the joint family properties had not signed the compromise, set aside the decree against the fourth defendant on her application. Whether that order is correct or not it is unnecessary for us to determine now because that has become final and no revision or appeal has been filed against the setting aside of the *ex parte* decree. On the petition filed by the plaintiff to set aside the compromise decree, the learned Judge purported to act under sections 151 and 153, Civil Procedure Code, set aside the compromise decree and directed the suit to be tried on the merits. Against that order of the learned Judge in I. A. No. 245 of 1951, the first defendant preferred the above appeal as well as the alternative civil revision petition.

At the time of the admission the learned Judge before whom it came up dismissed the civil revision petition on the ground that no question of jurisdiction arose; and the question of appealability was then left to be decided later on.

Now, it is clear that the learned Judge in the Court below purported to act under section 151, Civil Procedure Code, though in the application by the plaintiff, Order 23, rule 3, Civil Procedure Code, was also mentioned. We have doubt whether that Order 23, rule 3, Civil Procedure Code, cannot have the remotest application to the facts of the present case. Under that provision of law, where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by a lawful agreement or compromise, then the Court shall pass a decree in accordance therewith so far as it relates to the suit. Therefore, what this rule provides is that if the parties come to Court with a compromise petition and either both of them pray that a compromise decree be passed or one of them prays that a compromise decree be passed, while the other disputes the validity of the compromise, in such a case it is open to the Court, if it is satisfied that the parties have entered into a lawful compromise, to pass a decree. How this provision of law can be made applicable to an act of the Court by which it sets aside a decree passed, it is difficult to understand. The learned Judge does not in so many terms explicitly or by necessary implication say that he has invoked Order 23, rule 3, Civil Procedure Code, in passing the order under appeal. On the other hand, the learned Judge refers to two decisions of the Calcutta High Court, namely, *Gobind Chandra Sardar* v. *Bhagbat Sardar*[1], a decision of Sir Asutosh Mukherjee, *Kt.* and Beecheroft, JJ. and *Taraprasanna Sarkar* v. *Kalikamohan Sarkar*[2], another decision of Sir Asutosh Mukerji and Rankin, JJ., where the learned Judges have held that it is open to a

1. (1914) 27 I.C. 242. 2. (1923) 75 I.C. 319.

Court to set aside a compromise for valid reasons by applying sections 151 and 153, Civil Procedure Code. The decision in *Taraprasanna Sarkar* v. *Kalikamohan Sarkar*[1], is very instructive because in that case specific mention is made of sections 151 and 153, Civil Procedure Code. We have no doubt whatever that the Subordinate Judge here purported to set aside the decree passed in terms of the compromise by the application of the inherent power vested in him under section 151, Civil Procedure Code. Mr. A. Sundaram Iyer contends that we must read into the order of the learned Judge the importation of the application of Order 23, rule 3, Civil Procedure Code. But it seems to us that when that provision of the law cannot have any kind of application, by the mere fact that it is stated in the petition, it cannot be said that such a provision will be applicable. As an example, if in a petition to pass a decree in terms of the compromise, the party by design or inadvertence also puts in a section of the Criminal Procedure Code, it cannot be said that a criminal revision lies to the High Court or to any other Court. We are therefore satisfied that what has happened in this case is that the learned Judge on being satisfied that the decree passed by him on the footing of the compromise was unjustifiable and without jurisdiction invoked the inherent powers vested in him and thereby set it aside. When once we come to the conclusion that the order of the learned Judge in the Court below was passed under section 151, Civil Procedure Code, it is clear that no appeal lies to this Court.

This civil miscellaneous appeal is therefore dismissed. As we feel that the appellant has misconceived his remedy we make no order as to costs in this appeal.

R.M. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Munagala Venkateswara Rao .. *Petitioner**

v.

Mohammad Mohibulla Saheb .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), sections 5 and 6—Applicability.

The provisions of sections 5 and 6 of the Madras Buildings (Lease and Rent Control) Act, 1946 (now Act XXV of 1949) are peremptory and will apply even though the parties have contracted to the contrary. An increase in rent is permissible only under section 6 of the Act and not otherwise, whether or not fair rent is fixed by Court. Any agreement to the contrary is not valid. (*See* now sections 5 and 5-A of the Act.) *Moses Pillai* v. *Govindan*, (1948) 1 M.L.J. 51, followed.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of Small Causes Court, Eluru, in S. C. S. No. 115 of 1951.

I. Vishnu Rao for Petitioner.

Ch. Sankara Sastri for Respondent.

The Court delivered the following

JUDGMENT.—The suit out of which this revision petition arises was for a sum of money said to be the excess rent which the petitioner had agreed to pay to the respondent in accordance with a rent chit executed by him. The agreement was that the petitioner should pay Rs. 9 per month as rent for the premises from 1st July, 1947, till 30th June, 1949, and vacate the premises thereafter. If, on the other hand, he continued to remain on the premises, a higher rent at the rate of Rs. 14 per mensem was to be paid. The present suit is for recovery of the difference in rent from 1st July, 1949 to 12th January, 1951, at the rate of Rs. 5 per mensem. The defendant contested the suit on the ground that the agreement was null and void and was against the provisions of the Madras Buildings (Lease and Rent Control) Act, 1946, and therefore the agreement could not be enforced. There is a further contention that since the plaintiff had received without protest the rent

1. (1923) 75 I.C. 319.

* C.R.P. No. 1495 of 1951. 9th January, 1953.

at the rate of Rs. 9 per mensem even after 1st July, 1949, he had waived the claim for the increased rent. The lower Court rejected both these contentions and decreed the suit. The question for consideration is whether the agreement pleaded can be enforced or not.

In *Moses Pillai* v. *Govindan*[1], Govindarajachari, J., in construing clause 7 (*a*) of the Madras House Rent Control Order, which was one of the predecessors of the present Act, held that the language of clause 7 (*a*) of that order is peremptory and permits an increase in rent only where some addition, improvement or alteration such as is described in that clause has been carried out at the landlord's expense after the fixation of the rent. In that case also there was an agreement dated 4th February, 1942, which provided that the tenancy shall be for a period of one year from that date and during the period the rent was fixed at Rs. 40 per month. After the expiry of the period the tenant was to deliver possession of the house to the landlord but if he failed to deliver possession then the tenant agreed to pay a rent at the rate of Rs. 45 per mensem till possession was delivered over to the landlord. The landlord filed a suit to recover the higher rate of rent and it was contended that the stipulation for the payment of increased rent was not enforceable. Accepting that contention the learned Judge held that the provisions of clause 7 (*a*) of the order would apply even though the parties had contracted to the contrary. The result was that the landlord was held entitled only to the lower rate of rent as agreed to. It is contended for the petitioner that this decision would apply even under the present Act, because under section 6 a landlord is not entitled to claim anything in excess of the fair rent. Section 6 runs as follows :—

"6. When the Controller has determined the fair rent of a building—

(*a*) the landlord shall not claim or receive any premium or other like sum in addition to fair rent or any rent in excess of such fair rent, but the landlord may stipulate for, and receive as advance an amount not exceeding one month's rent;

(*b*) any agreement for the payment of any sum in addition to rent or of rent in excess of such fair rent except in cases falling under section 5 or clause (*a*) of this section shall be null and void in respect of such addition or excess and shall be construed as if it were an agreement for payment of the fair rent; . . . ."

Learned counsel for the respondent wants to escape from the effects of this section by saying that such an agreement can be declared null and void only where the fair rent of the building has been fixed under section 4 of the Act, and an increase in such fair rent has been allowed under section 5 of the Act. Section 4 deals with the determination of fair rent on an application by the tenant or the landlord ; and how the same has to be arrived at is set forth in detail in that section. Section 5 lays down that when the fair rent of a building has been fixed under section 4, no further increase in such fair rent shall be permissible except in cases where some addition, improvement or alteration has been carried out at the landlord's expense and if the building is then in the occupation of the tenant, at his request. From this it is argued that unless the fair rent of a building has been fixed under section 4, it is open to a landlord to increase the rent whenever he pleases. His argument is that if there is a tenancy and rent has been fixed by agreement of parties, even after the coming into operation of Madras Act XV of 1946, it is open to the landlord to increase the rent if there has been no fixation of the same by the Controller. It is relevant to quote section 5 of the Act which says :

"When the fair rent of a building has been fixed under section 4, no further increase in such fair rent shall be permissible except in cases where some addition, improvement or alteration has been carried out at the landlord's expense and if the building is then in the occupation of a tenant, at his request."

What is contended on behalf of the respondent is that the decision in *Moses Pillai* v. *Govindan*[1], was given under the provisions of the Madras House Rent Control Order, 1941, and not on the interpretation of Act XV of 1946, and that these two enactments are not in *pari materia*, but differ in important particulars. On a comparison of the various sections of the Act with the clauses of the Madras House

1. (1948) 1 M.L.J. 51.

Rent Control Order, I am not able to find any material difference which would justify my holding that the circumstances under which *Moses Pillai* v. *Govindan*[1], came to be decided were different. Clause 6 of the Madras House Rent Control Order is in the following terms :

"When the Controller has determined the fair rent of a house •

(a) the landlord shall not claim or receive any premium, advance or other like sum in addition to rent or any rent in excess of such fair rent ;

(b) any agreement for the payment of any sum in addition to rent or of rent in excess of such fair rent shall be null and void in respect of such excess and shall be construed as if it was an agreement for payment of the said fair rent ; . . . ."

Clause 6 of the Madras House Rent Control Order corresponds to section 6 of Madras Act XV of 1946. Whereas clause 6 opens by saying "when the Controller has determined the fair rent of a house," section 6 of Act XV of 1946 also opens with the words "When the Controller has determined the fair rent of a building," I am not able to find any distinction in essence between the two openings ; and if clause 6 of the Madras House Rent Control Order is compared to, and contrasted with, section 6 of the Act, there can be no material difference discernible. Likewise there cannot be much difference between clause 7 of the House Rent Control Order and section 5 of Act XV of 1946. Clause 7 says that after the commencement of this order an increase in the rent fixed under clause 5 shall be permissible only in cases where some addition, improvement or alteration not included in necessary repairs or repairs which are usually made to houses in that area has been carried out at the landlord's expense. Section 5 says that when the fair rent of a building has been fixed, an increase in rent cannot be permitted. Sub-clause (b) of clause 6 of the Madras House Rent Control Order when compared with clause (b) of section 6 of the Act leaves one with the impression that there was no material change. In these circumstances, I am unable to find any distinction between the present case and that decided in *Moses Pillai* v. *Govindan*[1]. The order of the lower Court is therefore not sustainable and is set aside. The civil revision petition is allowed with costs throughout.

R.M. — *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Kunda Papanna and others .. *Accused.**

Madras Prohibition Act (X of 1937)—Offences under—Practice and procedure—Section 562 (1), *Criminal Procedure Code (V of* 1898), *if could be applied—First offenders—Speculative presumption—Propriety.*

Small or lenient sentences in cases of doubt are highly objectionable, because they might allow illegal or unsustainable sentences to stand by making the party fear that if he appeals he might get a more severe sentence. Every Court must award the sentence suited to the offence and the offender and not make the sentence smaller because of any doubt regarding the commission of the offence itself.

Except under exceptional circumstances to apply section 562 (1), Criminal Procedure Code, to all first offences of drunkenness is neither the intention of the law, nor will it be consistent with common sense. In all such cases the antecedents of the offenders and the circumstances of the offence must be considered individually.

It is no part of a Court's function to speculate on undetected offences. To presume on no evidence, that a man committing an offence must have committed several offences before, which went undetected is not proper.

It is not proper to say that the spread of drink to classes not addicted to it before is to be treated, more indulgently than the continuance of drink among the classes addicted to it before. Nor should offenders be left off on the ground of their backwardness.

Case referred for the orders of the High Court under section 438 of the Criminal Procedure Code by the District Magistrate (Judicial), Nandyal, in his letter dated Dis. No. nil dated 11th October, 1952.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

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1. (1948) 1 M.L.J. 51.

* Crl. Rev. Case Nos. 1078 to 1090 of 1952. 14th November, 1952.
(Case Referred Nos. 54 to 66 of 1952).

The Court made the following

ORDER.—These are thirteen cases referred by the District Magistrate (Judicial), Nandyal, for setting aside the orders of the Stationary Sub-Magistrate, Jammalamadugu, in C. C. Nos. 120 to 132 of 1952, releasing 13 persons convicted under section 4-A of Act X of 1937, the Prohibition Act under section 562 (1), Criminal Procedure Code, on their entering into bonds for Rs. 200 each to appear and receive sentence whenever called upon to do so, and for inflicting substantial punishments on them. The learned Stationary Sub-Magistrate considered that, as these accused persons belonged to primitive backward tribes, like Dommara, Salai, Thogata, etc., and as these were their first offences they should be released under section 562 (1), Criminal Procedure Code, instead of awarding substantive sentences of imprisonment or fine. He also relied on the fact that two doctors differed regarding the question of these accused persons being really intoxicated by taking any illicit liquor.

The learned District Magistrate rightly attacks these orders on three grounds. Firstly, he says that any difference between doctors' opinions regarding the *factum* of the offence would only be a matter for acquitting the accused, if the Court entertained any reasonable doubt regarding their guilt, and would not be a reason for applying section 562 (1), Criminal Procedure Code. I agree. Indeed, small or lenient sentences in cases of doubt are highly objectionable, because they might allow illegal or unsustainable sentences to stand by making the party fear that if he appeals he might get a more severe sentence. Every Court must award the sentence suited to the offence and the offender, and not make the sentence smaller because of any doubt regarding the *commission of the offence itself.* Of course, the case is different where there is a doubt whether a graver offence or a smaller offence has been committed.

The second reason given by the learned District Magistrate is that section 562 (1), Criminal Procedure Code, should not be applied to cases like these. I agree that this section should not be applied to cases like these normally. To apply section 562 (1), Criminal Procedure Code, to all first offences of drunkenness is neither the intention of the law, nor will it be consistent with sense or common sense. Nor can all first offenders claim action under section 562. Thus, a man committing *murder* for the first time cannot invoke the aid of section 562 (1), Criminal Procedure Code, nor can, normally offences under Prohibition Act be properly dealt with under section 562 (1), Criminal Procedure Code. There will, of course, be exceptional cases, as, for instance, when a father, or a mother makes a son or daughter, just past 14 or even 18, drunk. But in all such cases, the antecedents of the offenders and the circumstances of the offence must be considered *individually*, and not in a kind of omnibus fashion, as here.

The third reason given by the District Magistrate is that backward classes should not be treated on a more lenient footing than forward classes regarding such offences. I agree. The Prohibition Act is largely intended to help the backward classes to save themselves from the drink evil, and to let off members of the backward classes committing such offences on the ground of backwardness, giving them, the same preference as under the Constitution for appointments, etc., will not be proper.

But I cannot agree with the learned District Magistrate regarding two other reasons relied on by him. The first was that these accused persons could not be deemed to be *first offenders*, as they must have committed, or must be presumed to have committed, several offences like these which went untedetected! It is no part of a Court's function to speculate regarding such undetected offences and cause an undeserved slur on the accused and the police or other detecting authority. Courts in our Indian Union are only to act on *proved facts* and ought not to say anything not warranted by evidence admissible under the Indian Evidence Act. To presume, on no evidence, that a man commiting an offence must have committed several offences before which went undetected is not allowable under our law. So, I consider that all these accused are really *first offenders*.

The next reason relied on by the learned District Magistrate is that the offenders belong to that class of society in which drink was common in pre-prohibition days and so, deserve a far more deterrent punishment than if they had belonged to non-drinking class in pre-prohibition days. It is *prima facie* ridiculous to say that the spread of drink to classes not addicted to it before is to be treated more indulgently than the continuance of drink among the classes addicted to it before.

After perusing the records, and hearing the learned Public Prosecutor, who did not want notices to issue to the accused in the peculiar circumstances, I have no doubt whatever that the conviction of everyone of the accused was fully supported by the evidence on record and need not be interfered with. But, I am of opinion that, in the peculiar circumstances, where only small fines would have been imposed by me had I tried these cases in the first instance, it will be against all justice, equity and good conscience to issue notices to these accused-petitioners, after a delay of several months, to appear in this Court, causing to them enormous waste of time, energy and money in coming from distant Kurnool to this place to answer notices for enhancement of punishment.

The learned Public Prosecutor agrees :

In the end, therefore, I see no reason to interfere, with the orders passed under section 562 (1), Criminal Procedure Code, even though they were not strictly warranted. The references are answered accordingly.

R.M. ——— *References answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Pethayya Pillai *alias* Ramaswami Pillai .. *Appellant**

v.

Karuppiah Nadar and others .. *Respondents.*

Oaths Act (X of 1873), section 8—Scope—One of the plaintiffs in-charge of the conduct of the litigation but having no power of attorney from remaining plaintiffs—Challenge by to defendant to take oath "on head of his eldest son"—Improper—Acceptance by defendant—The other plaintiffs appearing and resiling from challenge—Right to—Advocate for plaintiff signing challenge petition—Effect.

An oath purporting to effect a third person (for instance on the head of his eldest son) cannot be lawfully administered. If however in fact it was administered it would be conclusive of the matters stated. But where such a challenge is made by one of the plaintiffs in the absence of the other plaintiffs and accepted by the defendant but the other plaintiffs subsequently appeared and protested against the challenge from which they resiled but despite it the oath was administered and the suit dismissed as regards all the plaintiffs,

Held :—The other plaintiffs were entitled to resile from the challenge and the suit cannot be dismissed so far as their rights were concerned. The plaintiff making the challenge though in charge of the litigation had no power of attorney from the other plaintiffs so as to bind them by his challenge. Nor had their Advocate authority to sign a oath petition not contemplated by section 8 of the Oaths Act.

The position may have been perhaps different if the other plaintiffs had not appeared on the scene and resiled even before the oath was administered.

Appeal against the Order of the Court of the Subordinate Judge of Ramanathapuram at Mathurai dated the 21st day of March, 1949, and made in A. S. No. 126 of 1948 (O. S. No. 230 of 1946) on the file of the Court of the District Munsiff, Srivilliputtur.

S. V. Venugopalachari for Appellant.

C. K. Viswanatha Aiyar and *Messrs. Sundararajan* and *Sivaswami* for Respondents.

The Judgment of the Court was delivered by

Mack, J. :—This is an appeal which arises out of the Oaths Act. A suit was filed by four undivided Hindu brothers, one of whom was a minor against

* A.A.O. No. 571 of 1949. 17th December, 1952.

the first defendant and some tenants for a declaration of their title to certain immoveable property and for recovery of possession. At the trial of the suit, the second plaintiff, the younger brother of the first plaintiff, was in Court, conducting the litigation and instructing their learned Advocate. The second plaintiff issued a challenge to the first defendant, which was accepted to take an oath on the head of his eldest son. The other plaintiffs were not present in Court. The challenge was made on 12th December, 1947, and the suit adjourned for the taking of this very unusual oath to 16th December, 1947. On that day, the other adult plaintiffs appeared and protested against the challenge made by the second plaintiff from which they resiled. Despite their resiling, this oath was administered in Court on 16th December, 1947, and the suit dismissed with costs by the learned District Munsiff. In appeal, the learned Subordinate Judge held that the oath was not binding on the 1st, 3rd and 4th plaintiffs, who were entitled to resile from it and set aside the dismissal of the suit only as against them and remanded it for fresh disposal. The learned Advocates agree that that suit has now been decreed after contest and that an appeal against that decision is now pending. The position created by the learned Subordinate Judge's judgment is no doubt anamolous in that one of the plaintiffs has been non-suited, the oath being held to be binding on him only and that the suit has been retried only as regards the 1st, 3rd and 4th plaintiffs. In this particular suit, the anomoly does not result in any practical inconvenience or impossibility, seeing that in the event of the 1st, 3rd and 4th plaintiffs ultimately succeeding, they will get a decree for 3/4th share of the suit property and that the oath being binding on the second plaintiff, he becomes deprived of his share.

No decision has been placed before me, which covers the somewhat extraordinary facts in the present case. The learned Judge referred to two Allahabad decisions *Tulshiram* v. *Daya Ram*[1], and *Ram Narain Singh* v. *Babu Singh*[2], in which two learned Benches deprecated an extraordinary oath of this kind as being improper. For a person to be challenged or to make an offer to take an oath on the head of his son is, as it appears to me, to give evidence on oath not contemplated by section 8 of the Oaths Act, which specifically requires that the oath should be one not purporting to affect any third person. In *Tulshi Ram* v. *Daya Ram*[1], the oath was not in fact taken as the plaintiff did not produce his son into Court. In that case, the Court proceeded to judgment under Order 17, rule 3, Civil Procedure Code, on the available material. In appeal a trial on the merits after allowing the parties opportunity to produce all evidence was ordered. In *Ram Narain Singh* v. *Babu Singh*[2], the oath agreed on was one by the defendant holding the arm of his son. In that case, the oath was administered that very day. The learned Bench made this observation :—

"We have no hesitation in saying that the oath proposed should never have been administered. It was an oath understood and purporting to affect a third person and such an oath under Act X of 1873, is not an oath which could under any circumstances be lawfully administered."

Since however it was in fact administered, it was however considered conclusive proof of the matters stated.

My attention has been drawn to a number of decisions, which are not in point. In *Valli Ammal* v. *Arunachala Mooppanar*[3], it was held that once a challenge to take an oath was accepted, the challenger should not be permitted to resile after his offer has been accepted by the other party unless good ground is shown by the challenger to satisfy the Court. This decision is relied on for the position that the other plaintiffs in this case were legally precluded from resiling from the oath petition filed by the second plaintiff. This was signed by the second plaintiff and by the advocate. The second plaintiff was not conducting the suit under any power of attorney. He is said to have merely been in charge of the litigation. So far as he is concerned, I have no hesitation in holding that he had no right to bind the other plaintiffs by oath contrary to the provisions of section 8 of the Oaths Act.

1. A.I.R. 1925 All. 604.
2. (1895) I.L.R. 18 All. 46.
3. (1938) 1 M.L.J. 368.

The position may have been perhaps different if the other plaintiffs have not appeared on the scene and resiled, even before the oath was administered. So far as the advocate is concerned, I entirely fail to see how he of all persons could bind the absent plaintiffs by signing the oath petition which was not contemplated by section 8 of the Oaths Act and was in fact contrary to law. On the facts of this peculiar case, I have no hesitation in dismissing this appeal with costs, upholding the view of the learned Subordinate Judge that plaintiffs 1, 3 and 4 were in the circumstances entitled to resile from the oath petition filed on their behalf by the second plaintiff and their learned Advocate. Leave refused.

K.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Madepalli Sanyasappanna and others .. *Appellants**

v.

Siripurapu Appalaswami and others .. *Respondents.*

Madras Agriculturists Relief Act (IV of 1938), section 9-A (7)—Scope of.

To get an exemption under section 9-A (7) of the Madras Agriculturists Relief Act, a person should have acquired a title to the equity of redemption by a transfer *inter vivos* from another person who in his turn acquired a right to the same by one of the modes mentioned, namely, succession, survivorship, court-sale, etc. The transaction to be hit by the section should have been a transfer *inter vivos* from the original mortgagor between the two dates mentioned. The clause would not apply if the transfer effected between the dates is from a transferee from the original mortgagor prior to 30th September, 1937.

Appeal against the order of the District Court, Vizagapatam, dated 21st August, 1950, in A. S. No. 310 of 1949, preferred against the decree of the Court of the District Munsiff, Vizianagaram, in O. P. No. 33 of 1948.

E. Venkatesam and *E. L. Bhagiratha Rao* for Appellants.

C. V. Dikshitulu for Respondents.

The Court delivered the following

JUDGMENT.—The only question in this civil miscellaneous second appeal is whether the usufructuary mortgage deed, dated 16th April, 1908, has been completely discharged under the provisions of section 9-A of the Madras Agriculturists Relief Act. One Audinarayana executed a usufructuary mortgage deed, Ex. D-1, dated 16th April, 1908, in favour of Suryanarayana, Appalanarasimhulu, Narasiah and Chiranjeevulu. The sons of the mortgagor sold the equity of redemption to one Appalanarasimhulu and Venkata Narasimhulu under Ex. P-3, dated 24th February, 1920. The heirs of Venkata Narasimhulu sold their interest in the mortgage to Appalaswami under Ex. P-2, dated 28th October, 1945. Venkataramanayya is the heir of Appalanarasimhulu. Appalaswami and Venkataramanayya have therefore become the owners of the equity of redemption. Appalaswami filed O. P. No. 33 of 1948 on the file of the District Munsiff, Vizianagaram, under section 19-A of the Madras Act IV of 1938, to declare the sum due under the mortgage deed, dated 16th April, 1908. To that application Venkataramanayya, the owner of the half share in the equity of redemption was made the fifth respondent. The original mortgagees having died, their legal representatives were impleaded as respondents 1 to 4. The learned District Munsiff, and in appeal, the learned District Judge, Vizagapatam, held that the mortgage debt was completely discharged under section 9-A of the Act. The respondents, *i.e.*, the legal representatives of the original mortgagees, prefer the above appeal.

Learned counsel for the appellants contended that as the petitioner purchased the interest of Venkata Narasimhulu on 28th October, 1945, so far as he was concerned, the debt is not discharged under the provisions of section 9-A. The relevant provisions of section 9-A may now be read :—

*A.A.A.O. No. 122 of 1951. 18th November, 1952.

"Section 9-A (3): Where a usufructuary mortgagee has been in possession of the property mortgaged to him for an aggregate period of thirty years or more, then, not withstanding anything contained in sections 8 and 9 or the fact that the time, if any, fixed in the mortgage deed for redeeming the mortgage has not arrived, the mortgage debt shall be deemed to have been wholly discharged, with effect from the expiry of such period, or where such period expired before the commencement of the Madras Agriculturists Relief (Amendment) Act, 1948, with effect from the commencement of that Act.

Section 9-A (7).—Nothing contained in this section except sub-section (1) shall apply to any usufructuary mortgage—

(ii) in respect of property situated in any other area in the cases mentioned below :

(*a*) Where during the period after the 30th September, 1937 and before the 30th January, 1948, the equity of redemption in the property subject to the usufructuary mortgage has devolved either wholly or in part on a person by or through a transfer *inter vivos* either from the original mortgagor or from a person deriving title from or through such mortgagor otherwise than by a transfer *inter vivos*, then, to the whole or such part, as the case may be."

If a transaction conveying the equity of redemption is effected between the 30th September, 1937, and 30th January, 1948, in the manner prescribed in section 9-A (7) (ii) (a), the mortgage is taken out of the operation of section 9-A, *i.e.*, such a mortgage will not be deemed to be discharged under the section. But the section has not been artistically drafted and has lent ample scope for conflicting arguments. The discussion in the Legislative Assembly at the time of enacting of the aforesaid clause does not afford any clue and it is also not permissible to search for any light in that quarter. I would therefore construe the provisions of the section strictly in accordance with the plain meaning of the words used therein. Omitting that part of the clause which is irrelevant for the present purpose, it reads :

"the equity of redemption . . . . . has devolved either wholly or in part on a person by or through a transfer *inter vivos* from a person deriving title from or through such mortgagor otherwise than by a transfer *inter vivos*."

Devolution of a property otherwise than by a transfer *inter vivos* may include court sales, succession, survivorship, etc. To get an exemption therefore, a person should have acquired a title to the equity of redemption by a transfer *inter vivos* from another person who in his turn acquired a right to the same by one of the modes mentioned above, namely, succession, survivorship, court-sale, etc. To illustrate, *A* is the owner of the equity of redemption. *A* dies and *B* succeeds to him. *B* sells the equity of redemption to *C* between 30th September, 1937, and 30th January, 1948. *C* comes directly under this exception and therefore his usufructuary mortgage debt will not be deemed to have been discharged wholly or in part under the provisions of section 9-A of the Act. To take a different illustration, if *B* sells the equity of redemption to *D* before 30th September, 1937, and *D* sells it to *C* between the aforesaid two dates, can it be said that the equity of redemption has devolved on *C* through a transfer *inter vivos* during the aforesaid period from *B*, the heir of *A*? In the second illustration, the equity of redemption has not devolved during the prescribed period on a person through a transfer *inter vivos* from a person who acquired the property otherwise than by a transfer *inter vivos*. The first transfer from the heir, *i.e.*, the sale of *B* to *D*, may come within the terms of the clause ; but that took place prior to 30th September, 1937. The second sale which took place between the aforesaid two dates would only be by a transfer *inter vivos* from a person who himself got it by transfer *inter vivos*. That is what happened in this case. From the aforesaid fact it will be seen that the first petitioner purchased the equity of redemption from the heirs of Venkata Narasimhulu and that Venkata Narasimhulu purchased the same from the sons of the original mortgagor in the year 1920. The petitioner therefore purchased the equity of redemption from the heirs of a person who in his turn purchased from the heirs of the original mortgagor in 1920. The purchase of the petitioner therefore between the aforesaid two dates was not from a person deriving title through the mortgagor otherwise than by transfer *inter vivos*. He purchased it not from the mortgagor's heirs but from the heirs of the purchaser from the mortgagor's heirs. The transaction therefore does not strictly fall within the terms of the clause. It was said there is no apparent principle for making a distinction between a purchase from a heir of a mortgagor and a purchase from a purchaser from the heir of a mortgagor. The same anomaly may also be pointed out in the case of a devolution of the equity

of redemption on a person by or through a mortgagor, dealt with in the first part of the clause. There too the transaction to be hit by the section should have been a transfer *inter vivos* from the original mortgagor between the aforesaid two dates. The clause would not apply if the transfer effected between the aforesaid dates is from a transferee from the original mortgagor prior to 30th September, 1937. If it be permissible to read the mind of the Legislature, it may be suggested that the clause is intended to affect transfers *inter vivos* of an equity of redemption from the original mortgagor or his heirs etc., directly between the aforesaid two dates. The section was presumably enacted to hit at speculators who might have purchased the property after 30th September, 1937, hoping to get relief under the Madras Agriculturists Relief Act. If a mortgagor or his heir or a person who acquired the property from the mortgagor otherwise than by a transfer *inter vivos*, transferred the interest in the equity of redemption to another before the 30th September, 1937, the legislature presumed that a purchase during the aforesaid period from the first purchaser would be *bona fide*. But as I have already said, this is only a surmise and it is not necessary to make one if the terms of the clause are otherwise clear, as I have held them to be. I therefore hold that Ex. P-2 dated 28th October, 1945, is a transfer not covered by the provisions of section 9-A (7) (*ii*) (a). The learned District Judge was therefore right in applying the provisions of section 9-A (3) of the Act. In the result, the appeal fails and is dismissed with costs.

R.M. —————— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

S. Rangaraju Naidu .. *Petitioner**

v.

D. S. Kamesan .. *Respondent.*

Civil Procedure Code (V of 1908)—Section 115—Insufficiently stamped document coming into Court under process of law—Impounding and sending it to the Collector for the proper stamp duty being levied—If case decided —Revision—If lies—Stamp Act (II of 1899), section 38 (2).

A mere handing of a document, even if it is as a result of a summons from Court, cannot be said to be production. There must be volition on the part of the person bringing it into Court to use it for some purpose. The mechanical act of carrying the document as a result of an order of Court and handing it over to the officer of Court would not be production. But such act would come within the meaning of the term 'comes before the Court in the performance of its judicial functions' as laid down in *King Emperor* v. *Bala Kuppayan*, (1901) I.L.R. 25 Mad. 525.

Where a document under the compelling process of the Court came into the custody of the Court and the Court found the document insufficiently stamped and therefore impounded the same and under section 38 (2) of the Stamp Act, sent it to the Collector without giving a definite finding as to what should be the stamp duty to be collected

Held : That in so far as the document here could not be said to have not come into Court in the performance of its functions, though the petitioner did not produce it, the decision of the Court having not been made as to which of the contending parties was liable the action of the Court was a decision and so a revision lay.

The preliminary objection that section 115, Civil Procedure Code, was not applicable was not sustainable in view of decided cases in *Uttar Chand* v. *Perma Nand*, A.I.R. 1942 Lah. 265 and In re *Narayanadas Nathuram*, I.L.R. (1943) Nag. 520 : A.I.R. 1943 Nag. 97.

In the instant case as there was no decision as to the liability of any of the parties to pay the penalty it is open to the Collector or the Revenue Board to decide the same and the revision petition must be dismissed.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Salem, dated 28th April, 1950, in D. No. 684 of 1950, in O. S. No. 8 of 1947.

T. R. Srinivasan for Petitioner.

N. S. Srinivasan for the Government Pleader (*P. Satyanarayana Raju*) and *B. V. Subramaniam* for Respondent.

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* C.R.P. No. 525 of 1951. 14th November, 1952.

The Court delivered the following

JUDGMENT.—Mr. N. S. Srinivasan appearing for the learned Government Pleader raises a preliminary objection that section 115, Civil Procedure Code, will not apply to the present case. What happened was that when a document came into the possession of the Court below a question was raised as to whether it was properly stamped. On that arguments were heard by the Subordinate Judge who finding that the document had not been properly stamped impounded the same and sent it to the District Collector under section 38 (2) of the Indian Stamp Act. In doing so, the learned Judge did not give any definite finding as to the quantum of the stamp to be collected and left the decision on this matter to the Collector and if the Collector cannot decide that question, the Subordinate Judge suggested that the matter might be referred to the Chief Controlling Revenue Authority, namely, the Revenue Board, for referring the matter to the High Court under section 57 of the Act. What is contended very strenuously by Mr. Srinivasan is that the action of the Subordinate Judge in impounding the document and forwarding the same to the Collector with an accompanying letter does not amount to a decision of a case as contemplated under section 115, Civil Procedure Code. *Prima facie*, this argument seems to be correct but on examining the matter and probing into the legal aspects of the forwarding of the document one has to say that the Subordinate Judge, when he came to the conclusion that the document in question has not been properly stamped has decided the case and that decision, so far as the Subordinate Judge is concerned, is final. It is not open to the party when once the Subordinate Judge reached that conclusion to get back the document or to proceed with the case as if the document has been validly tendered for purposes of letting in evidence. The finality that attaches to the view taken by the Subordinate Judge makes it a case decided by him. Therefore, it seems to me that apart from any authority, on first principles it can be said that the action of the Subordinate Jugde is a case decided within the meaning of section 115, Civil Procedure Code, but the matter does not rest here.

Mr. T. R. Srinivasan for the petitioner has brought to my notice two decisions, one of the Lahore High Court and the other of the Nagpur High Court. In *Uttam Chand* v. *Parmanand*[1] Din Mohammad, J., had to deal with a similar case. There also a document which was produced before the Subordinate Judge was found to be insufficiently stamped and the Court determined the stamp duty payable before impounding and forwarded the document to the Collector. This action of the Court was sought to be revised in revision and on the objection taken that it was not a case decided within the meaning of the provisions of section 115, Civil Procedure Code, the learned Judge held that :

"It is a case decided within the meaning of section 115 Civil Procedure Code, inasmuch as it was disputed, between the parties *qua* this aspect of the case has, so far as the parties are concerned, been finally set at rest and no stage will ever arise later at which this order of the Subordinate Judge would be liable to be attacked."

The learned Judge, therefore, held that it was a case decided within the meaning of section 115, Civil Procedure Code. This decision has been followed later by the Nagpur High Court in In re *Narayanadas Nathuram*[2], where Vivian Bose, J., following the decision in *Uttam Chand* v. *Permanand*[1], and other cases came to the conclusion that the order of the lower Court impounding the document is revisable. In view of the decisions cited above I have no hesitation in coming to the same conclusion. In the absence of any decision in Madras to show that the action of the Subordinate Judge is not a case decided within the meaning of section 115, Civil Procedure Code, I have to conclude that the Subordinate Judge has finally decided the matter so far as he was concerned. The preliminary objection is therefore overruled.

Now that the preliminary objection has been overruled the merits of the case have to be gone into. The petitioner in the revision petition is the defendant in O.S.

1. A.I.R. 1942 Lah. 265. 2. I.L.R. (1943) Nag. 520: A.I.R. 1943 Nag. 97.

No. 8 of 1947, on the file of the Sub-Court, Salem. The suit was to recover a sum of nearly Rs. 2,00,000 with interest and the allegations are that the plaintiff respondent conveyed to the defendant petitioner half the right in a patent for manufacturing a particular kind of wood preservative, by means of an indenture dated 9th April, 1945. This indenture was stamped in Mysore and according to the Stamp law in force there the value of the stamp paper used was Rs. 4,687-8-0, whereas at that time if a similar document were to be executed in what was then British India but now the Indian Union, the stamp duty would be more than Rs. 7,400 and odd. According to section 18 of the Indian Stamp Act such instruments may be stamped with proper stamp duty under the statute within three months after it has been first received in India. But no such thing was done. Along with the plaint, a duplicate of the document in question was produced; but in the written statement the present petitioner raised an objection in paragraph 15, that the deed of assignment is inadmissible and unenforceable in the Indian Court as it is not validly stamped according to the law prevailing in India. The plaintiff respondent therefore summoned the defendant for the production of the original which was in his possession. In obedience to this summons issued by the Court, the defendant brought the indenture into Court and kept it in Court custody on 24th June, 1949. It has to be remembered in this connection that the defendant does not want to enforce the document, whereas the plaintiff's title and justification for the claim is dependent upon the validity of the document in question. Therefore a compelling process from the Court resulted in the document coming into its custody. Thereafter, the Subordinate Judge, as stated already, impounded the document and under section 38 (2) of the Stamp Act sent the same to the District Collector without giving a definite finding as to what should be the stamp duty to be collected on this instrument.

Mr. T. R. Srinivasan for the petitioner contends that the order impounding the document is illegal and *ultra vires* because the same was not "produced" nor has it come into the possession of the Court in performance of its judicial functions and such being the case the provisions of section 33 (1) of the Stamp Act cannot be attracted. Section 33 (1) reads :—

"Every person having by law or consent of parties authority to receive evidence and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same."

The important portion of this section "is produced or comes in the performance of his functions". According to the learned counsel production is a voluntary act and not the result of any compulsion from a Court of law. In order that the document should be deemed to have been produced in Court, it must be brought into the custosy of the Court by a person of his own accord and as a result of his volition in order that he might use it for his purpose or to secure some advantage by a legal process. Where, as a result of summons issued by Court, or seizure under a distraint or attachment warrant, a document comes into the possession of the Court it cannot be held that the instrument in question has been produced; so argues the learned counsel. For finding out the correctness of this argument, we should have a bird's eye view of the relevant provisions of the statute in question. Section 3 defines what instruments are chargeable with duty and there is no doubt that the present document is chargeable with duty in accordance with the provisions of that section. Section 17 lays down that all instruments chargeable with duty and executed by any person in India except Part B States shall be stamped before or at the time of execution. As already stated, section 18 lays down that if a document is executed in the territory which has now become a Part B State, when it is first received in India it must be stamped within three months. With regard to the liability of the person who has to pay the stamp duty, we have the provisions of section 29 (*c*) which say that in the case of a conveyance, the stamp duty shall be borne by the grantee and here the stamp duty, if the document had been executed in what was then British India, should have been paid by the defendant petitioner. Sections 33 and 38 deal with impounding. When

we come to section 44, we find that in certain cases a person paying duty or penalty may recover the same from the opposite party and section 44 (3) says that such amount may be included in the costs. Finally there is section 48 which is to the effect that all duties and penalties under the Act can be collected as if they are land revenue. How the penalty ought to be charged is laid down in section 35 where it is provided that it is open to the court to levy a penalty to the extent of ten times the duty. So far as the Collector is concerned there is no such obligation.

In view of the above provisions of the Stamp Act, the action of the court in impounding the documents and forwarding it to the Collector for finding out the stamp duty and ascertaining as to who is to pay the same would be correct if the document is *produced in court or comes into court in the performance of the court's functions*. Mr. B. V. Subramaniam for the respondent invites my attention to the distinction between section 33 and section 35 of the Act. Whereas section 33 contemplates the production or coming into possession of the court of the document, section 35 comes into operation only when it is tendered in evidence. Section 33 is an all-embracing one whereas section 35 is limited to special instances. What he argues is that the moment the petitioner, even if it be as a result of a process of court, brings the document and lets it into the possession of court, it should be deemed as if he has produced it. In any event, the document has come into the possession of the court, in the discharge of its judicial functions. In neither event, according to the learned counsel for the respondent the provisions of section 33 have been attracted and it cannot be said that the order of the lower court is illegal.

Though there is paucity of recent cases of this court on this aspect of the case, there are few cases of other courts which have been brought to my notice. The only Madras case so far as my attention has been drawn is that contained in *King-Emperor* v. *Balu Kuppayyan*[1], where the word "comes" in section 33 is held to have sufficiently wide connotation as to include the production of documents under a search warrant. The facts of that case are as follows: There have been complaints made to judicial authorities that offences under sections 64 (*c*) and 68 (*c*) of the Indian Stamp Act of 1899 were being committed and therefore the Magistrate issued a search warrant and when that was executed certain documents were seized and impounded under section 33 (2) of the Act. Before the High Court it was contended that when a document came into the custody of the Magistrate as a result of the execution of a search warrant, it did not come before the Magistrate in the performance of his functions within the meaning of section 33 (1). The contention was repelled by the learned Judges, Benson and Bashyam Aiyangar, JJ., with the remark:

"The word 'comes' is sufficiently wide to include the production of documents under a search warrant issued by the Magistrate."

I have not been shown any authority which dissents from this observation and I am therefore bound by it. It cannot be said that the document did not come into the possession of the court. It was brought and handed over to an officer of court by the defendant as a result of a summons issued to him to produce the document. "Comes into possession" is a widely known legal term and its import is sufficiently wide as to include cases where documents are handed over. All that is required is that the custody of the document must rest with the court. How it came into the custody is not a crucial factor. Therefore it is difficult to say in the present case that there is no operation of the phrase "comes into possession". Order 11, rule 14, Civil Procedure Code, empowers the court at any time during the pendency of the suit to order the production by any party of such documents in his possession or power relating to any matter in question in such a suit and it is in pursuance of the provisions of this rule that the summons has been issued to the defendant to bring the document into court.

The next case cited before me is reported in *Sashishi Mohan Saha* v. *Kumud-kumar Biswas*[2]. When a suit was filed before a District Munsif for the recovery

1. (1901) I.L.R. 25 Mad. 525. 2. (1916) 35 I.C. 415.

of a sum of money due on what is known as *hat-chita*, the plaintiff produced in court a book containing not only the *hat-chita* on which the suit was based but also a number of *hat-chitas* bound together as a book. The trial court on examining the book found that not only the *hat-chita* in question but other *hat-chitas* also were not properly stamped. Therefore the entire book was impounded under section 33 of the Indian Stamp Act. The High Court held in revision that the District Munsif had no jurisdiction to impound the *hat-chitas* other than the one which formed the basis of the plaintiff's claim because they were not produced, nor came before him in the performance of his functions; and in doing so, the learned Judges Sir Asutosh Mookerjee and Cuming, JJ., distinguished the case in *King-Emperor* v. *Balu Kuppayyan*[1]. According to that decision the mere physical possession of the *hat-chitas*, which have no relevancy so far as the suit was concerned, would not be sufficient to hold that they were produced or came into possession in the discharge of the District Munsif's functions. The observations relevant to the present case are at page 416 and I may extract them hereunder :

> "The case for the petitioners is that they did not produce before the officer any *hat-chita* other than the one upon which their claim was founded. The Munsif took action at a stage when there was no material to enable him to question the correctness of this allegation. Consequently the case is not covered by the first of the two alternatives mentioned in section 33. Nor can we say that the other *hat-chitas* came before the Munsif in the performance of his functions. In the performance of his functions as a judicial officer the only *hat-chita* which came before him at that stage was the *hat-chita* whereon the claim was founded. We cannot speculate whether if the trial has proceeded, the plaintiffs might not have possibly relied upon the other *hat-chitas* in support of their case. If they had done so, it could well be maintained that those *hat-chitas* were produced before the Munsif or came before him in the performance of his functions. But that stage was never reached. In our opinion, on the materials placed before us, it is impossible to say that the Munsif had jurisdiction to impound the *hat-chitas* other than the one which formed the basis of the claim. Reference has been made by the Senior Government Pleader to the case of *King-Emperor* v. *Balu Kuppayyan*[1], which is clearly distinguishable. There a search warrant was issued by a Magistrate with a view to the discovery of a register kept by the accused, containing documents not stamped in accordance with the provisions of the Stamp Act. The register was seized in the course of the search and brought in the court. It is clear that the register was produced before the Magistrate or came before him in the performance of his functions as a Magistrate."

It is clear from the passage quoted above that with reference to the *hat-chita* which formed the subject-matter of the particular suit, the learned Judges were of opinion that it came into the possession of the court in the performance of its judicial functions, though it is doubtful whether at that stage it might be said that there was any production of the other *hat-chitas*.

As against these two cases other decisions bearing on the question regarding the meaning of the expression "produced or comes into possession" have been relied upon. In *Thakardas* v. *The Crown*[2], a Full Bench of the Lahore High Court, on a reference to it by the Financial Commissioner, held that where a Sub-Registrar registered a document as a deed of dissolution and it was later on found by the Registrar that it should be stamped and registered as a deed of partition and he directed the party to produce the document, and holding that it was not duly stamped made a reference to the Collector who held that the document was a deed of partition and called upon the executants to make good the deficiency in stamp together with the penalty, that the Registrar was not acting in the performance of his functions in requiring the production of the document and therefore the document was neither produced nor came into the possession of the Registrar in the performance of his functions. This decision makes it clear that mere custody is not sufficient to attract the operation of section 33 (1) of the Indian Stamp Act.

That the person presenting the document in court must be the person legally liable to pay the deficient stamp duty is decided by another Full Bench of the Lahore High Court in *Mohamed Hussain* v. *The Crown*[3]. The person who was liable to be charged with stamp duty had died and the document insufficiently stamped was produced by one of his sons in a civil suit. In that case the learned Judges held that the son cannot be made liable to pay the penalty. Though this decision does

1. (1901) I.L.R. 25 Mad. 525.
2. (1932) I.L.R. 13 Lah. 745 (F.B.).
3. (1940) I.L.R. 21 Lah. 637 (F.B.).

not explain the meaning of the phrase "produced in court or comes into possession", it is useful in this respect, *viz.*, that the duty can be levied only from the person liable initially to pay the same. We do not think that this decision would carry the case any further at all.

Jai Lal, J., in *Ujjal Singh Sundersingh* v. *Ahmed Yarkhan*[1], held that mere presentation of a document or its transliteration without any attempt to prove it or without an attempt to tender it formally in evidence does not amount to production of the document before the person concerned nor does the document under such circumstances come before the person concerned in the performance of his functions so as to attract the provisions of section 33 of the Stamp Act. This decision is in favour of the petitioner's contention. But the learned Judge does not refer to any authority in support of his conclusion. Observations of this court in *King-Emperor* v. *Balu Kuppayyan*[2] have not been referred to in this case. The trend of decisions in Lahore seems to be that mere presentation is not enough in order to attract the operation of section 33. In *Uttar Chand* v. *Perman Nand*[3], there are observations of a similar nature. Din Mohammad, J., interprets the word "produced" in section 33 as produced in the ordinary course of law and not produced under compulsion. Therefore if the document is produced by a party as a result of a process issued by the court it cannot be said that he has produced it unless he tenders it in evidence and wants to use it for his benefit. The learned Judge further goes on to add that if compulsory production can be understood as production within the meaning of the section, then it will be competent for a court to conduct a search in the house of a party and seize all documents insufficiently stamped for the purpose of impounding the same. Such being the case it is highly improper for a court to compel a party to produce a original document with a view to impound because the court has been informed that it is insufficiently stamped. The facts of this case show that the original document was compelled to be produced into court by the Subordinate Judge before it was impounded. Here there was no compulsion but a voluntary presentation. In a more recent case *Hajimal & Sons* v. *H. S. Palta & Sons*[4], a single Judge of the Lahore High Court was of the opinion that if a party simply presented a document in court it cannot be said that it is production of the document as there was no attempt to tender it in evidence and where one of the parties does not issue a notice to the other party to admit or deny such a document and the court *suo motu* and for its own facility calls upon the parties to admit or deny the documents produced by the other party, this act of the court cannot be regarded as an implied tender by the party of the document in evidence. In such a case the party who presents the document cannot be called upon to pay the stamp duty and penalty, on the document if he is not otherwise the person by whom the stamp duty is payable under the Act. It seems to me that the result of the three Lahore cases referred to above is that mere bringing into court of a document would not be sufficient to make it a production. In order that there should be production it must be with the object of tendering it in evidence and using it for the benefit of the party himself.

An instructive case in point is to be found in In re *Narayanadas Nathuram*[5], which contains observations helpful for deciding the present case. Vivian Bose, J., was of the opinion that the word "produced" has a technical meaning and means either produced in response to a summons or produced voluntarily for some judicial purpose such, for instance, as evidence. A document, which falls accidentally or incidentally into a Judge's hand cannot be said to be produced. The word "produce" carries with it, when used in this connection, a mental element. The mere physical act of production is not enough when there is no intention to "produce". The learned Judge therefore held that when a party who was asked to produce one document produces another by mistake and hands it over to the court and it is found that the mistaken document is insufficiently stamped it does not come before

1. A.I.R. 1936 Lah. 985.
2. (1901) I.L.R. 25 Mad. 525.
3. A.I.R. 1942 Lah. 265.
4. A.I.R. 1947 Lah. 319.
5. I.L.R. (1943) Nag. 520: A.I.R. 1943 Nag. 97.

the Judge in the performance of his functions. The principle underlying this judgment is that if a party as a result of the summons produces the document, it must be deemed to be produced within the meaning of the section. The observations of the learned Judge cannot be said to be exactly in concurrence with the views expressed in the Lahore cases.

A consideration of these authorities leads me to the conclusion that a mere handing over of a document, even if it is as a result of a summons from court, cannot be said to be production. There must be a volition on the part of the person bringing it to court to use it for some purpose. The mechanical act of carrying the document as a result of an order of Court and handing it over to an officer of court would not be production. But such an act would come within the meaning of the term "comes before the court in the performance of its judicial functions" as laid down in *King-Emperor* v. *Balu Kuppayyan*[1]. In the present case it cannot be said that the document has not come before the court in the performance of its functions, though it may be that it has not been produced by the petitioner. Mr. T. R. Srinivasan for the petitioner contends that the letter forwarding the document to the Collector has decided that the production was by the petitioner. I do not think that there has been any decision by the lower Court as to whether the document was produced by the defendant. The question as to who was liable to pay the penalty has been left undecided. It is open to the Collector, or to the Revenue Board, to decide which party is liable to pay the penalty, and such being the case, I cannot say that the liability of any of the parties has been finally determined in these proceedings. With these observations the civil revision petition is dismissed, but in the circumstances without any order as to costs.

K.C. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATA RAMA AYYAR.

M. Gulamali Abdul Hussain & Co. .. *Appellants**

v.

A. P. M. S. Mohamed Yousuf and Brother and another .. *Respondents.*

Sale of goods—C.I.F. contract—Tender of documents representing goods—Failure of buyer to accept—Plea that goods were not in accordance with contract—How far admissible in defence to claim for damages for wrongful refusal to accept the documents and to honour the drafts.

In a c.i.f. contract the purchaser is bound to accept the documents which represent the goods and honour the draft and is not entitled to raise at that stage any question as to whether the goods are in accordance with the contract or not. If after taking delivery of the goods, it is found that they are not in accordance with the contract, then of course the purchaser has a right to reject the goods and to pursue his remedies against the seller. The plea that the goods were not in accordance with the contract is not admissible as a defence to an action for damages for wrongful refusal to accept the documents and to honour the drafts. In refusing to accept the documents and honour the hundies the purchaser committed a breach of contract and is therefore liable to the seller in damages.

A claim for damages for loss of goods while they were stocked in wharfage is inadmissible. No interest can be allowed on a claim for damages.

Appeal from the Decree and Judgment of the Honourable Mr. Justice Bell, dated 20th January, 1949 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in O.S. No. 158 of 1945.

K. Narasimha Ayyar for Appellants.

N. K. Prasad, C. R. Pattabhiraman and *R. Ramasubbu Ayyar* for Respondents.

The Judgment of the Court was delivered by

Venkatarama Ayyar, J.—This is an appeal by the defendants against the Judgment and Decree in C.S. No. 158 of 1945 on the Original Side of this Court. That was a suit instituted by the respondents for damages for non-acceptance of goods under

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1. (1901) I.L.R. 25 Mad. 525.

* O. S. Appeal No. 13 of 1949. 14th November, 1952.

six contracts. The appellants are a firm of merchants carrying on business in the export and import of metals in Bombay and they have branches in Madras and other places. The respondents are a firm of merchants carrying on business in the purchase and sale of scrap metal in Madras. From 1942 the appellants were also doing business as manufacturers of brass-sheets and have been purchasing for that purpose scrap brass in the market of Madras and elsewhere. In this litigation, we are concerned with six contracts entered into by the appellants with the respondents for purchase of scrap brass as per particulars mentioned below :

	Dates of Contract.		*Quantity.*	*Price.*
1.	30th November 1944	..	5 tons.	Rs. 136 per cwt.
2.	1st December 1944	..	5 "	" 138 "
3.	17th January 1945	..	10 "	" 166 "
4.	16th April 1945	..	5 "	" 149 "
5.	17th April 1945	..	15 "	" 147 "
6.	24th April 1945	..	20 "	" 147 "

All these contracts were *c.i.f.* Bombay : no time was fixed for the performance of the contracts.

In the performance of these contracts, the plaintiffs despatched 15 tons per s.s. " Seawall " on 19th April, 1945 and sent Invoice No. 406 therefor to the defendants (Exhibit P-17). The price charged thereunder is Rs. 166 per cwt. for 10 tons and Rs. 149 per cwt. for 5 tons. That would be the price payable under contracts Nos. 3 and 4 respectively. It must be noted that no goods had been despatched in performance of contracts Nos. 1 and 2, under which the prices were respectively Rs. 136 and Rs. 138 per cwt. That is to say, the plaintiffs appropriated the 15 tons to contracts Nos. 3 and 4, while contracts Nos. 1 and 2 remained unperformed. On 20th April, 1945, the plaintiffs shipped 10 tons per s.s. " Janaki " from Cochin port and sent invoice No. 408 therefor to the defendants (Exhibit P-18). The price charged in this invoice is Rs. 147 per cwt. and that is the price fixed under contracts Nos. 5 and 6. Both the above invoices (Exhibits P-17 and P-18) were received by the defendants on 23rd April, 1945 and the same was acknowledged by them in Exhibit P-21.

On 2nd May, 1945, the plaintiffs despatched 12 tons by rail from Bangalore to Karla and sent invoice No. 411 therefor to the defendants (Exhibit P-24). In this also the price charged was Rs. 147 per cwt., that being the price fixed in contracts Nos. 5 and 6. The relative railway receipts were sent to National Bank, Calcutta, with a draft for Rs. 34,708-3-0 being the amount of the invoice and the Bank issued a notice to the defendants on 7th May, 1945, that the bill should be honoured within a week (Exhibit D-11). On 12th May, 1945, the defendants sent a wire to the plaintiffs protesting against the amount of the invoice and followed it up with a letter Exhibit P-30 in which they stated that the consignment should first be appropriated towards the first two contracts and priced at the rates fixed under those contracts and that on that basis the amount of the bill should be reduced by Rs. 5,800. The goods actually arrived at Karla on 13th May, 1945 and the defendants retired the bank draft and took delivery of the goods. On 14th May, 1945, the defendants sent the wire Exhibit P-33 to the plaintiffs. It is as follows :—

" 240 bags of Karla wagon arrived yesterday on weighment found. . . . (?) gross weight cwts. 233, please send representative or ask anyone check (?) clear soon will not pay other hundi."

At this stage, the goods shipped per s.s. " Seawall " arrived in Bombay. On 15th May, 1945, the defendants sent the following telegram to the plaintiffs (Exhibit P-38) :

" Instruct bank receiving less shortage and other amounts, goods arrived, not responsible shortage and wharfage."

Meantime the plaintiffs had shipped 3 tons by s.s. " Jalaganga " on 7th May, 1945 and sent invoice No. 384 therefor to the defendants (Exhibit P-28). On 28th May, 1945, they despatched a further quantity of 8½ tons by rail to Cochin for being shipped to Bombay and sent invoice No. 390 therefor (Exhibit P-42). By 27th

May, 1945, they had secured the balance of 11½ tons for delivery to the defendants and they had stocked the same in Madras harbour ready to be shipped, and sent invoice No. 391 to the defendants (Exhibit P-47).

The defendants, however, raised several disputes and declined to take delivery of the goods ; there was an exchange of telegrams and letters and lawyer's notices ending with Exhibit D-12, dated 18th June, 1945, wherein the defendants unequivocally refused to take delivery of the goods or pay for them. The plaintiffs' representatives thereafter went to Bombay with a view to settle the matter amicably. But nothing came out of the negotiations and eventually the plaintiffs filed the suit out of which this appeal arises on 14th August, 1945, claiming a sum of Rs. 56,775-6-6, as damages for non-acceptance.

It will be seen that under the six contracts the plaintiffs had to deliver in all 60 tons. Twelve tons were sent by rail to Karla and the defendants took delivery of them. The suit is for damages for non-acceptance of the remaining 48 tons. According to the plaintiffs, 15 tons had been shipped per s.s. "Seawall" ; 10 tons per s.s. "Janaki"; 3 tons per s.s. "Jalaganga" ; 8½ tons had been consigned to Cochin for being shipped to Bombay (Exhibit P-42) and the remaining 11½ tons were kept ready for delivery in Madras harbour (Exhibit P-47) ; and they were not despatched owing to repudiation by the defendants. The plaintiffs alleged that the contract was finally broken by the defendants on 10th August, 1945, when the negotiations in Bombay broke down and damages are claimed on the basis of the market rate as on 10th August, 1945.

The defendants, beside contesting the claim of the plaintiffs for damages for non-acceptance of the 48 tons, filed a counter-claim with reference to the 12 tons consigned to Karla of which they had taken delivery after payment. They pleaded that the goods actually sent by the plaintiffs to Karla were not in accordance with the contract and were inferior in quality, that there was shortage in quantity, that the plaintiffs were, therefore, liable in damages, therefore, that the action of the plaintiffs in appropriating the goods to later contracts while the earlier contracts had remained unperformed was illegal and in contravention of an express agreement between the parties that the contracts should be performed in chronological order, that the goods sought to be supplied were not of the quality agreed, that therefore, the defendants were within their rights in not taking delivery of them, and that in any event the contract must be deemed to have been broken on 20th May, 1945 and that the damages claimed were excessive.

The suit was tried by Bell, J. He held that the goods tendered were in accordance with the contract ; that no shortage in quantity had been established; that there was no agreement that the contract should be performed in chronological order ; and that the defendants were in breach in not taking delivery of the goods. He also held that the contracts were broken by the defendants only on 10th August, 1945, when the negotiations finally broke down. In the result, he dismissed the counter-claim and decreed the suit as prayed for. The defendants appeal.

Before us Mr. K. Narasimha Ayyar, the learned counsel for the appellants, did not press the counter-claim for damages in respect of the Karla consignment. With reference to the decree for damages for non-acceptance granted in favour of the plaintiffs, he raised two contentions (1) that the goods tendered were not in accordance with the contract and that, therefore, the defendants were not bound to take delivery of them and (2) that even if the defendants were in default in not taking delivery of them, the breach of the contracts accrued on 18th June, 1945 and that the damages should be computed on the basis of the market rate as on that date and not as on 10th August, 1945.

On the first contention, the point for determination is, what was it that the defendants agreed to purchase under the contracts and what was it that the plaintiffs actually tendered.

* * * * *

[His Lordship then considered the evidence and concluded.]

On a consideration of the entire evidence, oral and documentary, we agree with Bell, J., that 'brass scraps' and 'brass utensils-bhangar' mean the same thing and that the parties entered into the contracts on the basis that they are identical and that, therefore, the defendants are in breach in not taking delivery of the goods.

We have assumed so far that it is open to the defendants to plead that the goods which were consigned per s.s. "Seawall", "Janaki" and "Jalaganga" were not in accordance with the contract. That, however, is not the true legal position. The contracts were *c.i.f.* and in a *c.i.f.* contract, the purchaser is bound to accept the documents which represent the goods and honour the draft and is not entitled to raise at that stage any question as to whether the goods are in accordance with the contract or not. If after taking delivery of the goods, it is found that they are not in accordance with the contract, then of course the purchaser has a right to reject the goods and to pursue his remedies against the seller. Therefore, the plea that the goods were not in accordance with the contract, though open to consideration in the counter-claim of the appellants, is not admissible as a defence to the action of the plaintiffs for damages for wrongful refusal to accept the documents and to honour the drafts. The contention of the defendants that they were not bound to honour the hundies because the goods were not in accordance with the contracts must accordingly be over-ruled. In the result, it must be held that the defendants committed breaches of the contracts and are, therefore, liable to the plaintiffs in damages.

The next question is, to what damages the plaintiffs are entitled and that depends on what date the contracts were broken by the defendants. The appellants contend that the breach was on 18th June, 1945, while the respondents maintain that it was on 10th August, 1945. Bell, J., accepted the latter date as the correct one as negotiations between the parties were going on in July in Bombay and they finally broke down only on 10th August, 1945. It should be observed that as the claim for damages relates to six contracts, it should, properly speaking, be necessary to determine with reference to each contract when it was broken; and this is so particularly in this case as the contracts were *c.i.f.* and in such contracts the purchasers commit breach when the documents are tendered and refused. In this case the documents had been tendered with reference to some of the shipments in May itself, while with reference to the remaining goods, there had been no tender prior to 18th June, 1945. Disputes having arisen between the parties, the defendants were willing to honour the hundies, only if certain demands of theirs were complied with. There was correspondence between the parties and ultimately the defendants sent Exhibit D-12 on 18th June, 1945, finally refusing to retire the drafts. Thereafter, there was no further correspondence. Mr. K. Narasimha Ayyar, the learned Advocate for the appellants, contends that when once the time for performance has arrived and there is default, the contract must be held to be broken on that date and damages should be assessed on the basis of the market rate on that date and he quoted *Mutthava Maniagaran* v. *Lakhu Reddiar*[1], in support of this position. That is not disputed by the respondents. The appellants accordingly argued that though the correspondence upto 18th June, 1945, might be construed as involving an extension of time for payment of the drafts, in view of the clear refusal contained in Exhibit D-12 dated 18th June 1945, it must be held that the contracts in respect of which performance had already fallen due were finally broken on that date and as to others, there was an anticipatory breach. The respondents contend that the negotiations did not finally terminate on 18th June, 1945, that after the date of Exhibit D-12, P. Ws. 4 and 5 had been to Bombay, the talks for settlement were going on between them and the defendants and that it was only on 10th August, 1945, that the father of D.W. 6 finally told the plaintiffs that the defendants would not take delivery of the goods. The plaintiffs further state that the father also told them that the goods might be sold in the market and that they would pay the difference. This is denied by D.W. 6 and sounds improbable. This conversation can in no wise be construed as an agreement extending

1. (1912) 22 M.L.J. 413: I.L.R. 37 Mad. 412.

the time for performance. We accordingly accept the contention of the appellants that the contracts were broken on 18th June, 1945.

The next point for decision is about the market rate for brass scraps on 18th June, 1945. P.W. 11 gave evidence that the price of one cwt. of brass scrap on 12th June, 1945, was Rs. 119-4-0 and that it remained at the same level on 22nd June, 1945. Exhibit D-3 shows that in Bombay the price of one cwt. on 20th June, 1945, was Rs. 124-0-0. According to Exhibit D-4 the market rate of ' brass bhangar ' on 19th June, 1945, was Rs. 123 per cwt. We think that the market rate for brass scrap on 18th June, 1945, may be fixed at Rs. 120 per cwt. On this basis the plaintiffs would be entitled to Rs. 27,920 by way of damages. The plaintiffs also claimed a sum of Rs. 4,000 as damages for loss of goods by theft, while they were stocked in the Bombay wharfage. This is clearly inadmissible and must be disallowed. The plaintiffs paid a sum of Rs. 3,500 as demurrage to the harbour authorities while the defendants were in correspondence with them and this amount is also claimed as part of damages. There is no opposition to this claim and it will be allowed. The plaintiffs also claimed a sum of Rs. 2,155-6-6 as interest on the amounts claimed. But no interest can be allowed on a claim for damages and this item must therefore be disallowed.

In the result, the appeal is allowed in part and there will be a decree for Rs. 31,420 in favour of the plaintiffs with interest thereon at six per cent. from the date of the decree, 20th January, 1949. The plaintiffs will also be entitled to proportionate costs both here and in the court below. The costs of the commission at Bombay will be allowed in full in favour of the plaintiffs. The defendants will bear their costs throughout.

K.S. ——— *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK AND MR. JUSTICE KRISHNASWAMI NAYUDU.

Parsam Venkataramayya .. *Appellant**

v.

Parsam Venkataramappa and others .. *Respondents.*

Hindu Law—Joint family—Individual business of a member—Gains of—Adequate nucleus—What is.

Civil Procedure Code (V of 1908), Order 20, rules 12 and 18—Scope of final decree proceedings.

If a member of a Hindu joint family who was given a certain sum from the joint family fund who goes out of the family in the sense of leaving the family house and starts a business of his own individually or in partnership and by virtue of his exertions he prospers in his business and acquires properties it will not be justifiable to hold that either the business or his properties would be joint family properties. The trend of judicial opinion has been as far as possible to recognise properties acquired out of the individual exertions of a member of a joint family to be his self-acquisition.

If a member of the family is inclined to start a trade and for that purpose he gets assistance by way of a contribution from the joint family and goes and starts a business and acquires properties it is reasonable to extend the principle of Hindu Gains of Learning Act (XXX of 1930) to such a case. There is no real distinction between the cases of a member getting himself educated out of the joint family funds and employing himself somewhere earning and acquiring properties and a member getting a cash contribution from the family and starting a trade on his own account. Unless it is shown that the family did not stop with the contribution but continued to take interest and the business was subsequently carried on with the assistance of the joint family it should not be held that the business is a family business.

The final decree proceedings under Order 20, rules 12 and 18 of the Code of Civil Procedure only relate to matters which are provided in the preliminary decree as to partition, as to an account for mesne profits or as to an account for other properties, but does not relate to the decision of any substantial rights of parties as to title to properties (*e.g.*, question of benami) which can only be decided in a regular suit.

Appeal against the Decree of the District Court, Anantapur, dated 23rd July, 1948, in O.S. No. 50 of 1946.

P. Somasundaram for Appellant.

T. S. Narasinga Rao and *M. Balachandrudu* for Respondents.

* Appeal No. 20 of 1949. 25th November, 1952.

The Judgment of the Court was delivered by

Krishnaswami Nayudu, J.—The main question that arises for determination in this appeal is as to whether a certain interest which the plaintiff-appellant had in a business is joint family property or the separate property of the plaintiff. The plaintiff and the first defendant were brothers. Defendants 2 to 4 are the sons of the first defendant and defendants 5 to 7 are the sons of a pre-deceased son of first defendant by name Thimmiah. The suit is for partition of the joint family properties. The first defendant was the manager and the elder brother of the plaintiff. He died on 28th August, 1946, a day after the institution of the suit, the suit having been instituted on 27th August, 1946. The joint family was possessed of about 60 acres of lands and a house at Kothur village and some valuable moveables including gold and silver. The first defendant was also conducting a small retail shop at Kothur and doing money-lending business. There is no dispute that the plaintiff left his ancestral village of Kothur to Anantapur at which place he was married to the daughter of P.W. 4, Rentala Bala Venkataswami. From 1933 onwards he continued to remain in his father-in-law's place and never came back to Kothur excepting probably on certain occasions. The feelings between the members of the joint family and the plaintiff have always been cordial. In the written statement filed on behalf of defendants 3 and 4, while not disputing the plaintiff's right to a partition of the joint family properties, it was alleged that the plaintiff was carrying on a mandy business on behalf of the family in partnership with the plaintiff's brother-in-law, Rentala Venkatasubbayya (D.W. 5), son of P.W. 4, and that the plaintiff should be directed to bring the family's interest in the said partnership into the hotchpot and the defendants given a share therein. The defendants also claimed a share in two houses at Anantapur, one acquired in the name of P.W. 4 and the other in the joint names of the plaintiff's wife and his brother-in-law D.W. 5. The case of the defendants is that they were fraudulently obtained in their names, though really the properties belonged to the family, that they were benami transactions and that therefore, they must be declared to be the properties of the joint family. The learned District Judge held in favour of the defendants that the plaintiff's share in the business at Anantapur was joint family business and that the defendants are entitled to an account of that business. As regards the houses, the learned Judge reserved it for decision in the final decree proceedings, directing the impleading of necessary parties to the transaction.

It is well established that there is no presumption that a business carried on by a member of a joint Hindu family is joint family business and it is for those who set it up to establish it that though the business was carried on by an individual member it was the business of the family.

The plaintiff's case is that in 1932 or 1933 on account of some differences among the womenfolk and misunderstandings with the first defendant, he left for Anantapur borrowed a sum of Rs. 1,000 under Exhibit A-5 from P.W. 2 and out of the sum he contributed about Rs. 600 or Rs. 700 to the partnership business of himself and his father-in-law and that later he discharged that liability. He is supported by P.W. 2 who has also filed the promissory note Exhibit A-5. The learned District Judge declined to accept this evidence and it is unnecessary for us, in the view which we are taking of the other evidence in the case, to differ from the conclusion of the learned Judge as regards the truth of this portion of the plaintiff's case as to his securing a sum of Rs. 1,000 from P.W. 2 required for providing for the capital of the partnership business of himself and his father-in-law. On behalf of the the defendants, while it is conceded that the plaintiff left the village about 1932 or 1933, the capital required for the business was stated to have been furnished by the first defendant by realisation of a sum of Rs. 600 due from D.W. 1 to whom a sum of Rs. 1,000 was lent on a promissory note by the first defendant which was family money. The first defendant having died, D.W. 1 who is the person who borrowed from the family and paid Rs. 600 to the plaintiff says that he borrowed a sum of Rs. 1,000 on a promissory note, that Rs. 600 was required by the plaintiff with a view to enable him to start the business in Anantapur, that he paid the same to the plainriff and the first defendant in the presence of others and that an endorse-

ment was made in the promissory note. D.W. 2 supports D.W. 1 that he was taken to the house of the first defendant by D.W. 1 and that he was present when the sum of Rs. 600 was paid and endorsed on the promissory note. This evidence the learned District Judge has preferred to accept.

We are, however, unable to agree with the learned District Judge on this finding. The promissory note which is stated to have been discharged has not been produced and the more important circumstance is, that the account books admittedly maintained by the defendants which must necessarily have contained an entry as to this lending of Rs. 1,000 if it was true and the repayment of Rs. 600 by D.W. 1 have not been produced. But on the other hand the learned Judge was of the opinion that defendants 2 to 4 have suppressed these accounts. In the absence of the promissory note and these accounts, it is not possible to accept the oral testimony of two witnesses on an important question as to payment of a sum of money on a certain occasion to the plaintiff for a particular purpose. We are therefore, unable to attach much weight to the oral testimony furnished by D.Ws. 1 and 2.

If the evidence on the side of the plaintiff and the defendants as regards the source of the capital for the starting of the partnership business is excluded, we have to fall back upon the documentary evidence in this case which throws some light as to how the plaintiff was able to secure the necessary capital and invest it in the business at Anantapur. A statement of account, Exhibit B-11, which is said to have been in the handwriting of one of the sons of P.W. 4 has been filed and the learned Judge has accepted the genuineness of it and we have no reason to suspect it. We are also of the opinion that Exhibit B-11 which is a patti statement is one prepared from the books of the partnership business of the plaintiff with P.W. 4 and Exhibit B-11 throws some light on this question. Some of the accounts of the partnership business have been exhibited, though the entire accounts are not forthcoming. Exhibit B-7 is the ledger account for the year 1935 and Exhibit B-7 (*c*) is the ledger page relating to P.W. 4 and the account disclosed a credit balance of Rs. 700-9-8 on 1st October, 1936. Similar ledger page for the plaintiff Exhibit B-7 (*a*) also discloses a sum of Rs. 546 as standing to his credit. This amount is on 1st October, 1936. In the ledger page of the plaintiff in Exhibit B-7 which is Exhibit B-7 (*b*) there is a further sum of Rs. 120 appearing as debit on 1st October, 1936.

The patti Exhibit B-11 which relates to the Anantapur shop shows the amount of capital contributed by P.W. 4 and the plaintiff. To start with a sum of Rs. 1,095 was contributed by P.W. 4 and Rs. 546 by the plaintiff. So far as the plaintiff was concerned he had then contributed only Rs. 546 and after deducting Rs. 120 a debit against him, his net contribution was only Rs. 426 and after similarly deducting Rs. 119-12-9 a debit against P.W. 4, his net contribution was only Rs. 975-3-8. The total contribution of these two partners is mentioned as Rs. 1,401-3-8 the share which each is to contribute being Rs. 700-9-8. There is an excess of Rs. 274-9-7 over the required contribution of Rs. 700-9-8 by P.W. 4 and Rs. 274-9-7 has been subsequently paid as adjusted by the plaintiff in the following manner. Exhibit B-11 also contains a statement of accounts of the first defendant Venkata Narasappa. It appears from this account that a sum of Rs. 500 was borrowed from the first defendant by the Anantapur firm and a sum of Rs. 274-9-7 out of it was transferred to make up the deficiency in the capital of the plaintiff by giving credit to him in the partnership account which goes to make up his contribution of the said Rs. 700-9-8. What we are able to arrive at from the evidence which is mainly documentary is that undisputedly a sum of Rs. 274-9-7 has been contributed by the first defendant presumably out of joint family funds to make up the plaintiff's share of capital in the Anantapur business, the share of capital that was required of him being Rs. Rs. 700-9-8. The balance must be deemed to have been provided by the plaintiff independently, as there is no evidence which we can rely upon to justify the conclusion that the joint family made further contribution towards the share capital. It may be mentioned here that, except the contribution of Rs. 274 and odd, or even according to the defendants the sum of Rs. 600, there is no other connection between

the plaintiff's partnership business at Anantapur and the joint family at Kothur. It is not pretended that the defendants were drawing the profits of Anantapur business or contributed any further capital as by way of replenishing the capital of the partnership business at Anantapur ; nor is there any evidence as to any blending of these two businesses ; nor is it suggested that the members of the family at Kothur except the plaintiff have participated in the business at Anantapur. On the sole circumstance of this contribution, it is argued, the plaintiff's interest in the partnership business is joint family business and that would be sufficient to constitute a joint family business.

It is further sought to be shown by the evidence of three witnesses D.Ws. 3, 4 and 6 that there was an admission by the plaintiff that his interest in the Anantapur business was family business and that he was prepared to bring it into account in any family partition about which there appears to have been a demand just sometime before the institution of the suit, when the first defendant was admittedly ill. We are unable to attach any weight to this evidence of these witnesses as to the admission and it is significant that the important person through whom the mediation is sought to have been broached has not been examined. We are therefore left with nothing except to decide on the mere fact that there is a small contribution made from the joint family funds to the plaintiff that it is a joint family business. Decisions of the Privy Council have held that there is no presumption that a business started by a member of the joint family is joint family business, unless there is something to show that it was started with the nucleus of the joint family or that the joint family participated in it or that there was a blending of the two businesses.

In *Annamalai* v. *Subramanian*[1], Lord Buckmaster observed that a member of a joint undivided family can make separate acquisition of property for his own benefit, and unless it can be shown that the business grew from joint family property, or that the earnings were blended with joint family estate, they remain free and separate and that the burden of proving in a partition action that any particular item of property is joint primarily rests upon the person who sets up a case of a joint family nature. In *Bhuru Mal* v. *Jagannath*[2], with reference to presumptions as to properties and business, it was held that whether or not it can be said that if a joint family is possessed of some joint property, there is a presumption that any property in the hands of an individual member is not his separate individual property but joint property, no such presumption can be applied to a business. A member of a joint undivided family can make separate acquisition of property for his own benefit and, unless it can be shown that the business grew from joint family property or that the earnings were blended with joint family estate, they remain free and separate. Sir George Rankin while agreeing with the observations of Lord Buckmaster in *Annamalai* v. *Subramanian*[1], observed that this question is a question of fact and the burden of proof lies upon the person who claims a share in the business and that jointness may be proved by evidence that the business was carried on as a family business, by proof that the profits were treated as joint family property being brought to one account or divided among the members.

Excepting that in this case there has been a nucleus of joint family fund in the sense of a very small contribution from the family to one of its members to enable him to become a partner, there is nothing to show that the profits earned by the plaintiff in that business were brought into account in the family books or enjoyed by them. There could not have been any blending of the two businesses, which only points to the absence of an intention on the part of the plaintiff to treat it as a joint family concern and equally no intention on the part of the first defendant and the other members to treat it as joint family business. There must be some proof of intention at the time of contribution that a particular business carried on by a member of the joint family individually or in partnership with others was treated as a joint family concern. That intention may be expressed by direct evidence or by conduct of the members of the family which can be inferred from circumstances and the

1. (1928) 56 M.L.J. 435 : A.I.R. 1929 P.C. 1.
2. (1943) 1 M.L.J. 70 : A.I.R. 1942 P.C. 13.
3. (1928) 56 M.L.J. 435 : A.I.R. 1929 P.C. 1.

manner in which they have been dealing with each other. There is admittedly no participation and it cannot be said that such an intention has been established in this case. The subsequent conduct on the part of the defendants, *i.e.*, of the family does not show that they took any interest at all in the partnership business of the plaintiff. There appears to have been no connection whatsoever between the family and the plaintiff's partnership business.

Mr. Narasinga Rao argues that the account books of the defendants will disclose the nature of the business and the way in which the family was treated with reference to the plaintiff's share and the non-production of the books of the defendants has placed the defendants, most of whom are minors, in a difficulty and they are, therefore, unable to establish their case. But it must be noted that the defendants have suppressed their account books. By reason of the suppression it can be reasonably inferred that the production of the account books will show the absence of any entry relating to the Anantapur business in the joint family accounts. It is not correct to say that the accounts of the Anantapur business have been completely suppressed. Certain ledgers and day books Exhibits B-8 and B-10 relating to the period from 1944 to 1946 and from 1947 to 1948 and even accounts relating to October, 1936 have been filed. Excepting for the period from 1937 to 1943, the rest of the accounts have been filed and D.W. 5 has given some explanation which seems to be reasonable as to the inability to file the remaining account books even in the defendant's accounts so far produced, the defendants have not been able to establish or point out any entry to show any payment of the profits payable to the plaintiff to the joint family or any contribution for the carrying on the partnership business. We are, therefore, of the opinion that mere contribution, assuming in this case and accepting the evidence on behalf of the defendants, that the contribution has provided a major portion of the capital, viz., Rs. 600 out of Rs. 700 and odd, coupled with the subsequent non-interference with the business by the defendants' family and the absence of any participation and non-enjoyment of any income from the business, would not justify the conclusion that the member's interest in that partnership business is joint family property.

It is not uncommon among trading families, as in the present case, for a member of the joint family who is fortunately married into a wealthy family to be taken by the father-in-law and set up in a business and that is what appears to have happened in this case. Almost ever since his marriage, the plaintiff has been with the father-in-law. His father-in-law took him as a partner in the business. It is not likely that the success of the business was due solely or mainly to the contribution of Rs. 274-9-7 towards the capital of business at its inception. It can reasonably be held in this case that the business was carried on by the plaintiff and not by the joint family and it is by reason of his efforts and exertions with the help and association with his father-in-law that he happened to be successful in that business.

We are inclined to the view that if a member of a joint family who was given a certain sum from the joint family funds and who goes out of the family in the sense of leaving the family house as in the present case, starts a business of his own individually or in partnership and by virtue of his exertions he prospers in his business and acquires properties, it will be not justifiable to hold that either the business or his properties would be joint family properties. In view of the constitution of the Hindu joint family and the incidents of its ownership of properties, to come to any other conclusion would be to deprive a member of such family of his initiative and his desire to eke out a livelihood by his individual efforts and intelligence. The trend of judicial opinion has been as far as possible to recognise properties acquired out of the individual exertions of a member of a joint family to be his self-acquisition. The Hindu Gains of Learning Act (Act XXX of 1930) is one of the enactments which gave legislative recognition to this view, by treating the properties acquired out of the earnings of the members of the family who happened to have had their education from out of the joint family funds as self-acquired and separate properties. The Act provides that notwithstanding any custom, rule or interpretation of the Hindu law, no gains of learning shall be held not to be the exclusive and separate property of the acquirer merely for

the reason that his learning, in whole or in part has been acquired with the aid of the funds of the family and "learning" has been understood to mean education which is to enable a person to pursue any trade, industry, profession or avocation in life. If a member of the family is inclined to start a trade and for that purpose he gets assistance by way of a contribution from the joint family funds without any further assitance from the joint family and goes and starts a business and acquires properties, it appears to be reasonable to extend the principle of the Hindu Gains of Learning Act to such a case. We are unable to find any real distinction between the case of a member getting himself educated out of the joint family funds and employing himself somewhere earning and acquiring properties and a member getting a cash contribution from the family and starting a trade on his own account. Unless it is shown that the joint family did not stop with the contribution but continued to take interest and the business was subsequently carried on with the assistance of the joint family, it should not be held that the business is family business.

Mr. Narasinga Rao referred to certain observations of Venkatasubba Rao, J. in *Manicka Chetti* v. *Kamalam*[1]. That was a case where there was already a partition and allotments of properties and a further claim was made as regards certain business and other properties and in considering the nature of the business whether it was joint family or separate, the learned Judge observed as follows :

"There is no doubt that the business had been carried on with the aid of joint family funds, and that circumstances would *prima facie* make it a joint family concern. When coparcenery funds are employed there may be one of two intentions, either that the concern belongs to an individual member, his share being debited with the sums employed or what is more natural that the concern was carried on for the joint benefit."

With these observations we are in respectful agreement. The business in that case was carried on with the aid of joint family funds and not merely started with a contribution from the joint family. The question is one of intention on the part of the members starting the business and the intention of the other members of the family as to the manner in which they treated the business, and such an intention must be established by sufficient evidence. That evidence is lacking in the present case.

We are of the opinion that the plaintiff's share in the business at Anantapur in respect of which an account was ordered by the learned District Judge is not joint family business and the defendants are not entitled to an account thereof. This disposes of the appeal and the appellant has to succeed.

But, there is one matter about which we consider it is necessary to express our views. Issue No. 5 relates to the ownership of the two houses at Anantapur standing in the name of the plaintiff's father-in-law, wife and brother-in-law as to whether they were *benami* for the joint family of the plaintiff and the defendants. In view of our finding that the plaintiff's interest in the Anantapur business is not joint family business, it may be unnecessary to go into the question as to whether the properties purchased with the income from the business are joint family properties or not; however, we desire to express our opinion, that the manner in which the learned Judge had dealt with it is not satisfactory. The consideration of the question as to the ownership of these houses can only be disposed of completely and effectively in the presence of the persons in whose names the properties are purchased, *i.e.*, P.W. 4 and D.W. 5 and the plaintiff's wife all of whom are not parties to the suit. The learned District Judge thought that this is a matter that could be reserved for decision in the final decree proceedings after impleading the necessary parties. But, we would say that this is wrong procedure which should not be adopted. The final decree proceedings under Order 20, rules 12 and 18 only relate to matters which are provided in the preliminary decree as to partition, as to an account for mesne profits or as to an account for other properties, but does not relate to the decision of any substantial rights of parties as to title to properties which can only be decided in a regular suit. If P.W. 4, D.W. 5 and the plaintiff's wife had been parties to the suit and this issue had been raised, it would have been

1. (1937) 1 M.L.J. 95.

open to the learned Judge while deciding the case to give his decision on that matter. But it was not open to him to reserve the question for the final decree proceedings. We, therefore, set aside that direction regarding the properties covered by issue 5 and reserve it for any suit which the defendants may file if so advised.

The appeal is allowed. The appellant will get his costs. Advocate's fee being fixed at Rs. 250 from the respondents.

R.M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

J. Loomchand Sait ... *Appellant.**

v.

The Official Liquidators, Peerdan Joharmall Bank, Ltd. ... *Respondents.*

Companies Act (VII of 1913), section 282-A and section 179-A—Sanction of Court to institute proceedings against defaulting Director by Official Liquidators—When necessary—Constitution of India (1950), Article 20 (2)—If violated.

Banking Companies Act (X of 1949), section 45-C and section 45-G—Powers of Court.

It is not necessary that previous sanction of Court should be obtained by the Official Liquidators for instituting criminal proceedings against a defaulting managing director. In the absence of specific terms that sanction should be previously obtained, it follows, as a necessary corollary, that the sanction required by the Official Liquidators could be given by the Court at any time even after the proceedings have actually been instituted or even in the course of the proceedings.

Non-compliance with formal requirements in the matter of the description of the applicants cannot and will not amount to any violation of section 177 of the Companies Act, where there is substantial compliance with its provisions.

Section 282-A of the Companies Act does not offend against Article 20 (2) of the Constitution of India.

Failure to frame rules under section 45-G of the Banking Companies Act does not vitiate any proceedings taken under the Act as per the Original Side Rules or the Companies Act and the rules framed thereunder.

Under section 45-G of the Banking Companies Act the High Court is the proper and the competent Court and not the Presidency Magistrates' Court to try offences under the Act even though the trial is in a summary way. The Judge dealing with the proceedings for the winding up of the Banking Company is also competent to try any offence against the defaulting director.

Appeal from the judgment and order of Krishnaswami Nayudu, J., dated 29th August, 1951 and made in the exercise of the ordinary original civil jurisdiction of the High Court in Application No. 4572 of 1949 in O.P. No. 212 of 1949.

K. Rajah Iyer, S. Narasinga Rao, D. Suryaprakasa Rao and *T. K. Raman Nambisan* for Appellant.

A. Balasubramanian and *C. S. Vidyasankaran* for Respondent.

The Judgment of the Court was delivered by

Basheer Ahmed Sayeed, J.—The appellant in this appeal is one Loomchand Sait, who was the Managing Director of the Peerdan Joharmal Bank, Ltd., in liquidation. He has preferred this appeal against the order of Krishnaswami Nayudu, J., who held that the appellant had acted fraudulently and had brought himself within the purview of section 282-A of the Indian Companies Act. The learned Judge found all the charges framed against him proved and sentenced him to pay a fine of Rs. 1,000 and directed him to pay Rs. 42,527-12-9, deliver the jewels particulars of which were given in the schedule to the charge excepting some three items referred to in the judgment and also to pay a sum of Rs. 87,000 plus Rs. 199-12-0 being the value of the securities wilfully misapplied by the said appellant on or before the 12th September, 1951. In default, he ordered that the appellant should undergo imprisonment for two years. The appellant was given time till the 12th September, 1951 to which date the matter stood adjourned. On the 14th September, 1951, the appellant having failed to comply with the order,

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* O.S. Appeal No. 88 of 1951. 17th December, 1952.

dated the 29th August, 1951, the matter came up before the learned Judge on the 14th September, 1951. The respondent was ordered to undergo imprisonment as directed in the order, dated 29th August, 1951, for a period of two years and that the necessary warrant should issue. This appeal is preferred against the said order.

The earlier history of the application taken out by the Official Liquidators of the said Peerdan Joharmal Bank, Ltd., in Thiruchirapalli (in liquidation) under section 282-A of the Indian Companies Act, for passing appropriate orders against the respondent, has been elaborately set out in the order passed by Krishnaswami Nayudu, J., under appeal, and it is therefore unnecessary to traverse the entire ground in this judgment. Suffice it to mention that the application of the liquidators in its final form was ordered by Mack, J., on the 11th January, 1950, by which he held that the appellant was liable to bring in a sum of Rs. 2,00,000, being the value of the securities, jewels and of the unaccounted cash balance. He was directed to pay a fine of Rs. 1000 under section 282-A and ordered to pay up within three months the sum of Rs. 2,00,000 and in default sentenced to suffer imprisonment for a period of two years. The appellant preferred O.S.A. No. 20 of 1950, against this order of Mack, J. The appellate Court set aside the order of Mack, J., and remanded the application to be heard and disposed of in an elaborate judgment delivered by the Honourable the Chief Justice sitting with Viswanatha Sastri, J. On remand, Krishnaswami Nayudu, J., after hearing the evidence on behalf of the applicants, the Official liquidators, framed three charges against the appellant on the 25th April, 1951, under section 282-A of the Indian Companies Act. After holding an elaborate enquiry into the said three charges, which have been set out in the order of the learned Judge, and after giving every opportunity to the appellant who was represented by counsel to cross-examine the applicants' witnesses and also adduce defence evidence, the learned Judge, as already stated, came to the conclusion that the charges had been proved and imposed the sentence of fine of Rs. 1,000 and imprisonment for two years.

When the appeal came on for hearing before us the appellant wanted a counsel to be appointed by the Court to conduct his case, but we could not persuade ourselves to comply with his request. Thereupon, the appellant engaged the services of Mr. Rajah Aiyar assisted by three other counsel. Mr. Rajah Aiyar argued the appeal at length and placed before us every aspect of the case which was in favour of the appellant. We are thankful to Mr. Rajah Aiyar for his able argument.

After having heard the arguments of Mr. Rajah Aiyar, and those of the Official liquidators and having perused the entire evidence in the case, both oral and documentary, and having considered all the legal points raised by the learned counsel on both sides and having given our anxious consideration to the case, we have come to the conclusion, for the reasons set out hereinafter, that there are no merits in this appeal, that the order under appeal should be confirmed and that the appeal dismissed.

The first point that Mr. Rajah Aiyar has urged on behalf of the appellant is that no leave has been obtained by the Official liquidators for instituting proceedings against the appellant under section 282-A of the Indian Companies Act, as required by section 179 of the said Act. Mr. Rajah Aiyar has invited our attention to the language of section 179-A of the Indian Companies Act which is to the following effect :

"The Official Liquidator shall have power, with the sanction of the Court, to do the following things : (*a*) to institute or defend any suit or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company, etc."

and contends that the sanction of the Court for instituting criminal proceedings against the appellant was a condition precedent and that, inasmuch as no sanction was obtained by the Official liquidators for the filing of the present application against the appellant, the proceedings against him are vitiated by this serious legal defect. He also drew our attention to the fact that the order of appointment

given to the Official liquidators also did not contain any power authorising the Official liquidators to institute proceedings under section 179-A of the Indian Companies Act. The first order passed by Mack, J., on 22nd November, 1949, it has been pointed out, does not give authority to the Official Liquidators to institute Criminal proceedings under section 282-A, but only under section 238-A of the Act. The notice of motion alone mentions for the first time section 282-A along with other sections. This section has been introduced by the Official liquidators without sanction from the Court in the said notice of motion. Therefore, it is urged by Mr. Rajah Aiyar that the proceedings are incompetent and improper. If reliance were to be placed on the order dated 11th January, 1950, Mr. Rajah Aiyar, would argue, that that order having been set aside by the appellate Court which treated the application as one under section 238-A did not hold the field any more. So, it was not of any avail, though it mentions that the advocate of two creditors made a request that the appellant might be dealt with under section 282-A and that action was therefore taken under that section by the learned company Judge. Section 282-A says that action has to be taken " on the complaint of the company " and that it was not enough that the creditors of the company made a request to treat the application of the liquidators as one under section 282-A ; nor was it open to the learned Judge to take action *suo motu* no complaint having been made under section 282-A of the Act.

It must, however, be observed that though the appellate order says that section 238-A did not apply and directed that the application should be enquired into and disposed of under section 282-A still the point of want of previous sanction, was not raised before the said appellate Court, nor even before the learned company Judge, who passed the order under appeal.

We have carefully examined the language of section 179-A of the Companies Act and also the various other sub-clauses of which this section is comprised. We do not think that the language of the section warrants the interpretation put upon it by the learned counsel for the appellant that it enacts that previous sanction should be obtained by the Official liquidators for instituting criminal proceedings against the defaulting managing director. If it were the intention that previous sanction should be obtained for instituting criminal proceedings, the language of the section would have been in a mandatory form as contained in various enactments such as the Civil Procedure Code, and the Criminal Procedure Code and certain other Acts where it has been provided that " no suit or proceedings shall lie or be taken without the previous sanction " of the Court or the authority concerned (*Vide* sections 195 and 196, Criminal Procedure Code, section 92, Civil Procedure Code, section 70 of the Stamp Act, section 223 of the Local Boards Act and section 399 of the City Municipal Act). Far from being a prohibitory section, as is the case in other enactments, the section in the Indian Companies Act is an enabling one which says that the liquidators shall have power, with the sanction of the Court, to institute criminal proceedings. We do not think that there is sufficient justification for us to import into the language of section 179, the words " previous sanction." If the words " previous sanction " were to be imported into this section, then the administration of the affairs of the company in liquidation under the various sub-clauses of this section would become well-nigh impossible, for, it would then become necessary that the liquidators should run up to the Court even for ordinary acts of administering the properties and affairs of the company. At that rate, it would be inconceivable that the administration of the company in liquidation could ever be carried on. So it is, that the section has provided in general terms that the liquidators shall have power, with the sanction of the Court, to do acts which are enumerated in the various sub-clauses without laying it down that such sanction is a condition precedent to the taking of steps for the administration of the company by the Official liquidators. On the point that previous leave is necessary, the learned counsel has invited our attention to a decision in *Gokalchand Dwarkadas* v. *The King*[1], wherein it has been observed that section 537, Criminal Procedure Code, does not

1. (1948) 1 M.L.J. 243 : L.R. 75 I.A. 30 : A.I.R. 1948 P.C. 82 (P.C.).

cure the lack of leave. We do not think that in the circumstances of this case that decision has any application. Reference has also been invited to the decisions in *Thangamani, In re*[1], *Dawood Mohideen* v. *Sahabdeen*[2], to support the contention that the general power to institute proceedings is not sufficient and that leave is a condition precedent for the filing of the complaint under the Indian Companies Act. On the facts of this case, we are unable to see that these decisions have any bearing. In the absence of specific terms that sanction should be previously obtained, it follows, as a necessary corollary, that the sanction required by the Official liquidators could be given by the concerned authority at any time, even after the proceedings have actually been instituted or even in the course of the proceedings. On the materials placed before us by the Official Liquidators, we find that, as a matter of fact, the learned company Judge has given the sanction to institute proceedings under section 238-A of the Indian Companies Act even before the institution of the proceedings took place and has also given further sanction under section 282-A of the Act, in the course of the application taken out by the liquidators for proceedings against the appellant. In the order passed by the learned company Judge in Application No. 3054 of 1949 on the 22nd November, 1949, the official liquidators were directed to file an application for the commitment of the appellant to prison for violation of the directions given to him on the 7th and 14th October, 1949. In the notice of motion in Application No. 4572 of 1949, the applicants prayed for appropriate orders under section 238-A and 282-A. This notice of motion was filed under four sections, *viz.*, 183, 185, 238-A and 282-A, of the Indian Companies Act and under rule 9 of the Original Side rules and under the Banking Companies Ordinance dated 23rd September, 1949. Paragraphs 21 and 22 of the affidavit filed in support of the notice of motion in Application No. 4572 of 1949 mention that the appellant had rendered himself liable to be dealt with under sections 238-A and 282-A of the Indian Companies Act and that it was, therefore, just and necessary that the Court should be pleased to summon Loomchand Sait, the appellant, and commit him for contempt of Court and pass appropriate orders under sections 238-A and 282-A of the Indian Companies Act. It is, therefore, clear that the Court was approached by the Official liquidators not merely under section 238-A but also under section 282-A of the Indian Companies Act. While the order of Mack, J., proceeded at the outset to state that he had treated the application substantially as one under section 238-A for punishing Loomchand Sait for breach of his obligations under sub-sections (1) and (2) of section 238-A in the course of his order, at a later stage, the learned Judge has observed as follows :

"There is abundant material before me to commit Loomchand Sait immediatey to prison to undergo the maximum sentence of two years rigorous imprisonmemt on these counts proved against him under section 238-A (1) (*b*). I should have had no hesitation in adopting this course but for a plea made by Mr. Ganapati Aiyar on behalf of the two creditors that in their own interests and in the interests of the general body of creditors action may be taken instead under section 282-A of the Indian Companies Act, as if Loomchand Sait is sent to prison, the creditors may not recover a substantial dividend as they would be deprived of his assistance in recovering the bank's liabilities . . . . I have decided to give Loomchand Sait in view of his having run this bank for nearly 17 years an opportunity of implementing his assertion that he can still find 16 annas in the rupee to be paid to his creditors and to apply to this case section 282-A under which also this application has been filed and not to send Loomchand Sait immediately to prison though he richly deserves it in view of my findings under section 238-A."

In paragraph 7 of his order, the learned Judge further discusses the scope of both sections 238-A and 282-A and the various requirements that have to be satisfied for action being taken under either of the sections and finally winds up by saying that it would be manifestly desirable in the interests of winding up administration and that he could see no legal impediment in the way of section 282-A being applied in suitable cases in the interests of creditors, although the immediate commitment to prison of the delinquent director or managing agent under section 238-A would be legally justified. A reading of the relevant passages of the order of the learned company Judge referred to and extracted above would clearly prove that even if it

1. (1951) 1 M.L.J. 101. 841.
2. (1937) 2 M.L.J. 223 : I.L.R. (1937) Mad.

were contended with any force that previous sanction had not been accorded to the Official liquidators for instituting criminal proceedings, such sanction had been actually given to the Official liquidators in the course of the proceedings by the learned company Judge. Since we are of the opinion that section 179 of the Indian Companies Act does not preclude the giving of sanction by the concerned authority even in the course of the proceedings or on application, we do not think that there is anything wrong in the learned company Judge having accorded sanction in the course of the proceedings. In this view, it will be futile to contend that the Official liquidators had not obtained sanction from the Court for instituting criminal proceedings which have terminated in the conviction and sentence of the appellant. We think section 179 has been substantially complied with, there being no statutory prohibition against proceedings being instituted without the previous sanction of the Court. Section 17 of the Presidency Towns Insolvency Act, we may state, has been interpreted to mean that sanction could be given even during the course of the proceedings. The learned Official liquidators have invited our attention to the decisions in *Mrityunjay* v. *Provot Kumar*[1], *The Official Receiver, Coimbatore* v. *Kanga*[2], *Emperor* v. *Bishan Sahai Vidyarthi*[3], *Subramania Aiyar* v. *The Podanur Bank, Thiruvadamarudur*,[4] and *Laduram Nathmul* v. *Nandalal Karuri*[5], wherein the broad principle has been enunciated that the grant of leave is a matter between the Court and the receiver or the Official liquidators and that the sections requiring leave of the Court in the Indian Companies Act and in the Insolvency Acts are only administrative provisions which are the matters entirely between the Official liquidators or the Official receivers and the Court. It is also urged by the learned Official liquidators that if leave is not obtained, it will be merely an error which can be rectified at a later stage. In the view we have taken, we do not think that we need go into this question any further. The learned Official liquidators have invited our attention to a comparison of section 171 with section 179 of the Indian Companies Act and they urge that the language of the two sections is different that whereas section 171 of the Indian Companies Act requires that leave should be obtained as a condition precedent, the same is not the case with section 179 of the Act. They have also relied upon the decisions in *Bhagirath* v. *Emperor*[6], and *Sunilchandra* v. *Krishnachandra*[7], where even the requirements of section 171 have been liberally interpreted.

Mr. Rajah Aiyar has next urged that the complaint in this case by the Official Liquidators ought to have been filed in the name and on behalf of the company, and that, in this case, it has been filed merely by the Official liquidators of the company. The proceedings are not, according to him, in the name and on behalf of the company as required by law. He invites our attention to section 177 of the Indian Companies Act, which provides for the formalities to be observed in proceedings under the Indian Companies Act. Section 177 is to the following effect :

> "The Official Liquidator shall be described by the style of the Official Liquidator of the particular company in respect of which he is appointed, and not by his individual name."

The question is whether the requirements of this section have been substantially complied with by the form in which the proceedings have been instituted by the Official liquidators of the company before the Court dealing with the company matters. It is true that section 282-A says that action is to be taken on the complaint of the company and Mr. Rajah Aiyar would urge that the Judge cannot take any action *suo motu*. In this case, the Official liquidators it is that have moved the Court for the investigation into the default committed by the appellant and, as has already been pointed out, the notice of motion filed by the liquidators has been filed only under section 282-A as well as the other sections. There is, therefore, no question of the Judge taking action *suo motu* in this case. The complaint has been by the liquidators on behalf of the company for which they have been appointed

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1. (1952) 56 C.W.N. 18.
2. (1921) 42 M.L.J. 53 : I.L.R. 45 Mad. 167.
3. I.L.R. (1939) All. 779.
4. (1947) 1 M.L.J. 54.
5. (1919) I.L.R. 47 Cal. 555 at 557.
6. A.I.R. 1948 Cal. 42.
7. A.I.R. 1949 Cal. 689.

official liquidators. Besides, an examination of the cause title of the application and the notice of motion that have been taken out by the liquidators clearly set out that the applications are in the matter of the Indian Companies Act VII of 1913 and in the matter of the Peerdan Joharmal Bank, Ltd., in liquidation and the proceedings are stated to be between N. Krishnaswami Aiyangar, the petitioner and Peerdan Joharmal Bank, Ltd., the respondent and also between A. Balasubramaniam and C.S. Vidyasankaran, joint Official liquidators, applicants and J. Loomchand Sait, respondent. It is true that the applicants in the said application and the notice of motion have not been described as the Peerdan Joharmal Bank Ltd., (in liquidation) by the joint official liquidators, Messrs. A. Balasubramaniam and C. S. Vidyasankran. The question is as to whether by their inscribing their name as they have actually done instead of adopting the form which they should have done, it would be so serious a defect as to vitiate the entire proceedings and whether it would go to prove that the proceedings have not been in the name and on behalf of the company. In our opinion, the non-compliance with this formal requirement in the matter of the description of the applicants in the said notice of motion and the application, cannot and will not alter the substance of the applications which, we have to state, are substantially in the name and on behalf of the company. In *Muhammad Yusuf* v. *The Himalaya Bank, Ltd.*,[1], it has been held that where the Official liquidator described himself merely as " the official liquidator, the Himalaya Bank, Ltd., in liquidation", and did not describe himself as " The Himalaya Bank, Ltd., in liquidation, the plaintiff,", there was a substantial compliance with the provisions of Act VI of 1882, (the Indian Companies Act) and that even if it was considered that any amendment was necessary under the Civil Procedure Code such an amendment would not introduce a new plaintiff into the suit so as to let in the operation of section 22 of Act XV of 1877, the Indian Limitation Act. Even so, in *Shiamlal Diwan* v. *Official Liquidator, U.P. Oil Mills Co.*[2], the learned Judges have held that even if the proceedings are not in the name and on behalf of the company they must be deemed to be by the company through its liquidators when the Official liquidators have taken the proceedings in the matter of the company in liquidation. We do not think, therefore, that there is any grave defect in the omission committed in the manner and form of description of the applicants in the two applications that have been filed by the Official liquidators in this matter.

A more substantial point of law that has been urged by Mr . Rajah Aiyar, the learned counsel for the applelant, is that under Article 20 (2) of the Constitution of India, no person can be prosecuted and punished for the same offence more than once. He contendeds that section 282-A of the Companies Act provides a double punishment in that it provides for a fine not exceeding a thousand rupees and also a term of imprisonment not exceeding two years for the same offence. The terms of section 282-A are as follows :

"Any director, managing agent, manager or other officer or employee of a company who wrongfully obtains possession of any property of a company, or having any such property in his possession wrongfully withholds it or wilfully applies it to purposes other than those expressed or directed in the articles and authorised by this Act, shall, on the complaint of the company or any creditor or contributory thereof, be punishable with fine not exceeding one thousand rupees and may be ordered by the Court trying the offence to deliver up or refund within a time to be fixed by the Court any such property improperly obtained or wrongfully withheld or wilfully misapplied or in default to suffer imprisonment for a period not exceeding two years."

A reading of this section shows that what is provided for in the first instance is a fine not exceeding Rs. 1,000 to be imposed upon the director or other person found guilty and an order to be passed by the Court directing the person complained of to deliver or refund the property improperly obtained or wrongfully withheld or wilfully misapplied by him ; and in the second place, the section goes on to provide that, if the person against whom the fine and the order having been passed commits default, he may be ordered to suffer imprisonment for a period not exceeding two years. This default clause imposing a term of imprisonment might come into operation either in case the person fined fails to pay the fine imposed or when he

1. (1896) I.L.R. 18 All. 198 (F.B.). 2. (1933) 55 All. 912.

fails to comply with the order passed against him. It may also be that the said default clause might come into operation when the person against whom the fine and the order have been passed commits default in both. The intention and the language of the latter part of section 282-A seem to be that there should be a term of imprisonment imposed upon the person, who has already been fined and ordered to do a certain thing, if he fails to comply with either or with both. If the words " of either or both " had been inserted between the words " default " and " to suffer," the language of the section would have become complete and explicit. Though these words do not actually occur in the language of the section, still we think that what has been aimed at by the section is only that in default of either paying the fine or complying with the order for delivery, etc., or both, there should be a punishment by way of imprisonment for a term not exceeding two years. We do not think that the language of the section is capable of being so interpreted as to say that it provides for a double punishment for one and the same offence. It provides a punishment in the first instance on proof of an offence, and enables the Court to pass an order along with the punishment, and in default of the party complying with the payment of the fine or the compliance with the order, a punishment for such default has been prescribed. It is only an alternative punishment arising when default is committed. It is quite in consonance with the principles of criminal jurisprudence on which our criminal laws are based, and we do not think that this section 282-A offends against Article 20 (2) of the Constitution of India. Though the commentaries so far available on this Article 20 (2) are meagre, still, the commentaries that have been placed before us, *viz.*, that of Mr. Basu on the Indian Constitution and the Constitution of India by Mr. N. R. Raghavachariar, do not enable us to say that section 282-A of the Indian Companies Act, could be construed as providing for a double punishment. The commentators have discussed the point of double punishment while dealing with Article 20 (2) and have opined that the word " and " in the phrase " prosecuted and punished " could be taken either as a conjunctive or a disjunctive word. Whatever might be the comment on that aspect of the language contained in Article 20 (2), in this case, there can be no substance in the contention that the appellant has been prosecuted and punished twice over for the same offence; much less is it a case of the appellant being simply punished twice over for the same offence. In other words whether the word " and " occurring in the phrase " prosecuted and punished " be simply taken as a conjunction or a disjunctive " word " in our opinion, it cannot be contended with any force that the appellant in this case has been either prosecuted twice or punished twice for the same offence. Therefore, we are unable to agree with the argument of the learned counsel for the appellant that the punishment imposed on the appellant in this case would amount to a double punishment for one and the same offence.

The third point urged by the learned counsel for the appellant is that inasmuch as the present proceedings have been also taken under the Indian Banking Companies Act and so far no rules having been framed by the Court under the Banking Companies Act, as required by section 45-G of the said Act, the proceedings out of which this appeal has arisen must be considered to be vitiated and void. Section 45-G of the Banking Companies Act is in the following terms :

" The Court may make rules consistent with this Act concerning the mode of proceedings to be had for the decision of all claims or questions and all other proceedings, whether civil or criminal, which are to be decided pursuant to the provisions of Part III or Part III-A and concerning all other matters for which provision has to be made for enabling the Court to effectively exercise its functions under the said provisions."

While it has not been brought to our notice that any rules have actually been framed for criminal proceedings under the said Act by the High Court, which is the Court defined under section 45-A no authority has been placed before us to show that simply because rules required by section 45-A have not been framed, the proceedings taken under the Indian Companies Act as well as the Indian Banking Companies Act are null and void and that the High Court has no jurisdiction to inquire into the same and pass orders thereon. If the rules have not been framed as required by the said section 45-G in our opinion, the existing rules framed under the Indian

Companies Act under which also this application has been taken out would be applicable to the proceedings in question. Even otherwise, if no rules have been framed under the Indian Banking Companies Act under which this application is said to have been taken out since the matter is one that is dealt with on the Original side of the High Court by the Judge dealing with company matters, we think that the procedure laid down by the Original Side rules will apply until such time as the rules required to be provided for under section 45-G of the Banking Companies Act, have actually been framed. In any case, we do not think that it could be validly urged that the proceedings that have been instituted and have been investigated into by the learned Judge sitting on the Original Side and dealing with company matters are without jurisidiction or that they are in any way defective or vitiated by reason of the non-framing of the rules, under section 45-G of the Banking Companies Act.

In this connection, the learned counsel for the appellant has pointed out that under section 45-C the Court may, if it thinks fit, take cognisance of and try in a summary way any offence alleged to have been committed by any person who has taken part in the formation or promotion of the banking company which is being wound up or any past or present director, manager or officer thereof. There is also a proviso to this section which is in the following terms :

"Provided that the offence is one punishable under the Indian Companies Act, 1913 (VII of 1913), with imprisonment for a term which does not exceed two years, or with fine which does not exceed one thousand rupees."

The second clause of this section 45-C sets forth details as to what the trying Court should do if the case is tried summarily under sub-section (1) of the said section. To this clause also there is a further clause which says that nothing contained in sub-section (2) of section 262 of the Criminal Procedure Code, 1898, shall apply to any such trial. The third sub-clause of this section (section 45-C) lays down thus :

"All offences in relation to winding up alleged to have been committed by any person specified in sub-section (1), which are punishable under the Indian Companies Act, 1913, (VII of 1913), and which are not tried in the summary way under sub-section (1) shall, notwithstanding anything to the contrary, contained in that Act or the Criminal Procedure Code, 1898 (V of 1898) or in any other law for the time being in force, be taken cognizance of and tried by a Judge of the Court other than the Judge for the time being dealing with the proceedings for the winding up of the banking company."

The fourth sub-clause of the section says :

"Notwithstanding anything to the contrary contained in the Criminal Procedure Code, 1898, (Act V of 1898), the Court shall take cognizance of any offence under this section without the accused beihg committed to it for trial and all such trials shall be without the aid of a jury."

It is argued by the learned counsel for the appellant that in so far as the offence complained of against the appellant is one which is capable of being punished with imprisonment for a period which does not exceed two years or with fine which does not exceed Rs. 1,000, the case should have been tried in a summary manner. In which case, his contention is, that, as per the Criminal Procedure Code, such cases should be tried only by a Presidency Magistrate in the Presidency Town and not by the High Court. Reliance for this position is placed on the decisions in *K. Sundaresa Aiyar*, In re[1], and *Veerappan*, In re[2]. We do not think that these decisions apply to the facts of the present case. Even so, the learned counsel has invited our attention to the decision in *Harishchandra v. Kavindranarain Sinha*[3], and argues that the High Court has no jurisdiction under section 85 of the Indian Companies Act. We are unable to agree with this contention. The Banking Companies Act has defined the Court as the High Court which has jurisdiction to try cases under the Banking Companies Act and the procedure has been prescribed by section 45-C of the said Banking Companies Act, and we do not think that there has been any irregularity in the procedure followed

1. (1950) 1 M.L.J. 314.
2. (1944) 1 M.L.J. 390.
3. A.I.R. 1936 All. 830 (F.B.).

by the Company Judge in the trial of this case. But the argument is that if the trial has been in a summary manner as contemplated by section 45-C the proper Court vested with the jurisdiction to try the offence would have been the Presidency Magistrate's Court and not the High Court. We do not think that we can agree with this contention for the reason that the Court has been defined in section 45-A of the Banking Companies Act as the High Court exercising jurisdiction in the place where the registered office of the banking company which is being wound up is situated. Therefore, the proper and competent Court contemplated by the scheme of the Act would only be the High Court and not the Presidency Magistrate's Court, even if it is contended that the offence has been tried in a summary way.

In the alternative, the contention of the learned counsel for the appellant is that if the offence has not been tried in a summary way under sub-section (1) of section 45-C, then it should have been tried by a Judge other than the Judge for the time being dealing with the proceedings in winding up of the banking company. His point is that in the present case, the procedure that has been followed is that of a warrant case, *i.e.*, where witnesses have been first examined and the appellant has been called upon to enter into his defence. In such an event, according to the learned counsel the judge who should have tried this offence should not be the Judge dealing with the winding up proceedings of the banking company but some other Judge. But, actually, in the present proceedings, the same Judge dealing with the company matters has also been the Judge who tried the offence and imposed the punishment against the appellant. On this ground, the learned counsel for the appellant argues that the whole proceedings have been vitiated and they should be treated as incompetent and as a nullity. The appellant ought not to have been tried by the same Judge who was dealing with the winding up of the banking company of which the appellant has been the managing director. The official liquidators, however, contend that the offence, in the present case, has been tried only in a summary way but the procedure followed has been that prescribed for warrant cases. They urge that it is open to the Court which tries an offence in a summary way to adopt the procedure of a warrant case, and in this case, since the offence is one that is liable to be punished by a fine not exceeding Rs. 1,000 and a term of imprisonment not exceeding two years, the Court has, in fact, tried the offence only in a summary way and not tried it as a warrant case, keeping in view the sub-clause (1) and the proviso to section 45-C of the Indian Banking Companies Act. Merely because the procedure followed has been that of a warrant case, while the case is being tried in a summary way, it cannot be said that the Judge dealing with the proceedings for the winding up of the banking company was not competent to try the offence. Though a reading of the judgment of the learned Judge who tried the offence, *prima facie*, shows that the procedure followed has been the one prescribed for a warrant case, still it is not certain and no evidence has been placed before us to show that the offence has not been tried in a summary way. It has therefore to be presumed that the offence has been tried only in accordance with section 45-C, sub-clause (1) and not tried as contemplated in sub-clause (3) of the said section 45-C. That being the case, we think that the Court which has tried the offence for which the appellant has been convicted, has jurisdiction, and has exercised the power vested in it to try the offence in a summary way and the proceedings cannot, therefore, be said to be vitiated. If the case has been tried in a summary way, as we think it has been, then section 45-C sub-clause (2) provides that sub-clause (2) of section 262 of the Criminal Procedure Code, 1898, shall not apply to any such trial. We therefore cannot feel ourselves persuaded to agree with the contention of the learned counsel for the appellant that there has been any defect such as to nullify the trial of the appellant for the offence for which he has been convicted.

There was a further point raised by the learned counsel for the appellant that in this case no fraudulent intention has been proved on the part of the appellant as is required by section 282-A of the Indian Companies Act. When the case was remanded by the appellate Court it did observe that to render the appellant liable

to the penalties imposed by section 282-A of the Indian Companies Act, there should be proof of fraudulent intention. The learned Chief Justice, who delivered the judgment of the appellate Court has referred to the decisions in *Barrett* v. *Markham*[1] and also to the decision in *Madden* v. *Rodes*[2], wherein it has been laid down that the person who is proceeded against for withholding or misapplying monies belonging to the company should be proved to have had a fraudulent intention in doing so. Of course, it has been observed by the learned Chief Justice in the said judgment that fraud cannot be directly proved but it could be inferred from the circumstances. In this case, the learned Judge, who has tried this appellant, has, in the last two paragraphs of his judgment found that the Official liquidators have established that the appellant has acted fraudulently and that the appellant had brought himself to be proceeded against under section 282-A of the Indian Companies Act. The learned Judge has further observed that the whole conduct of the appellant in regard to the cash in the safe and the jewels would show his fraudulent intention to utilise public money for private purposes and that there was no question of his acting honestly, and dealing fairly with the properties belonging to the bank, that therefore, it was a clear case of fraud and dishonesty on the part of the appellant. The point urged by the learned counsel for the appellant in this connection is that the charges have been framed in a wrong manner and as the charges stand they only state that the appellant had wrongly withheld the properties in his possession and not that he had acted fraudulently or dishonestly in doing so. The essence of the charge, according to the counsel for the appellant, is merely misapplication of properties and not that he had any fraudulent intention in such misappropriation. As has been pointed out by the learned trial Judge, the fraudulent intention on the part of the appellant could be inferred from his conduct in regard to the funds and properties of the bank of which he was the managing director. We have been taken through the entire evidence, oral and documentary, in this case by the learned counsel on both sides and we do not think that any sufficient reason has been shown to us to dissent from the conclusions which the learned trial Judge has arrived at in holding that the circumstances of this case prove beyond doubt that the conduct of the appellant was motivated by a fraudulent and dishonest intention to deprive the bank of its properties. We do not also think that there is much substance in the contention of the learned counsel for the appellant that the trial Judge had pre-judged the appellant's case by his order dated the 25th April, 1951, in which the learned trial Judge held that there was a *prima facie* case made out to justify the Court to frame charges against the appellant.

The learned counsel for the appellant invites our attention to section 281 of the Indian Companies Act which provides that if it appears to the Court hearing the case that the person proceeded against for negligence, default, breach of duty or breach of trust, has acted honestly and reasonably he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that the Court may relieve him either wholly or partly, from his liability on such terms as the Court may think fit. We do not think that, on the facts of this case, the learned counsel for the appellant have succeeded in establishing to our satisfaction that there is justification to invoke the aid of this section in favour of the appellant. The explanations given by the appellant for his conduct in respect of the properties belonging to the company do not enable us to come to the conclusion that he has acted honestly and reasonably. All the circumstances which have been placed before us go to prove only the contrary, namely, that the appellant has not acted in any *bona fide* manner, much less honestly or reasonably. Except the point that at a time when there was a run on the bank the appellant had tried to meet the situation there is nothing else which can be said to his credit. The facts reveal that in dealing with the properties of the bank the appellant has tried not merely to help himself at the expense of the bank, but also to help all his near and dear relations with funds belonging to the bank and

1. (1872) L.R. 7 Common Pleas 405. 2. (1906) 1 K.B. 534.

the amounts thus disbursed to his relations amount to several lakhs of rupees and the Official liquidators submit that there is no possibility of the bank recovering even a small proportion of these several lakhs disbursed to these close relations of the appellant. Such a conduct on the part of the appellant cannot be said to be any circumstances that should enable the Court to think that the appellant could be fairly excused for his negligence, default or breach of duty, or breach of trust in order to deserve any relief either wholly or partly. In fact, notwithstanding this reprehensive conduct on the part of the appellant as has been proved by the evidence in the case, we did give him an opportunity to prove his *bona fides* so as to see what relief could be afforded to him. We directed him to pay a sum of Rs. 50,000, in the aggregate in instalments to the official liquidators within a reasonable time to be fixed and to pay a sum of Rs. 10,000 by way of first instalment thereof within a week. We also gave him time to consider over the matter and make up his mind whether he would be agreeable to the suggestions made by us, but his learned counsel represented that the appellant was not in a position to agree to the proposal. A sum of Rs. 50,000 bore a very infinitesimal proportion to the huge sum of about Rs. 18,00,000 in which the bank was indebted to its creditors and also bore a small proportion to the sum of Rs. 2,00,000 that the appellant was called upon to pay by the order which is under appeal. We therefore find it impossible to exercise any indulgence in favour of the appellant even under section 281 of the Companies Act, which was invoked by the learned counsel on his behalf.

On the question of the liability of the appellant in respect of the Government securities which formed also the subject matter of the charges against him, the learned counsel for the appellant relies upon a resolution of the Board of Directors condoning the disposal of the Government securities by the appellant and contends that in the face of this condonation by the Board of directors, the charge in respect of the Government securities cannot stand. We have perused the resolution said to have been passed by the Board of Directors and we do not think that it is capable of being interpreted in the sense in which the learned counsel for the appellant would like to have it. The resolution, in our opinion, is only a record by the company of what the appellant is said to have done and it does not appear to us to contain the approval of the Board of Directors of the conduct of the appellant in respect of the Government securities. In fact, the latter part of the resolution directs the appellant to rectify the position which resulted from his conduct. This the appellant has not chosen to do. In such circumstances, it cannot be said that the resolution of the Board of Directors affords any protection against the charge which he has been called upon to answer. Reliance in this connection has been placed on the decisions in *Dovey* v. *Cory*[1], *Blyth's case*[2], and In re *Kingston Cotton Mill, Co.*,[3] and the learned counsel argues that the director must be deemed to have acted as a man of business in having disposed of the Government securities and if his conduct has been merely imprudent, it cannot be criminally liable, and he must be deemed to have resorted to honest, reasonable and *bona fide* payments with a view to save the credit of the bank. Such honest and reasonable conduct cannot be the subject of criminal charge under section 282-A of the Indian Companies Act, is the contention of the learned counsel for the appellant. He has invited our attention to a decision in *Natesan*, In re[4], in this connection. We do not think that we can accept the argument of the learned counsel for the appellant on this aspect of the case. In our view, the conduct of the appellant cannot be brought within the scope of the rule laid down in these decisions.

On a consideration of all the contentions and the arguments placed before us by the learned counsel for the appellant, we do not think that any sufficient ground has been shown to us to dissent from the order of the learned trial Judge. We are, therefore, of the opinion that the charges have been proved against the appellant on the evidence that has been placed before the trial Court and the conviction and sentence by the learned trial Judge are correct. We, therefore, while confirming

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1. (1901) A.C. 477.
2. (1876) 4 Ch.D. 341.
3. (1896) 1 Ch.D. 331.
4. (1949) 1 M.L.J. 436.

the conviction and sentence, dismiss this appeal. The Official Liquidators will have their costs of this appeal from out of the assets of the bank in their hands. The appellant will surrender before the Registrar on the 19th December, 1952.

R.M. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Yelchuri Ranganayakalu Chetti and another .. *Petitioners**

v.

K. Gopala Chetti .. *Respondent.*

Criminal Trial—Practice—Jurisdiction of High Court to stay criminal proceedings pending disposal of civil suit—Principles applicable.

A complaint was filed by one partner against another alleging criminal misappropriation. The accused, after the complaint was filed, filed a suit for dissolution of partnership. On an application to stay the trial of criminal proceedings *held* that the considerations when stay shall be granted are as follows :

(i) Is the accused likely to be prejudiced if the criminal proceeding is not stayed pending disposal of the civil suit ?

(ii) Is the matter in issue of such a complicated kind for the decision of which civil Courts are preferred as peculiarly qualified ?

(iii) Is the criminal proceeding instituted with the motive of hampering the conduct of the civil proceeding ?

(iv) Is the civil proceeding filed for the purpose of delaying or the conduct of which would result in a long delay of the trial of the crimnal proceeding ?

(v) Has the civil suit been filed before the institution of the criminal proceeding and does it appear that the decision in the former will be of value on arriving at the truth in the criminal case ?

(vi) Has the civil suit been filed after the criminal case and is there a possibility of its being decided soon ?

(vii) Does the criminal proceeding arise in any way out of the civil suit and would the decision of the civil Court necessarily affect the decision of the criminal Court ?

(viii) Are the parties and questions to be decided in the civil and criminal cases identical ?

(ix) Is it a claim of disputed title to land where it is difficult to draw a line between a *bona fide* claim and a criminal trespass ?

(x) Wherein does the public interest lie and not merely the supposed interest of the particular complainant ?

In considering the above there is the invariable rule that a criminal proceeding should be stayed pending the issue of a civil suit, but the matter is entirely one of discretion by the Court to be exercised having regard to the merits and all the circumstances of the case, the only general rule that can be adumbrated being that every Court should be left as far as possible to dispose of the case on its file with the utmost expedition and the only general assumption that can be made is that in either Court Justice will be done.

Applying the above principle the Court held in the instant case that no case was made for stay, though the High Court has jurisdiction to stay criminal proceedings.

Petition praying that in the circumstances stated therein the High Court will be pleased to direct stay of C.C. No. 8277 of 1952 Eighth Presidency Magistrate's Court of the Presidency Magistrates, Madras, pending C.S. No. 158 of 1952, High Court, Original Side, Madras.

V. Rajagopalachari and *P. V. Subramaniam* for the Petitioners.

V. T. Rangaswami Aiyangar for the Respondents.

The State Prosecutor (*S. Govind Swaminathan*) for the State.

The Court made the following

ORDER.—This is an application for stay of trial of C.C. No. 8277 of 1952 on the file of the Eighth Presidency Magistrate, George Town, Madras, pending disposal of C.S. No. 158 of 1952 on the file of the High Court on the original side.

* Crl.M.P. No. 1361 of 1952. 3rd October, 1952.

The facts are: The two petitioners before us Y. Ranganayakalu Chetty and Doraiswami Aiyangar constituted a partnership along with the respondent K. Gopala Chetty and K. Lakshminarayana Chetty and K. Satyanarayana Chetti under the style and name of Sri C. P. V. Kotiah Chetty & Co., carrying on business as commission agents in pulses, coriander, chillies, etc., at No. 21, Chinnathambi Mudali Street, G.T., Madras. The partnership agreement is dated 25th July, 1951. It provides that each of these petitioners is to contribute Rs. 25,000 and the partners were to share the profits in the following proportion, the first petitioner 0-5-9, the second petitioner 0-5-3, the complainant 0-3-0, Lakshminarayana Chetty 0-4-0 and Satyanarayana 0-2-6, out of a total of 1-4-6. The agreement also provided that no partner shall be at liberty to draw any amount which would reduce at any time the amount to his credit in the firm to less than the amount of the capital subscribed by him. The actual working of the partnership was in the hands of Ranganayakalu Chetty and Doraiswami Aiyangar. The complainant, Lakshminarayana Chetty, and Satyanarayana Chetti were advancing considerable capital. Therefore the complainant and the two others were alone given the power to operate on the bank accounts, to accept cheque, etc., for and on behalf of the partnership while Ranganayakalu Chetty and Doraiswami Aiyangar had no such right. There was a further stipulation that while the complainant and the two others could carry on other businesses apart from the partnership business, the petitioners could not do so.

It is in these circumstances that this partnership came to grief in 1952.

In regard to this partnership coming to be on the rocks and which has given rise to the criminal complaint and the suit, two opposing versions are given.

The version of the complainant and the two others is as follows: The petitioners had as between themselves conspired to collect the moneys due to the partnership and misappropriate the same to themselves for their personal use without any justification and in pursuance of the conspiracy the second petitioner left Madras on or about 27th May, 1952, taking with him all the bills, etc. and called upon the various constituents to make payments not by cheque but in cash and also intimated to the constituents that the dues to the company should be paid up urgently, and having made these collections kept this complainant in the dark about such collections and even went to the extent of making it appear that the collections in some quarters were not made while it subsequently transpired that the moneys had been in fact collected. The complainant became aware of the fraud practised by the petitioners in collusion with one another on or about 8th June, 1952 and started collecting information regarding the misappropriation, where after the petitioners wanted to make it appear as if the collection of about Rs. 65,000 was to be debited against the personal account of the first petitioner. The complainant contends that this ruse was entirely an after-thought when the petitioners came to know that the game was up and in fact the first petitioner could not claim to be debited with this large amount inasmuch as they had already overdrawn the moneys considerably from the partnership with ulterior object during 1951 and 1952, and in fact the accounts show that on 3rd June, 1952, the amounts standing to the credit of the first petitioner was only Rs. 27,120-4-6 while the amount that was standing to the credit of the second petitioner was only Rs. 18,857-10-10 while according to the argument, as stated above, there should be a minimum advance of Rs. 25,000 against each of the petitioners and so no claim could be set up for debiting the first petitioner with as much as Rs. 65,000. The complainant also contends that on the very admissions made by the petitioners they have misappropriated a sum of about Rs. 65,000 for the personal benefit of the first petitioner in purchasing a house in his own name without bringing the same into the partnership accounts and a clear case of criminal misappropriation had been made out for which he (complainant) has filed a complaint on 14th June, 1952.

The version of Ranganayakalu Chetty and Doraiswami Aiyangar is as follows: The cash balance as per the firm's books for the first week of June, 1952, of over Rs. 55,000 was in the hands of the complainant while a sum of Rs. 15,000 was in the

banks. There were besides considerable outstandings and stocks on which the firm had made large advances, both amounting to about four lakhs of rupees. A sum of Rs. 60,000 was collected by the second petitioner in the usual course of business during the latter part of May and beginning of June, 1952, which he handed over to the first petitioner, and a further sum of Rs. 4,000 had been collected by the first petitioner, himself and the entire aggregate sum of Rs. 64,151-6-0 was in the hands of the first petitioner. The complainant was duly informed of the collections by the second petitioner by letter dated 9th June, 1952. On or about 19th May, 1952, the first petitioner entered into an agreement for the purchase of premises No. 48, Strotten Muthiah Mudali Street, Madras, for Rs. 42,000. The complainant also competed for the purchase of the said property, but as the first petitioner's offer was higher, the bargain was struck in favour of the first petitioner. An advance of Rs. 2,500 was paid by the first petitioner for the purchase of the said house from and out of the amounts to his credit in the firm, and the first petitioner, to the knowledge of all the partners, requested the complainant on or about 25th May, 1952, to make available the balance of the sum required for the purchase of the property from and out of the firm's cash in his hands and to debit the same to the first petitioner's account. The complainant with ulterior motives failed to do so. On 10th June, 1952, the first petitioner wrote to the firm that he had Rs. 64,151-6-0 being the amount collected in his hands and asked that the sum of Rs. 64,000 out of it be debited to his account as the chitta books in which entries had to be made had not been sent to him for posting the entries. Thereupon the three other partners including the complainant sent a telegram on 12th June, 1952, charging the petitioners with criminal misappropriation of the said amount and imputing to them dishonest motives to which the first petitioner sent a reply telegram the same day repudiating the allegations. The second petitioner also wrote a letter the same day to the other partners setting out the real position and in view of the hostile and wholly untenable attitude of the other partners in charging him with dishonesty, he gave notice of dissolution of the firm and for settlement of accounts, the partnership being terminable at will.

K. Gopala Chetti thereupon filed the complaint on 14th June, 1952, and Lakshminarayana Chetti filed a suit for dissolution of partnership on 24th June, 1952.

The case for Lakshminarayana Chetti for filing the suit is that it had to be filed as the petitioners had intimated a desire to dissolve the partnership and brought the business to a standstill and that the large stocks which had got freezed by this move of the petitioners had to be dealt with and third parties had to be satisfied by the appointment of a Receiver and the business had to be kept going on and wound up normally.

It is in these circumstances that the present petition has been filed by Ranganayakalu Chetti and Doraiswami Aiyangar for the stay of the criminal trial pending the disposal of the civil suit on the foot that the controversy between them can be adjudicated upon only by looking into the accounts and on ascertainment of the amounts due to these petitioners and that then only it could be stated whether the offences of dishonest misappropriation etc., have been made out and that the proper forum for disposing of this controversy is the civil Court wherein the civil suit is filed by a partner and not the criminal Court. On the other hand, the contention of the complainant is that the case of misappropriation referred to in the complaint would not form the subject-matter for the civil suit and the criminal complaint which has been filed earlier should not be stayed pending the disposal of the civil suit which may legitimately take some years in the High Court itself, both in the original side and as a regular first appeal, not to speak of the matter going up to the Supreme Court to which it is bound to go up on account of the heavy financial interest involved and that the same acts or omissions may give rise to a tort as well as a criminal offence and that the proper view to take in such cases is that each Court must expeditiously dispose of the matter coming before it.

On the allegations the point for consideration are (*a*) jurisdiction and (*b*) principles which should guide the stay of criminal proceedings and applicable to the instant case.

Section 344, Criminal Procedure Code, authorises only the postponement or adjournment of criminal cases from time to time and does not contemplate the stay of proceedings for an indefinite period. But a civil Court has an inherent power to stay a case pending on its file where it is necessary for the ends of justice to do so. The power of the High Court in this respect is expressly recognised by section 561-A, Criminal Procedure Code. The High Court had also, independent of section 561-A, power under section 107 of the Government of India Act, 1915, to stay proceedings in subordinate Courts in the exercise of its powers of superintendence over inferior Courts. But under section 224 of the Government of India Act, 1935, which corresponds to section 107 of the Act of 1915, the High Court was held to have no power to interfere with the judicial orders of the lower Courts: *see* sub-section (2) of section 224 and the two undermentioned cases: *Sakkal* v. *Iswar*[1] and *Jahnabi* v. *Basudeb*[2]. Under the Constitution of India, in Article 227, which is a reproduction of section 224 of the Government of India Act, 1935, sub-section (2) of section 224 has been omitted. This omission of sub-section (2) of section 224 in Article 227 shows that the Constitution of India has restored the power which the High Court had under the Government of India Act of 1915: *Abdul Rahim* v. *Jabbar*[3], and *Bimala Prosad* v. *State of West Bengal*[4]. Therefore we have jurisdiction to stay criminal proceedings.

It is often stated that a criminal proceeding should be stayed during the pendency of civil proceeding in respect of the same or substantially the same subject-matter. The type-design arguments on the foot of which this plea is rested invariably have been examined in a decision of this Court by Jackson, J., in *Gnanasigamani Nadar* v. *Vedamuthu Nadar*[5].

"For instance, to take the argument most usually advanced in these cases, can it be said that where there is a common issue, it must first be finally decided in the civil Court before it is examined in the criminal Court. A criminal Court is in every way as competent as a civil Court to examine questions of possession or questions involving the genuineness of documents, and there is no particular reason for giving priority to the civil Court.

Then can it be said that trials cannot be allowed to proceed simultaneously upon the same issue in different Courts because simultaneity is essentially wrong and one trial, either the civil or the criminal, must therefore be stayed? Simultaneous trials may have their disadvantages, but when in any circumstances the two several Courts must try the same issue, there is no reason to prefer consecutive trials. It is not as though the trial which is taken first would absorb or govern the other. A criminal Court cannot decline to examine a question of forgery, because the forged document has been admitted as genuine in a civil Court; it must try the case sooner or later and on the general principle that judicial work should not be retarded the sooner the better.

Moreover there is special disadvantage in delaying a criminal trial.

'A grave charge has been made against a gentleman and it is desirable for his own sake and for every body concerned that it should be disposed of as quickly as possible, and if the proceeedings be postponed, until the final decision of the civil suit, witnesses may not be available'. (*Tajuddin* v. *Taj Muhammad*[6].)

If delay would avoid conflicting decisions there might be more to be said for it; but it cannot do that. Conflicting decisions are the inherent risk of the division of causes into civil and criminal. The risk is probably much less than the arguments in this type of case might lead one to suppose. Ordinarily the same evidence will result in the same finding and if there are divergent views they ultimately flow in the ordinary course of procedure to the same channel. If the District or High Court has upheld or quashed a criminal conviction, that Court is unlikely to confirm a divergent finding in a civil suit. Nor need it be held that one subordinate Court will be prejudiced by the opinion of the other. Apart from the fact that Judges may be trusted to be masters of their own minds, the criminal and civil Courts are never trying precisely the same issue. In the criminal Court guilt must be established beyond all possibility of doubt, but the civil Court weighs probabability. An acquittal of forgery in a criminal Court does not mean that the party will necessarily succeed in the civil Court —the authenticity of the document may still be doubtful; and if evidence is conclusive enough for conviction in the criminal Court, apart from any question of prejudice there must be every likelihood

1. I.L.R. (1941) 2 Cal. 365.
2. (1949) 54 C.W.N. 626.
3. (1950) 54 C.W.N. 445.
4. A.I.R. 1951 Cal. 258.
5. (1926) 52 M.L.J. 80.
6. (1921) 69 I.C. 380 (2).

that the accused will be unsuited in the civil Court. And anyhow if a case is delayed, since the Court is not relieved from the ultimate duty of trying it, what danger there may be of conflicting decisions and prejudice is a factor in consecutive as well as in simultaneous trials.

It is sometimes argued that if the trials are consecutive at least the parties are not hampered by having to conduct two causes at the same time. This is a question of fact and is chiefly relevant to those cases where the accused in the criminal is defendant in the civil Court. In the present case where accused himself has elected to institute civil proceedings subsequent to the criminal complaint he can hardly claim that his resources are unduly strained. And even where the accused is also defendant the harassment must be actual and something more than inconvenience.

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That it must be fought out is inevitable, and it must be fought out in both Courts. If the civil case is stayed pending the criminal case, it will have practically the same result as staying neither case; for ordinarily the criminal case will be finally concluded in three to six months, and the civil case in three to six years; so that delaying the civil case will have little effect and in my opinion will do no good. If the criminal case is stayed pending the civil case, then, as pointed out above, a person presumably innocent, is left for years with a criminal case hanging over him; and if ultimately proved to be guilty he will have successfully stayed off his well-merited punishment for an equal period. In either view the stay of the criminal proceeding is objectionable. Therefore the less undesirable course is to adhere to the main principle and to let both cases proceed with all possible dispatch.

It is sometimes argued that one or other proceeding is an abuse of justice, that the complainant has filed the criminal case in order to overawe his civil antagonist; or that the latter has filed the civil case to hamper the former. There may be cases in which such motives are clearly apparent; but ordinarily speaking Courts should be chary of imputing wrongful motives for rightful actions. If the law allows a legal process, it should not be condemned as unjust."

There is therefore now a consensus of judicial opinion that there is no invariable rule that a criminal proceeding should be stayed pending the issue of a civil suit, but that the matter is entirely one of discretion of the Court to be exercised having regard to the merits and all the circumstances of the case, the only general rule that can be adumbrated being that every Court should be left as far as possible to dispose of the case on its file with the utmost expedition and the only general assumption that can be made is that in either Court justice will be done, per Jackson, J.—in *Ramiah* v. *Ramiah*[1]; *Jagannath Acharya* v. *Rajagopalachari*[2]; *Rewamal Udhomal* v. *Mehrumal*[3]; *Kanhaiyalal* v. *Baijnath Mahesri*[4]. There is no hard and fast rule in this matter. The Court should consider the circumstances of each particular case and decide on grounds of justice and expediency whether it is proper that the criminal proceedings should be stayed or that the civil proceedings should be stayed or that both should be allowed to take their course—per Broomfield, J. in *Dias* v. *Mahadev*[5]. In exercising the discretion in the matter of stay the following ten principles deducible from the plentiful and not always reconcilable case law on the subject may be borne in mind and for which compilation I must here acknowledge my indebtedness to Chitaley and Annaji Rao's Encyclopædiæ, up-to-date, and accurate excellent commentary on the Criminal Procedure Code, 4th Edition, at page 1920 and following:

(i) Is the accused likely to be prejudiced if the criminal proceeding is not stayed until the disposal of the suit? I have already dealt with the general type design objections which are put forward and the observations of Jackson, J. in regard thereto. Therefore, the kind of prejudice which we have to consider is the particular prejudice in certain types of cases where the non-stay of criminal proceedings would be hurtful to the accused. The following are some of the instances. In *Sankarayya* v. *Subba Aiyar*[6], it was held that where there was a complaint of forgery of document and the question of genuineness of this document was pending in a civil Court, criminal proceedings should be stayed. In *Anna Aiyar* v. *Emperor*[7] petitioners 2 to 4 filed under section 77 of the Indian Registration Act a civil suit for the registration of a will alleged to have been made by their sister *S* and written by the petitioner No. 6 and attested by Nos. 7 to 9. While the suit was pending

1. (1926) 53 M.L.J. 265 : I.L.R. 50 Mad. 839.
2. A.I.R. 1931 Pat. 411.
3. A.I.R. 1934 Sind. 143.
4. A.I.R. 1933 Nag. 78.
5. (1931) 35 B.L.R. 1054.
6. (1891) 2 Weir 260.
7. (1907) I.L.R. 30 Mad. 226.

the counter-petitioner without obtaining sanction preferred a complaint before the Magistrate against the petitioners alleging that they had forged the said will of *S.* Petitioners applied to the Magistrate to stay proceedings in the criminal case until the civil suit should be decided. The High Court in these circumstances directed that the criminal proceedings be stayed pending the trials of the suit. In *Md. Ibrahim* v. *Kattayyam*[1], the facts were: There was refusal to register a document alleged to be forged. There was a suit to compel registration. There was a criminal trial for forgery. The High Court held that the criminal trial must be stayed pending disposal of the civil suit to compel registration. In *Jhummaklal* v. *Sunderlal*[2], where the very constitution of committee of trustees which authorised a particular individual from amongst them to lodge on its behalf a criminal complaint against the manager of the trust property was challenged as invalid in a previously instituted suit, held, the criminal trial should be stayed pending decision of civil suit. In *Khobhari Rai* v. *Bhagwat Rai*[3] there was a suit in regard to property and there was a charge of theft of such property. It was held that the criminal case should be stayed. In *Debi Mahto* v. *Emperor*[4], proceedings were instituted as a result of an order under section 476, Criminal Procedure Code. This order was appealed against. It was held that the criminal Court proceedings should be stayed pending appeal. These cases are not exhaustive but only afford illustrations of the particular prejudice that might be caused to the accused necessitating stay of criminal proceedings.

(ii) Is the matter in issue of such a complicated kind for the decision of which civil Courts are preferred as peculiarly qualified as, for example, the genuineness of a will or other document, the validity of a will, the *bona fides* of the civil claim, and the examination of complicated accounts. But even here it cannot be assumed that there will be a manifest and irreparable injustice done in the criminal Court when the integrity of that Court is not questioned. It is in this connection that reliance is placed by the learned advocate for the petitioners before me on the decision of *Dias* v. *Mahadev*[5], referred to above. In this decision it was pointed out that some cases are obviously more suitable for determination by a civil Court and that for instance it is not uncommon in Bombay for complaints of breach of trust by one partner against another and that such cases often involve the examination of complicated accounts for which the civil Courts have better means at their disposal than criminal Courts and that indeed it may often be impossible to say whether any criminal offence has been committed until the accounts of the partnership had been taken and the civil rights of the parties had been determined. The learned Judge, Broomfield, J., referred in this connection to *Emperor* v. *Jagannath Raghunath Das*[6]. But the learned Judge was careful to add that there is no hard and fast rule in this matter and the Court has to consider the circumstances of each particular case and decide on grounds of justice and expediency whether it is proper that the criminal proceedings should be stayed. In fact he has laid down other circumstances where by weight of the same the mere fact that a civil case of this nature is pending is not by itself a sufficient ground for staying criminal proceedings.

(iii) Is the criminal proceeding instituted with the motive of hampering the conduct of the civil proceeding? Because, if it is so the criminal proceeding may be ordered to be stayed: *Jehangir* v. *Framji*[7]; *Anna Iyer* v. *Emperor*[8]; *In re Subramania Chetti*[9]; *In re Ramachandra Babaji*[10]. This however will not apply in the case of public prosecutions such as prosecutions under section 195 or section 476, Criminal Procedure Code. These principles are embodied in *Gopal Chandra* v. *Suresh Chandra*[11]; *Dwarka Nath Rai* v. *Emperor*[12]; *Anrudh Kumar* v. *Emperor*[13] and *In re Kesav Narain*[14].

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1. A.I.R. 1916 Mad. 1123.
2. A.I.R. 1932 Nag. 86.
3. A.I.R. 1917 Pat. 621.
4. A.I.R. 1916 Pat. 7.
5. (1933) 35 B.L.R. 1054.
6. (1931) 33 B.L.R. 1518.
7. (1928) 29 Cr.L.J. 1053 : 112 I.C. 477.
8. (1907) I.L.R. 30 Mad. 226.
9. (1894) 2 Weir 415.
10. A.I.R. 1933 Bom. 307.
11. A.I.R. 1929 Cal. 563.
12. (1904) I.L.R. 31 Cal. 858.
13. (1921) 65 I.C. 436 (All.)
14. (1912) 17 I.C. 720 (Bom).

(iv) Is the civil proceeding filed for the purpose of delaying or the conduct of which would result in a long delay of the trial of the criminal case? If the answer is that criminal litigation has been started to prejudice civil litigation then a stay should be granted (In re *Ramachandra Babaji*[1]; and the answer is that if the conduct of the suit would result in long delay of the criminal trial naturally no stay should be granted. The latter ratio was laid down by Jackson, J., in *Ramiah* v. *Ramiah*[2], who cites with approval a Patna ruling that it is the policy of the law to go on immediately with the enquiry: *Ramsaran Singh* v. *Nikhaa Narain Singh*[3], founded on *Sheik Bahadur* v. *Nobdali*[4]. See also *Emperor* v. *Dinal Sha Kajanshah*[5]. Broomfield, J., in *Dias* v. *Mahadev*[6], has pointed out that the point that civil proceedings normally take longer than criminal and it is not difficult to find the means of delaying a decision is one of the matters to be borne in mind in deciding whether the ends of justice require that criminal proceedings should be stayed, echoing as it were the observations of Jackson, J., in *Gnanasigamani Nadar* v. *Vedamuthu Nadar*[7]. Thus in *Peda Baliah* v. *Venkatasami*[8] in view of the suit being a summary one and which in the normal course would get disposed of without delay criminal proceedings were stayed.

(v) Has the civil suit been filed *before* the institution of the criminal proceedings and does it appear that the decision in the former will be of value in arriving at the truth in the criminal case? If so, naturally the latter may be stayed. Thus in *Thakorlal Vadilal* v. *Ambalal Dhikabhai*[9], a criminal complaint was filed during the pendency of the civil suit between the parties alleging criminal trespass and wrongful restraint in relation to a portion of the suit property by one of the parties to the suit, and it was held that the criminal trial should be stayed pending hearing of the suit. In *Molhu Rai* v. *Emperor*[10] a civil suit was based on a hand-note and the defendant alleged that the hand note was the outcome of fraud on him and the defendant filed a complaint against the plaintiff and the plaintiff applied for stay of criminal proceedings till the decision of his prior civil suit. Held, stay should be granted. In *Faiz Muhammad* v. *Abbas Jafferali*[11], where disputes in criminal proceeding and civil suit were intimately connected and the civil suit was prior in time and common issues were capable of being decided more properly in civil suit, held, criminal case should be stayed.

(vi) Has a civil suit been filed *after* the criminal case and is there a possibility of it being decided soon? Because, if it were not so, a stay should not ordinarily be granted. It has been held in *Basheshar Nath* v. *Ratanchand*[12] and later in *Chhanno Prasad Singh* v. *Sakichand Sahu*[13], that where a civil suit is likely to be delayed the Magistrate is justified in holding that all the prosecution evidence should be recorded before the question of staying the criminal case can be considered. If the law allows a legal process it should not be condemned as unjust. Where the accused chooses to file a civil suit during the pendency of a criminal action against him he should not be denied that right. His action only becomes questionable when he tries by virtue of the suit to set up other rights to which he is not entitled: *Gnanasigamani Nadar* v. *Vedamuthu Nadar*[7].

(vii) Does the criminal prosecution in any way arise out of the civil suit and would the decision in the civil Court necessarily affect the decision in the criminal Court? *Mathura Kuar* v. *Durga Kuar*[14]. Otherwise, it would be unreasonable and speculative to order stay of proceedings in the criminal Court. In *U. Than Zan* v. *U Pyant*[15], it was rightly pointed out that it is no doubt undesirable that a criminal prosecution connected with a civil suit should be proceeded with until the civil suit is decided; but such cases are usually those where the criminal prose-

1. A.I.R. 1933 Bom. 307.
2. (1926) 53 M.L.J. 265: I.L.R. 50 Mad. 839.
3. A.I.R. 1925 Pat. 819.
4. A.I.R. 1924 Cal. 634.
5. A.I.R. 1933 Sind 358.
6. (1933) 35 B.L.R. 1054.
7. (1926) 52 M.L.J. 80.
8. A.I.R. 1914 Mad. 143.
9. A.I.R. 1942 Bom. 330.
10. A.I.R. 1937 Pat. 8.
11. A.I.R. 1935 Sind 187.
12. A.I.R. 1933 Lah. 37.
13. A.I.R. 1942 Pat. 45.
14. (1925) 2 All. L.J. 747: 2 Crl.L.J. 798.
15. A.I.R. 1935 Rang. 487.

cutions arise directly out of the proceedings of the civil Court such as for instance the prosecutions for perjury or forgery in relation to documents put in evidence in the civil Court. It would therefore be unreasonable and speculative to order stay of proceedings in the criminal Court on the off chance that there might be some decision in the civil Court which might have some bearing on the criminal prosecution : See *Mt. Shudeshara* v. *Emperor*[1]; *Molhu Rai* v. *Emperor*[2] and *Palani Goundan* v. *Emperor*[3].

(viii) Are the parties and points for decision in the criminal and civil cases identical? If they have no such identity stay will not be granted; *Jodhi Singh* v. *Emperor*[4]; *Tajuddin* v. *Tajmuhammad*[5], *Mansharam* v. *Chetanram*[6]; *Madanlal Brijulal* v. *Emperor*[7]; *Motiram Jasmal* v. *Emperor*[8]; *Pannalal* v. *Emperor*[9].

(ix) Is it a case of disputed title to land where it is difficult to draw a line between a *bona fide* claim and a criminal trespass? In such a case stay would be granted. The judgment of a civil Court on the other hand on actions *in personam* is not relevant to the same issue in a criminal Court and hence there is no justification for staying a criminal case pending the decision of the civil Courts: *Keshyap* v. *Emperor*[10].

(x) Wherein does the public interest lie and not merely the supposed interest of the particular complainant? In considering this aspect of the matter we have to take into consideration the foregoing factors and we must not merely regard the matter as a sort of competition between the civil and the criminal Courts: *Thakorlal Vadilal* v. *Ambalal Bhikabhi*[11].

Now applying these principles to the instant case we find that no case has been made out for staying the criminal proceedings pending disposal of the suit which has been subsequently filed by one of the partners. It cannot be stated for the reasons mentioned in *Gnanasigamani Nadar* v. *Vedamuthu Nadar*[12], that any prejudice would be caused to the accused in this case if the criminal trial is proceeded with. It will be open to these accused to put forward all the matters which would be open to them in the civil suit and probably within a shorter compass and repel the accusations against them. The complainant will be obtaining no particular or unfair advantage over the accused persons if the subject-matter of the accusations in the criminal trial is gone into independently of and prior to the adjudication in the suit. The accusations are not of such a complicated kind that it can be stated that a civil Court is more peculiarly qualified to adjudicate upon them. The points involved are simple and can be satisfactorily disposed of by the Presidency Magistrate. This criminal proceeding has not been instituted with the motive of hampering the conduct of the civil proceeding. On the other hand, if the criminal proceeding is stayed it would result in a long delay of the trial of the criminal case, which would not be even in the interests of the accused as pointed out by Jackson, J. in *Gnanasigamani Nadar* v. *Vedamuthu Nadar*[12] and *Ramiah* v. *Ramiah*[13]. The civil suit has been filed not before but after the criminal case. It cannot be stated that the criminal prosecution in this case arises out of the civil suit and the decision of the civil Court will necessarily affect the decision of the criminal Court. In any event the decision of the civil Court will not constitute *res judicata* and the criminal Court will have to independently investigate the accusation material against the accused. In the civil suit the issues involved are not identical with those arising in the criminal case. The criminal case is confined to the question of criminal misappropriation. Public interests require that criminal Court proceedings should be expeditiously disposed of and I need not add that the spectacle of a criminal trial pending for years till the civil suit has undergone the weary waiting period of three years in the original side of the High Court and then a period of three years in appeal and then another appeal in the Supreme Court, involving another 3 or 4

1. A.I.R. 1933 All. 818.
2. A.I.R. 1937 Pat. 8.
3. 1937 M.W.N. 21.
4. A.I.R. 1921 Pat. 484.
5. (1922) 69 I.C. 380.
6. A.I.R. 1945 Sind 32.
7. A.I.R. 1934 Pat. 113.
8. A.I.R. 1943 Sind 10.
9. A.I.R. 1943 All. 14.
10. A.I.R. 1945 Lah. 23.
11. A.I.R. 1942 Bom. 330.
12. (1926) 52 M.L.J. 80.
13. (1926) 53 M.L.J. 265: I.L.R. 50 Mad. 839.

years is not calculated to raise public morale in the efficacy and efficiency of the administration of justice.

In these circumstances there are no good grounds for granting stay of the criminal proceedings asked for and this petition is dismissed.

V.P.S. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AIYAR.

The Visakapatnam Co-operative Motor Transports, Ltd., Visakapatnam .. *Appellant**

v.

G. Bangaruraju and others .. *Respondents.*

Motor Vehicles Act (IV of 1939), section 44 (2)—District Collector ex-officio *President of a Co-operative Society—Society applying for permit—Membership of Regional Transport Authority—If affects—Validity of orders.*

The District Collector of a district is not disqualified from being appointed as a member of the Regional Transport Authority under section 44 (2) of the Motor Vehicles Act merely because he happens to be the *ex-officio* President of a Co-operative Society, which applied for issue of a bus permit.

One of the great principles of civilised jurisprudence which is a part of the law in Britain and which has been adopted in this country is that no man shall be a Judge in his own cause. Closely allied to this principle is the other salutary principle that it is of fundamental importance that justice should not only be done but manifestly and undoubtedly seem to be done. The combined result of these two well-established principles is that irrespective of the possibility or otherwise of actual partiality being proved, the constitution of a tribunal entrusted with judicial or quasi-judicial functions is deemed to be bad if and when it deals with any case in which it can be said that one of the members of that body is among the suitors or litigants before the body. (Halsbury's Laws of England, 2nd Edition, Vol. IX, page 883, *et seq*).

Jagat Bus Service v. *State Transport Authority*, A.I.R. 1952 All. 75 and *Ibrahim* v. *Regional Transport Authority, Tanjore*, (1953) S.C.J. 31 : (1953) 1 M.L.J. 205 (S.C.), distinguished.

The order of the Regional Transport Authority of which the District Collector is a member granting permit to a Co-operative Society of which he is *ex-officio* President is therefore void and must be quashed.

Appeal under clause 15, Letters Patent, against the order of the High Court dated 9th January, 1952, in C.M.P. Nos. 7184 and 7185 of 1951, petitions presented to the High Court respectively for the issue of a writ of *certiorari* calling for the records of the C.R.T.B., Madras, in R. No. 28479 A. 4/1950, dated 10th October, 1950, therein and to quash the order therein and to issue a writ of *mandamus* directing the C.R.T.B. to restore to file the appeals and dispose of them according to law, etc.

The Government Pleader (*P. Satyanarayana Raju*) for Appellant in L.P.A. No. 52 of 1952 and Respondent in L.P.A. Nos. 6 and 146 of 1952.

D. V. Reddi Pantulu and *U. Somasundaram* for Appellant in L.P.A. Nos. 6 and 146 of 1952.

The Advocate-General (*V. K. Tiruvenkatachari*), *M. K. Nambiar, C. F. Louis, N. Sundaram Aiyar, D. Narasaraju, K. B. Krishnamurthy, K. Mangachari, T. K. Rajagopalan* and *S. S. Rajagopalan* for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—The same question of law is involved in these three Letters Patent Appeals against the judgments of Subba Rao, J., in three applications for the issue of writs of *certiorari* and *mandamus* against proceedings under the Motor Vehicles Act. The question arises on the following facts which are substantially common to all the three petitions though they related to different districts in the State. There were applications to the concerned Regional Transport Authorities for the issue of bus permits. One of the applicants was the District Co-operative Society for ex-servicemen. It is common ground that the Collector of the con-

*L.P. Appeals Nos. 6, 52 and 146 of 1952. 21st January, 1953.

cerned district is the President of the respective Co-operative Society. It is also common ground that the Collector of the district is a member of the Regional Transport Authority which has to adjudicate on the comparative claims of the applicants and which is under a duty to decide as to who should be granted the permit. In all the three cases, a permit was granted to the respective Co-operative Society in the district. In all the three cases, the Collector happened to be the President of the respective Regional Transport Authority and took part in the proceedings in which the permit was granted. Two objections *inter alia* were taken by and on behalf of the other applicants, namely, (1) that the District Collector was disqualified from being appointed as a member of the Regional Transport Authority because he had a financial interest in a Transport undertaking, and (2) the order of the Regional Transport Authority was contrary to the principles of natural justice because the Collector who was a member of the Regional Transport Authority was also the President of the Co-operative Society which was one of the applicants. Subba Rao, J., overruled the first objection which was based on section 44 (2) of the Motor Vehicles Act. Under that provision, no person who has any financial interest whether as proprietor, employee or otherwise in any transport undertaking shall be appointed or continue as a member of a Provincial or Regional Transport Authority. The learned Judge held that the Collector of the District did not have any financial interest in the Co-operative Society of which he was *ex officio* President and therefore he was not disqualified under that provision.

The learned Judge however upheld the second objection. He held that the order of the Regional Transport Authority issuing a permit to the Co-operative Society in each of these cases was not valid, because the President of the Society, namely, the Collector took part in the proceedings of the Regional Transport Authority, as one of its members. The reasoning of the learned Judge which was based on several decisions of English courts to which reference was made before him was shortly this: Members of the Regional Transport Authority performed a judicial or quasi-judicial function in deciding on the applications made to the Authority for the grant of a permit and the member of such a body should not have a bias which is likely to affect his impartiality. It is not necessary that actual partiality should be established before the proceedings of that body are vitiated. The presence of a member having a bias vitiates *ab initio* the constitution of the body itself. On this ground, the learned Judge quashed the orders of the Regional Transport Authority granting the permits of the respective Co-operative Societies.

In the three appeals before us, in one of the appeals the Government is the appellant, and in the other two, the parties affected by the decision of Subba Rao, J., are the appellants.

We agree with the learned Judge that the Collector of the district was not disqualified from being appointed as a member of the Regional Transport Authority under section 44 (2) of the Act, merely because he happened to be the *ex-officio* President of the respective Co-operative Society for ex-servicemen. We are also in agreement with the learned Judge on the second point. It is not necessary to discuss at length the legal principles which have been well established in dealing with the proceedings of inferior tribunals entrusted with judicial and quasi-judicial functions. One of the great principles of civilised jurisprudence which is a part of the law in Britain and which has been adopted in this country is that no man shall be a Judge in his own cause. Closely allied to this principle is the other salutary principles that it is of fundamental importance that justice should not only be done but manifestly and undoubtedly seem to be done. The combined result of these two well-established principles is that irrespective of the possibility or otherwise of actual partiality being proved, the constitution of a tribunal entrusted with judicial or quasi-judicial functions is deemed to be bad if and when it deals with any case in which it can be said that one of the members of that body is among the suitors or litigants before the body. *See* Halsbury's Laws of England, 2nd Edn., Vol. IX, page 883, *et seq.*

Reference was made to a recent decision of the Allahabad High Court in *Jagat Bus Service* v. *State Transport Authority*[1], in which it was held that merely because the Government owns an undertaking, its servants and officials as such are not disqualified from being appointed as members of the State or Regional Transport Authority. We agree. But this decision was not concerned with facts like what we have before us in these appeals. The decision related to an interpretation of section 44 (2) of the Motor Vehicles Act and we are in entire agreement with the construction placed by the learned Judge on this provision. But it is of interest to note that in the judgment of Agarwala, J., the following observations occur :

"I cannot part with this case, however, without observing that although I have held above that Government servants who are not servants in the Government Roadways undertaking may be lawfully appointed as members of the State or Regional Transport Authorities, the Government should in the larger interest of the State consider how far it will be desirable or advisable to appoint such persons to those bodies. Having regard to the scheme of the Motor Vehicles Act, the State or the Regional Transport Authorities are intended to be independent statutory bodies with quasi-judicial functions. They are expected to bring an independent mind to bear upon the problems presented to them for solution. When the Government itself was not running any transport undertaking and was not competing with the private individuals in the business of transport, there could have been no objection to Government servants directly or indirectly connected with the Roadways being appointed to these quasi-judicial tribunals. But now that the Government itself has become one of the interested parties, such of its servants as are directly or indirectly connected with the Roadways department cannot, in the nature of things, inspire confidence in the minds of the public that they would get justice from the tribunals composed entirely or partially of the employees of one of the parties to the dispute. It has been said that justice must not only be done but seem to be done. I would say that the rule is equally applicable to all officers of law or statutory bodies called upon to perform functions which are either judicial or quasi-judicial."

These observations so far as they go, do not run counter to the view which we have expressed.

Our attention was drawn to a recent decision of the Supreme Court of India in *Ibrahim* v. *Regional Transport Authority, Tanjore*[2]. That case related to the fixing of a place for a bus stand. The Regional Transport Authority was entrusted with this function and the Collector of the district presided over a meeting of the Transport Authority which duly notified the Municipal bus stand in the place of a private bus stand which existed previously. The owner of the private bus stand applied for a writ under Article 226 of the Constitution to quash the order of the Regional Transport Authority, and one of the grounds on which he attacked the order of the Authority was that the District Collector who presided over the meeting of the Transport Authority had himself opened the new municipal bus stand sometime earlier. The suggestion was that he did not bring to bear upon the question an impartial and unbiassed mind. This objection was overruled by the Supreme Court with the following observations :

"The District Collector was not acting in the exercise of judicial or quasi-judicial functions so that his action can be subjected to the scrutiny which is permissible in the case of a judicial officer. He was acting purely in his executive capacity and his conduct in presiding over the meeting of the Transport Authority in the exercise of his normal functions and also opening the Municipal stand which he was entitled to do as the head of the district, does not affect the validity or fairness of the order complained against."

It must not be overlooked that their Lordships of the Supreme Court in that case were dealing with an order of the Transport Authority fixing a particular place for a bus stand. It cannot be said that the said action was done in the exercise of judicial or quasi-judicial functions. But it cannot surely be denied that the Regional Transport Authority in dealing with applications for permits are acting in a judicial or quasi-judicial capacity. It has been held over and over again in England that licensing Justices who perform exactly similar functions as the Regional Transport Authority act judicially in granting or refusing licences and their orders are subject to the writ of *certiorari*. With great respect we do not think that the observations of the Supreme Court can be relied on in this case to support an argument that the Regional Transport Authority of which the District Collector was a member was not acting in the exercise of judicial or quasi-judicial functions and

1. A.I.R. 1952 All. 75.

2. (1953) 1 M.L.J. 205 : 1953 S.C.J. 31 (S.C.).

that therefore its action could not be called in question before this Court under an application under Article 226 of the Constitution.

In our opinion, in this case, the Collector was a member of the Regional Transport Authority and was also one of the applicants before that Authority. The fact that the Collector has this dual capacity *ex officio* is neither here nor there. It is the same official capacity because of which he happens to be a member of the Regional Transport Authority as well as chairman of the Co-operative Society for ex-servicemen. He cannot be a Judge in his own case. The order of the Regional Transport Authority in each of these cases was therefore rightly quashed by Subba Rao, J.

The appeals are therefore dismissed. In L.P.A. Nos. 6 and 146 of 1952, the contesting respondents will be entitled to his costs from the appellant.

R.M. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

The Masulipatnam Municipal Council represented by the Executive Authority and Commissioner .. *Appellant**

v.

Movvachandrika Mahalakshmamma .. *Respondent.*

Madras District Municipalities Act (*V of* 1920) *and Madras* (*Enlargement of Area and Alteration of Boundaries*) *Order*, 1948—*Inclusion of the French Loge at Masulipatnam in the territories of India—Extension of Laws —Levy of tax by the Municipality on the properties situated in the French Loge at Masulipatnam—Validity.*

Inclusion of territory in a Municipality—Necessity for notification under section 4 *of the District Municipalities Act*, 1920.

Government of India Act (1935) *and Indian Independence Act* (1947)—*Power to increase the area of the dominion—Extension of laws to the altered area—Procedure.*

Madras District Municipalities Act (*V of* 1920), *sections* 78 (3) *and* 80—*Fresh notification and resolution for added area—Necessity.*

On a plain reading of the provisions of the Madras (Enlargement of Area and Alteration of Boundaries) Order of 1948, there can be no doubt that the area known as French Loge in Masulipatnam was deemed to have always formed part of the town of Masulipatnam, also known as Bandar. By the force of this Order the District Municipalities Act applies to the area added to the Bandar town and all the notifications issued, *i.e.*, notifications constituting the Bandar town a municipality, would also apply to this area and the municipality would be entitled to levy property tax under the provisions of the District Municipalities Act.

The exact date when this area became part of British territory is irrelevant, for on either hypothesis the area formed part of the municipality. If before the District Municipalities Act, 1920, came into force, the area was part of the Bandar town, as British territory the procedure laid down by section 4 of the District Municipalities Act, 1920, cannot obviously be applied because the provisions of that section are prospective in their operation and not retrospective. If, however, the taking over possession by the British Government of this area from the French Government was subsequent to the Act of 1920, then the provisions of section 4 would not apply to an area which was not till then British territory. It applies only to areas which are subject to the jurisdiction of Provincial Legislature, and in respect of which the Provincial Legislature could have enacted a law. When the possession was taken over, the British Government could make provision for its administration also and extend the operation of the laws which till then applied to what was then Bandar town to the newly added area.

Section 5 (*d*) of Government of India Act, 1935, empowers the dominion to add other areas whatever may be the mode by which the areas were acquired, *i.e.*, whether it was acquired under international law, by cession, accretion, conquest or subjugation. Whatever may be the mode, if the area was acquired, the dominion with its consent could add that area to the already existing area constituting the Dominion of India. An area so acquired cannot be left in the air without providing the law applicable and the machinery which should administer the law to that area which was included in a province. All the necessary machinery for the administration of the area by the province and the law that should be applied to it should be provided by the Governor-General while adding an area to a province. It is that that has been provided by the Order of 1948. It was not a legislative power which was exercised by the Governor-General under section 290 of the Government of India Act, 1935. The law is already there ; it had to be applied to a particular area which has been

*Second Appeal No. 52 of 1951. 16th September, 1952.

added to a province. This right of providing for the law applicable by a notification is not unknown to constitutional law of civilised countries.

If a property tax was properly levied by a municipality and if an area was included within the municipal limits, it automatically follows that all the laws which were applicable under the District Municipalities Act to that municipality will equally apply to the area which has been added to the municipality. No fresh notification or fresh resolutions are required either under section 4 or sections 78 (3) and 80 of the District Municipalities Act, 1920.

Appeal against the decree of the Court of the Subordinate Judge of Masulipatnam in Appeal Suit No. 246 of 1949 preferred against the decree of the Court of the District Munsif of Masulipatnam in Original Suit No. 107 of 1947.

P. Satyanarayana Raju (The Government Pleader) and *V. V. Raghavan* for Appellant.

J. Krishnamurthi for Respondent.

The Court delivered the following

JUDGMENT :—The Masulipatnam Municipal Council by its Commissioner and Executive Authority who was the defendant in the action, is the appellant in this second appeal. The suit was filed by the respondent for a declaration that the defendant was not entitled to levy any taxes on the schedule property and that the defendant should be restrained by a permanent injunction from recovering from her the sum of Rs. 78-2-2 and from levying further taxes on the schedule property. The tax that has been levied by the Municipality is property tax and the property is situated in what was previously known as Frenchpet or French Loge in Masulipatnam town. In the plaint it was admitted that the sovereignty of British India was transferred to the Dominion of India under the Indian Independence Act, 1947, and that the Dominion had acquired by transfer the said Loge which was subsequently included in Bandar town in the Province of Madras, but it was claimed that the said Loge was never included in the Municipality of Masulipatnam and that the procedure laid down for inclusion under section 4 of the District Municipalities Act was not complied with. It was also alleged that there were no proper legal and valid notifications and resolutions under section 78 (3) and section 80 of the District Municipalities Act and that therefore the defendant was not entitled to levy the tax. The defendant stated in the written statement that the French Loge was part and parcel of the Masulipatnam town and it was so declared very early by Sir Samuel Hoare, the then Secretary of State for India, and that it was always within the municipal limits of Masulipatnam and constituted part of the municipality under the District Municipalities Act, that there was no necessity for any notice under section 4 of the District Municipalities Act, particularly in view of the order,—the Madras (Enlargement of Area and Alterations of Boundaries) Order, 1948, published in G.O. No. 899, Public (Political) Department, dated 14th April, 1948, by which the doubts, if any, which existed by that date were removed and it was declared that the French Logè at Masulipatnam was included in the territories of the Dominion of India and shall be deemed always to have been included in the said territory. That notification further declared that the Loge at Masulipatnam should form part of Bandar town in Krishna District and that the area should be administered accordingly. It was also further declared that all the enactments for the time being in force in the said town and all notifications, orders, schemes, rules, forms and by-laws issued thereunder, shall extend to or be in force in the said territory and shall always be deemed to have extended to and to have been in force in the area included in the town. It was also averred that there was no necessity to issue a fresh resolution or notification under section 78 (3) or 80 of the District Municipalities Act and the levy of the property tax by the municipality was therefore valid and justified. The contention of the municipality was upheld by the District Munsif and the suit was dismissed by him. On appeal this decision was reversed by the learned Subordinate Judge and hence this second appeal.

It is no doubt true that for a long time French Loge or Frenchpet was under the French Government and the municipality of Bandar or Masulipatnam never exercised any rights over that area. In 1935, for the first time, doubts arose whether

the British Indian Court at Masulipatnam had jurisdiction to try an offence which occurred in Frenchpet. Under section 438, Criminal Procedure Code, the Sessions Judge of Kistna referred the matter to the High Court. During the hearing of the reference the Advocate-General on behalf of the Crown obtained an adjournment of the case to obtain a declaration from the Secretary of State for India, regarding the status of the territory in question. Under section 57 (10) of the Evidence Act the Court could take judicial notice whether a place is part of British territory or not and a declaration by the Political Department of the Government of India was treated as final. The Advocate-General obtained from the Foreign and Political Department of the Government of India, G.D., F. 24/35, dated 5th March, 1935, and it was communicated to the High Court. It ran as follows :

"The Advocate-General is informed that the Secretary of State for India has since intimated that His Majesty's Government regard the Loge at Masulipatnam as part of the territories in the dominion of the British Crown. He is requested to inform the High Court accordingly. Should the High Court require a copy of the official letter from the India office to be produced, Government will have no objection to furnish it. The Advocate-General is requested to ask for it at once if he finds it necessary."

When this was brought to the notice of this Court, the learned Judges accepted the communication as final and treated the area known as the Loge at Masulipatnam as part of the territories under the dominion of the British Crown. (*Vide* 1935 Madras Crl. Cases 424.)

One would have thought therefore that the question whether this Loge was or was not part of British territory bacame final by the communication of the Political Department which was accepted by this High Court in 1935, but for the fact that the learned Subordinate Judge in the present case thought that this is of no consequence as it may be a mere paper declaration without effect being given to it. After the declaration of Independence in 1947, the provisions of the Government of India Act were amended so as to make them applicable to the altered circumstance that India became a dominion. Under section 290 of the Government of India Act, as amended, to clear all doubts the Government of India issued a notification which is styled the Madras (Enlargement of Area and Alteration of Boundaries) Order, 1948. It reads :

"Whereas by section 290 of the Government of India Act, 1935, as adapted by the Indian (Provisional Constitution) Order, 1947, it is provided that the Governor-General may by order increase the area, and alter the boundaries, of any province and may make such provisions as the Governor-General may deem necessary or proper for any supplementary, incidental or consequential matters ;

And whereas in accordance with the provisions of the said section, the Governor-General has ascertained the views of the Government of the Province of Madras, both with respect to the proposal to make the order and with respect to the provisions to be inserted therein ;

Now, therefore, in exercise of the powers conferred on him by the said section and of all other powers enabling him in that behalf, the Governor-General is pleased to make the following orders ;

1. This Order may be cited as the Madras (Enlargement of Area and Alteration of Boundaries) Order, 1948.

2. The areas spcified in the schedule to this Order, which were known as the French Loges at Masulipatnam and Calicut, are hereby declared to be included in the territories of the Dominion of India and shall be deemed always to have been included in the said territories.

3. The said areas shall form part of the Province of Madras and shall be deemed always to have formed part of the said Province and the boundaries of the said Province shall be deemed always to have been so altered as to comprise within them the said areas.

4. (i) The area comprised in the Loge at Masulipatnam shall form part of Bandar town in Kistna District and the area comprised in the Loge at Calicut shall form part of Calicut town in Malabar District and the said areas shall be administered accordingly.

(ii) All enactments for the time being in force in any of the said towns and all notifications, orders, schemes, rules, forms and by-laws issued, made or prescribed under such enactments and for the time being in force in any of the said towns shall extend to and be in force in and shall always be deemed to have extended to and to have been in force in the area included in that town by the preceding paragraph."

To this Order is appended a schedule giving the boundaries of the Loge at Masulipatnam and also of the Loge at Calicut. It is clear therefore that whatever doubt there might have been was resolved by this Order of the Government of India which declared that the French Loge at Masulipatnam was included in the territories

of the Dominion of India and should be deemed always to have been included in the said territories. It was treated as forming part of the Province of Madras and also deemed to have always formed part of the said Province. It further provided that this Loge of Masulipatnam should form part of the Bandar town and it should be administered accordingly and sub-clause (2) of section 4 declared that the enactments, notifications, orders, etc., which were in force at that time in Bandar town should extend to and be in force and shall always be deemed to have been extended to and been in force in the area included in the town by the preceding paragraph, so that for all practical purposes the area of 66.48 acres formed part and parcel of what is known as Bandar town which is only an *alias* for Masulipatnam, and so subject to the laws which were applicable to that town and it was directed that it should be administered in accordance with those laws.

The question now raised is that this notification could not have the effect of making this area part of the Municipality of Masulipatnam even if it formed part of the town of Bandar for other purposes and that in any event, without a further notification under section 4 of the District Municipalities Act, the tax could not be levied by the municipality. My attention was drawn by the learned Advocate-General to the notifications constituting the town of Masulipatnam a municipality under the District Municipalities Act, 1884. The Act of 1884 was the earliest of the District Municipalities Acts which was enacted for introducing municipal administration in this province. Section 4 of that Act empowered the Governor-in-Council by notification to declare any town, village, hamlet, suburb, bazaar, station or other local area or any part of the same to be a municipality; *vide* sub-section (10) of section 4. He could also cancel by a declaration a municipality and dissolve it, *vide* sub-section (2) of section 4. A 'Municipality' is defined by that Act as meaning "any town, village, hamlet, suburb, bazaar, station or other local area or any part of the same which may be declared to be a municipality in the manner hereinafter provided" so that it was open under that Act to constitute any local area into a municipality, and no other requirement is laid down by that section except a notification under section 4 (1) by the Governor-in-Council. On 19th March, 1885, Notification No. 597 was issued by the Governor in Council by virtue of the power vested in him under sub-section (1) of section 4 of the Madras District Municipalities Act, 1884 and it states :

"The Governor-in-Council is pleased to declare all the marginally noted local areas, which have hitherto been towns for the purposes of the Madras Towns Improvement Act, 1871, to be Municipalities for the purposes of the said Madras District Municipalities Act, 1884, and to direct that the said Act shall come into force in the said municipalities on the 1st April, 1885."

Among the marginally noted towns Masulipatnam is one. Under the Towns Improvement Act, 1871, referred to in that notification, a notification was issued on the 25th April, 1871, by the Governor-in-Council extending the provisions of that Act to the town of Masulipatnam. Under an earlier Town Improvement Act of 1865 (Act X of 1865), Masulipatnam, commonly called and known as the town of Bandar, in the District of Kistna and the areas specified in the notification under the Act were united for the purposes of the Act under the name of the town of Masulipatnam.

The question is whether this area is part of the municipality of Bandar town or Masulipatnam and whether a further notification under section 4 of the District Municipalities Act, 1920, is necessary before the property tax is levied under the provisions of District Municipalities Act, 1920, as contended on behalf of the respondent. On a plain reading of the provisions of the Order of 1948, there can be no doubt that this area was deemed to have always formed part of the town of Masulipatnam, also known as Bandar. That is what in terms sub-section (1) of section 4 states. If Masulipatnam on that date was already a municipality governed by the provisions of the District Municipalities Act and if an area is added to it, it naturally follows that it forms part of the municipality. Section 4 (1) directs also that it should be administered as part of the Bandar town and what is more, sub-section (2) of section 4 not only makes enactments, notifications, orders, schemes, rules, forms and by-laws issued, made or prescribed under such enactments

for the time being in force in the town of Masulipatnam should extend to and be in force in the added area, but should be deemed always, to have extended to and to have been in force in the area included in the town by the preceding paragraph. This implies that the enactment, namely, the District Municipalities Act, must be deemed to have been in force all along, in other words, it retrospectively makes the Act applicable. Not only the Act but also notifications issued under the enactments which were applicable to Bandar town would also apply and also must be deemed to have always applied and extended to the new area. By the force of this Order the District Municipalities Act applies to the area added to the Bandar town and all the notifications issued, *i.e.*, notifications constituting the Bandar town a municipality would also apply to this area and the municipality would be entitled to levy property tax under the provisions of the District Municipalities Act.

It is however argued on behalf of the respondent that it is not known when exactly this territory was made over to the British Government and unless that is known it is not possible to assume that it formed part of the municipality. The exact date when this area became part of British territory in my opinion is irrelevant for on either hypothesis the area formed part of the municipality. If before the District Municipalities Act, 1920, came into force, the area was part of the Bandar town, as British territory the procedure laid down by section 4 of the District Municipalities Act cannot obviously be applied because the provisions of that section are prospective in their operation and not retrospective. If, however, the taking over possession by the British Government of this area from the French Government was subsequent to the Act of 1920, then the provisions of section 4 would not apply to an area which was not till then British territory. It applies only to areas which are subject to the jurisdiction of Provincial legislature, and in respect of which the Provincial legislature could have enacted a law. When the possession was taken over, the British Government could make provision for its administration also and extend the operation of the laws which till then applied to what was then Bandar town to the newly added area. It was however urged that after India became a dominion after the Independence Act of 1947, the dominion had no power to acquire or add any fresh territory to it. This argument, in my opinion, overlooks the provisions of section 5 (*d*) of the Government of India Act, 1935.

Sections 5 reads:

"The Dominion of India established by the Indian Independence Act, 1947, shall, as from the 15th August, 1947, be a Union comprising :—

(*a*) the Provinces, hereinafter called the Governor's Provinces ;

(*b*) the Provinces hereinafter called Chief Commissioner's Provinces ;

(*c*) the Indian States acceding to the Dominion in the manner hereinafter provided ; and

(*d*) any other areas that may with the consent of the Dominion be included in the Dominion."

The inclusion in the dominion of an area implies that it was originally not part of the dominion. There could be no question of inclusion of an area if it was already part of the dominion. This clause therefore empowers the dominion to add other areas whatever may be the mode by which the areas were acquired, *i.e.*, whether it was acquired under international law, by cession, accretion conquest or subjugation. Whatever may be the mode, if the area was acquired, the dominion with its consent could add that area to the already existing area constituting the Dominion of India. Learned counsel for the respondent when he advanced this extraordinary proposition overlooked the provisions of section 5 of the Government of India Act, 1935. In my opinion the argument which is in the teeth of the clear provisions of the Constitution cannot be accepted. Under the Act when India became a dominion, the power and duty to alter the boundaries of a province, to create a new province, to increase the area of a province and to diminish its area is conferred upon the Governor-General by section 290 of the Act. Before Independence this power vested in His Majesty. That power was conferred on the Governor-General when India was a dominion. The Governor-General

under this provision was authorised to make alterations in the area of a province subject to the proviso that in making the order the Governor-General should ascertain the view of the Government of such province which will be affected by the order, both with respect to the proposal to make the order and with respect to the provisions to be inserted therein. When once the area is taken over and added to a province, it naturally follows that an arrangement should be made for its proper administration. An area so acquired cannot be left in the air without providing the law applicable and the machinery which should administer the law to that area which was included in a province and for this purpose sub-section (2) authorised *inter alia* by clause (*e*) that the Governor-General should make other supplemental, incidental and consequential matters. In other words, all the necessary machinery for the administration of the area by the province and the law that should be applied to it should be provided by the Governor-General while adding an area to a province. It is that that has been provided by the order of 1948. It was not a legislative power which was exercised by the Governor-General under section 290 as was wrongly assumed by the learned Subordinate Judge. The law is already there; it had to be applied to a particular area which has been added to a province. This right of providing for the law applicable by a notification is not unknown to constitutional law of civilised countries. There are a number of decisions in which this power has been recognised and it is considered merely as a power to extend the existing laws by an executive order to the areas which have been newly added to a province. The Governor-General, therefore, was competent to issue the order under section 290 of the Act so as to bring into force the enactments, notifications, orders, rules and by-laws which have been in force till then in what was known as Bandar town *alias* Masulipatnam. The requirement therefore that has been insisted on behalf of the respondent that there should be a fresh notification under section 4 is in my opinion wholly unnecessary in view of the clear language of the order of 1948 which it was within the competence of the Governor-General to issue under section 290 of the Government of India Act.

There remains the objection to the tax itself on the ground that there were no fresh resolutions and fresh notifications under sections 78 (3) and 80 of the District Municipalities Act. This argument again, in my opinion, proceeds on a wrong assumption. It is not disputed that the property tax was properly levied in what was known as Masulipatnam municipality before the inclusion of the area. Resolutions and notifications were regularly made and nobody ever disputed that the levy of property tax in the municipality was not warranted because the requirements of the two sections were not complied with. If the property tax was therefore properly levied by the municipality and if this area was included within the municipal limits, it automatically follows that all the laws which were applicable under the District Municipalities Act to Masulipatnam will equally apply to the area which has been added to the municipality. No fresh notifications or fresh resolutions are required and the tax in my opinion was properly levied by the municipality.

From the foregoing it follows that the decision of the learned Subordinate Judge which proceeds on an erroneous view cannot be supported and must be set aside and that of the District Munsif restored with costs here and in the courts below.

No leave.

R.M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATARAMA AYYAR.

Kalavagunta Sriramarao .. *Appellant**

v.

Kalavagunta Suryanarayanamurthi and others .. *Respondents.*

Madras Debt Conciliation Act (XI of 1936), section 25—Registrar under Madras Co-operative Societies Act —If a " Civil Court "—Sale by Registrar in execution of award during pendency of application before Debt Conciliation Board—Is void.

In order to decide whether an authority constituted under a special statute is an administrative body or a tribunal discharging the functions of a judicial character of a Court it is necessary to look into the nature of the powers conferred on the authority by the provisions of the Statute.

The Registrar of Co-operative Societies functioning under the Madras Co-operative Societies Act and the rules made thereunder is a Civil Court though the provisions of the Code of Civil Procedure may not apply to it.

Case-law reviewed.

Subramanya Ayyar v. *Official Liquidator, Mocheri Co-operative Society in Liquidation*, (1949) 1 M.L.J. 107, followed.

Mohammad Amin Sahib (died) v. *Tiruvannamalai Co-operative Society*, (1949) 2 M.L.J. 682 : I.L.R. (1950) Mad. 692, distinguished.

Proceedings pending before such Registrar in respect of a debt cannot be proceeded with unless an application made to the Debt Conciliation Board for settlement of debts has been dismissed. Accordingly a sale held by the Registrar during the pendency of an application before the Debt Conciliation Board is void.

Appeal against the decree of the Court of the Subordinate Judge of Masulipatnam in Appeal Suit No. 16 of 1947, preferred against the Decree of the Court of the District Munsif of Gudivada in Original Suit No. 52 of 1944.

Ch. Ramakrishna Rao for Appellant.

B. V. Ramanarasu for Respondents.

The Court delivered the following

JUDGMENT:—This Second Appeal raises an interesting question as to whether the Registrar functioning under the Madras Co-operative Societies Act is a Civil Court within the meaning of that expression in section 25 of the Madras Debt Conciliation Act (XI of 1936). The facts are not in dispute. The first plaintiff is the father and plaintiffs 2 and 3 and the third defendant are his sons and they are the members of a joint undivided Hindu family. The first plaintiff became indebted to the Co-operative Society of Kalavagunta and on the application of the society an award was passed against the first plaintiff by the Deputy Registrar of Co-operative Societies, Vijayawada, Award No. 1011 of 1933. In execution of the said award the suit properties were attached in E.P. No. 503 of 1940-41 on his file and the sale was fixed for 29th April, 1942. On 27th of April, 1942, the first plaintiff filed a petition under section 4 of the Madras Debt Conciliation Act, D.C.B. No. 6 of 1942 on the file of the Debt Conciliation Board, Bandar, for settlement of his debts and among the debts included in the petition was the debt due to the Co-operative Society under Award No. 1011 of 1933. No notice, however, of the presentation of this petition was given either to the Registrar or to the sales officer. On 29th April, 1942, the sale was actually held and the properties were purchased by the appellant for a sum of Rs. 60. On 16th May, 1942, the Debt Conciliation Board dismissed the Application D.C.B. No. 6 of 1942 on the ground that as a result of the sale which had taken place on 29th April, 1942, what was left of the properties of the petitioner was only a land of the extent of two cents and that, therefore, a settlement was impracticable. The first plaintiff moved the department for setting aside the sale but without success. *Vide* the order of the Joint Registrar dated 26th March, 1943, Exhibit P-8. Thereupon the present action was instituted in the Court of the District Munsif of Gudivada for setting aside the sale on the ground

* S.A. No. 2206 of 1948. 10th October, 1952.

that it was in contravention of section 25 of the Madras Debt Conciliation Act and therefore void and for recovery of possession of the properties from the auction-purchaser who was impleaded as the second defendant in the suit. The District Munsif held that the sale was in violation of section 25 of the Act and decreed the suit and this decision was affirmed on appeal by the Subordinate Judge, Masulipatnam. The auction-purchaser has preferred this second appeal.

The only point for determination in this appeal is whether the sale held on 29th April, 1942, was within the prohibition enacted in section 25 of the Debt Conciliation Act. In view of the long course of decisions ending with *Ratnasabapathi Iyer* v. *Subramania Pillai*[1], it has not been argued in this Court that even if the proceedings in E.P. No. 503 of 1940-41 fell within the purview of section 25 of the Debt Conciliation Act, the sale should be upheld for the reason that no notice of the presentation of D.C.B. No. 6 of 1942 was given to the Registrar or to the Sales Officer. The argument that has been pressed on behalf of the appellant is that the sale proceedings conducted by the Department under the provisions of the Madras Co-operative Societies Act are not proceedings in a Civil Court and that, therefore, unaffected by section 25 of the Debt Conciliation Act. The substantial question for determination is whether the proceedings in E.P. No. 503 of 1940-41 were proceedings before a Civil Court within the meaning of that expression in section 25 of the Debt Conciliation Act.

Mr. Ch. Ramakrishna Rao, the learned Advocate for the appellant, in an able argument contended that the Registrar and the Arbitrators acting under the provisions of the Co-operative Societies Act are performing functions more or less of a ministerial character, that even if those functions are judicial, the authorities are not acting as Courts and in any event they are not acting as Civil Courts as required by section 25 of the Debt Conciliation Act. When a question is raised as to whether an authority constituted under a special statute is an administrative body or a tribunal discharging the functions of a judicial character or a Court, the answer to it must depend on the nature of the powers conferred on the authorities by the provisions of the statute. It is therefore necessary in the first instance to examine the provisions of the Madras Co-operative Societies Act so far as they bear on this contention. Under section 51 of the Act when there is a dispute between a Society and its members and of the nature mentioned therein " such dispute shall be referred to the Registrar for decision ". He may himself decide the dispute under section 51 (2) (*a*) ; he may transfer it to a person who is authorised by the Government to hear the dispute under section 51 (2) (*b*) or he may refer it to the decision of an arbitrator or arbitrators under section 51 (2) (*c*). The decision of the Registrar is final and not liable to be " called in question in any Civil or Revenue Court ". The decision of the person to whom the dispute is transferred under section 51 (2) (*b*) or of the arbitrator or arbitrators appointed under section 51 (2) (*c*) is open to revision by the Registrar under section 51 (5).

Subject to it the decision is final and cannot be called " in question in any Civil or Revenue Court ". Turning next to the rules framed by the Government in exercise of the power conferred by section 65 of the Act, Rule XV prescribes the procedure to be followed when proceedings are taken under section 51. Sub-rule (1-A) provides that the period of limitation for reference under section 51 shall be regulated by the provisions of the Indian Limitation Act as if the dispute were a suit and the Registrar a Civil Court. Sub-rule 3 provides that

" the Registrar, the arbitrator or the body of arbitrators or other persons deciding the dispute shall have power to administer oaths, require the attendance of all parties concerned and all witnesses and to require the production of all books and documents relating to the matter in dispute."

Sub-rule 4 enacts that the Registrar or the arbitrators should record notes of evidence and pronounce a decision on a consideration of all the evidence in the case. Section 57-A confers on the Registrar or any person empowered by him in that behalf power to recover the amounts due under the decision or award passed

1. (1946) 1 M.L.J. 193 : I.L.R. (1946) Mad. 828.

under section 51 of the Act by sale of the property of the person who is liable under the decision or award, with or without attachment of the property. Section 57-B declares that in exercising the powers under section 57-A the Registrar or the person empowered by him in that behalf " shall be deemed to be Civil Court for purposes of Article 182 of the first schedule to the Indian Limitation Act of 1908 ". Rule XXII prescribes the procedure to be followed in executing the decision or award passed under section 51 of the Act. It contains elaborate provisions for attachment of movables, of shares in a company, of negotiable instruments, of decrees and of debts. Then follow provisions for attachment of immovable properties, for settlement of sale proclamations and for sale in public auction. There are provisions for setting aside the sale on the deposit of the amount payable under the award or on the ground of irregularity or fraud in the conduct of the sale ; for confirmation of sale and for delivery of possession to the purchaser ; provision is also made for investigation of claim by third persons to the properties attached and for institution of claim suits. In short, Rule XXII is in substance a replica of Order 21 of the Code of Civil Procedure. There is also a provision that the decision or award passed under section 51 shall on application to the Civil Court having jurisdiction over the subject-matter of the decision or award, be enforced " as if it were a final decree of the Court " [Rule XI (7) (*c*)].

Such being the provisions of the Madras Co-operative Societies Act and the rules framed thereunder, the question is how far they support the contentions of the appellant that the Registrar and the arbitrators are not Civil Courts. It was firstly urged that the functions of the Registrar and of the Arbitrators under the Act are administrative and not judicial and reference was made to the decision in *Rajah of Mandasa* v. *Jagennayakulu*[1], as supporting this position. There the point for decision was whether the High Court had power to entertain a revision against the order of a Revenue Officer making settlement of rent under Chapter XI of the Madras Estates Land Act and it was held by the majority of the Full Bench that the Revenue Officer was exercising under that chapter powers of a ministerial character and was, therefore, not a Court over which the High Court had powers of interference. The reason for this conclusion was thus stated by Reilly, J. :

> " This examination of the provisions of Chapter XI shows, I think, that neither in the preparation of record of rights nor in the settlement of rents is the Revenue Officer acting as a Civil Court. The reliefs which can be sought and given in settlement of rents include reliefs which no Civil Court could grant. They can be refused by an order of the Executive Government. They can be imposed between parties neither of whom had moved the supposed Court for any relief. The procedure prescribed is wholly inappropriate and in some particulars would be nothing less than scandalous in a Civil Court. I find it impossible to believe that by these provisions the Legislature intended to create Civil Court of any kind. Such a creation would be unique monstrosity, not a kind of Civil Court but a travesty of a Court."

The distinction between acts which are ministerial and acts which are judicial has been the subject of consideration in numerous cases in English Courts and they were reviewed by the Supreme Court in *The Province of Bombay* v. *Kushal Das A. Advani*[2]. A definition of a judicial act which was pronounced to be

> " one of the best definitions of a judicial act as distinguished from an administrative act "

(per Lord Atkinson in *Frome United Breweries Co.* v. *Bath Justices*[3], is that given by May, C.J., in *Reg.* (*John M'Evoy*) v. *Dublin Corporation*[4]. He observed :

> " A judicial act seems to be an act done by a competent authority upon a consideration of facts and circumstances and imposing liability or affecting the rights of others."

It will be seen from this definition that the essential ingredients of a judicial act are three in number :—It must be that of a person or persons who have legal authority to determine questions affecting the rights of parties and in a judicial manner. *Vide* also observations of Lord Justice Atkin in *The King* v. *Electricity Commissioners*[5], and of Lord Justice Slesser in the *King* v. *London County Council*[6]. Judged

1. (1931) 63 M.L.J. 450 : I.L.R. 55 Mad. 883 (F.B.).
2. (1950) 2 M.L.J. 703 : 1950 S.C.J. 451 (S.C.).
3. (1926) A.C. 586.
4. (1878) 2 L.R. Ir. 371, 376.
5. (1924) 1 K.B. 171.
6. (1931) 2 K.B. 215 at 233.

by these tests the functions of the Registrar and of the Arbitrators under the Madras Co-operative Societies Act are clearly judicial. They are invested by the Act with powers to decide the disputes mentioned in section 51 of the Act and to execute the decisions as provided in sections 57-A and 57-B. In exercising their powers under sections 51, 57-A and 57-B they are enjoined to hear and decide on evidence, that is, to act judicially and the decisions given by them are in respect of rights and obligations of individuals.

In *Srinivasa Tholoppachar* v. *Seshagiri Rao*[1], the point for determination was whether the Sales Officer acting under the provisions of the Madras Co-operative Societies Act was acting judicially so as to be entitled to protection under the Judicial Officers Protection Act. The Sales Officer had adjourned the sale and that had resulted in damage to the appellant. In an action for damages the Sales Officer claimed protection under the Judicial Officers Protection Act. The appellant contended that it was an administrative act and that, therefore the Sales Officer was not entitled to protection. In repelling this contention the Court observed :

"There were here proceedings analogous to proceedings in execution under the Code of Civil Procedure and if the Registrar of the District had passed an order directing the postponement of this sale, there would be no doubt that he would have been acting in a judicial capacity. The Sales Officer is given equal power of ordering an adjournment and he exercised this power in execution proceedings regularly instituted. The fact that the order is not appealable does not turn it from a judicial act into an administrative act. There are orders contemplated by the Code of Civil Procedure which are judicial orders and which are not appealable".

This is clear authority that the proceedings under the Act are judicial and not administrative. It was next argued that even if the functions assigned to the authorities under the Act were judicial in character, that would confer on them the status of a tribunal but not that of a Court. That there is a real distinction between a tribunal and a Court cannot be disputed ; though it may often be fine and sometimes difficult to define. There is no definition of Court either in the Madras Co-operative Societies Act or the Madras Debt Conciliation Act ; nor one under the General Clauses Act. Section 3 of the Evidence Act defines Court as including all Judges and Magistrates and all persons except Arbitrators legally authorised to take evidence. It was argued that as the reference in section 51 of the Madras Co-operative Societies Act is to Arbitrators and as their decision is termed an award the authorities acting under that Act are not Courts according to this definition. This contention was repelled by this Court in *Velayudha Mudali* v. *The Co-operative Rural Credit Society*[2], where the question was whether the Registrar acting under the Madras Co-operative Societies Act was a Court. Dealing with the argument that the decision is by an arbitrator and that it is an award Walsh, J., observed :

"Several points with regard to this position may be noted. The first is that he is not an arbitrator in the sense in which that word is understood under the Arbitration Act or in Schedule II of the Civil Procedure Code and therefore, section 3 of the Evidence Act which excludes arbitration from the definition of Court is not of much assistance. The essential characteristic of an arbitrator is that the matter is referred to him by consent of both parties. But under Rule XIV (now Rule XV) any one party may make a reference to the Registrar and on receipt of such reference he is bound to dispose of the case. He can, no doubt, refer it to an arbitrator appointed by him or the several arbitrators (the word is used in a special sense here). But his position in this matter is that of a Court to whose decision one party can compel the other party to submit".

It must, moreover, be remembered that the definition in the Evidence Act is only for the purpose of that Act. Vide *Queen Empress* v. *Tulja*[3].

In Halsbury's Laws of England, Vol. VIII, page 525, paragraph 1166, Court is defined as follows :—

"The term Court has *inter alia* the original meaning of the King's palace and has acquired the meaning of the persons who exercise judicial functions under authority derived either immediately or mediately from the King".

It is unnecessary for the purpose of the present case to attempt an exhaustive definition of the features which distinguish a Court from a tribunal. The right of the Co-operative Society for the recovery of the amounts lent is a civil right which but

1. (1945) 2 M.L.J. 180 : I.L.R. (1946) Mad. 461.
2. (1933) 66 M.L.J. 90 : I.L.R. 57 Mad. 426.
3. (1888) I.L.R. 12 Bom. 36.

for the provisions of the Co-operative Societies Act would have to be brought before a Civil Court. Does it lose that character because the Act constitutes a special authority for its adjudication? The authorities dealing with that claim under the Madras Co-operative Societies Act are exercising the functions of a Civil Court. The very procedure prescribed for hearing disputes and for enforcing the decision or award is closely modelled on the provisions of the Civil Procedure Code. It would, therefore, be right to conclude that the Registrar and the Arbitrators are acting as Courts in the discharge of their functions under the Act.

There is also considerable authority in support of this position. In *Subba Reddi, In re*[1], the Registrar of Co-operative Societies was held to be a Court for purposes of section 195 of the Code of Criminal Procedure. In *Velayuda Mudali* v. *The Co-operative Rural Credit Society*[2], already referred to it was held that the Registrar of Co-operative Societies was a Court within the meaning of section 52 of the Transfer of Property Act and that an alienation made while the proceedings were pending before him would be affected by the doctrine of *lis pendens*. The following observations of Walsh, J., might be quoted :—

> "Then it has to be noticed that the whole procedure under Rule XIV appears to be devised as a short-cut by which the Registrar takes the place of the Court, decides a matter which would otherwise have been referred to it, and passes an award which becomes a decree of a Civil Court having jurisdiction over the subject-matter of the decision when the Court is asked to enforce it".

This decision was followed by Somayya, J., in *Venkatachalamiah* v. *Venkatiah*[3], where he observed :

> "The word 'Court' as mentioned in section 52 appears to me to be comprehensive enough to include the Registrar or the Arbitrator appointed by him under the Act".

In *Sheo Saran* v. *Gaya Amla Co-operative Society*[4], a Bench of the Patna High Court consisting of Fazl Ali and Varma JJ., held that the Registrar hearing a dispute under the Act was acting as a Court.

The learned Advocate for the appellant cited several decisions in which it had been held that the authorities constituted under particular statutes were held to be not Courts, but decisions relating to statutory bodies created under other enactments cannot be of much use in deciding whether on the provisions of the Madras Co-operative Societies Act and the rules framed thereunder the authortities constituted thereby are Courts.

In *Manavala Goundan* v. *Kumarappa Reddi*[5], it was held that a District Registrar under the Indian Registration Act was not a Court, though he might be discharging judicial functions. In *Mohd. Ahmed* v. *Governor-General in Council*[6], the question that came up for consideration by a Full Bench was whether a tribunal established under the United Provinces Town Improvement Act was a Court. It was held by a majority that it was not a Court; while Abdur Rahman, J., came to a different conclusion. After discussing the meaning of the word 'Court' Harries, C.J., observed :

> "It appears to me that before a person or persons can be said to constitute a Court, it must be held that they derive their powers from the State and are exercising the judicial powers of the State If the tribunal is the result of any private arrangement for the settlement of disputes it cannot in my view constitute a Court".

These observations follow the statement of law in Halsbury's Laws of England Vol. VIII, page 525, already cited. Judged by the tests laid down herein it must be held that the authorities under the Madras Co-operative Societies Act are Courts because they derive their authority to decide a dispute only under the provisions of the statute and not by any agreement of parties and they are exercising the judicial powers of the State. The weight of authority is, undoubtedly, in favour of the view that the Registrar and the Arbitrators functioning under the statute act as Courts. It was finally contended that even if the authorities under the Madras

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1. (1930) 59 M.L.J. 229.
2. (1933) 66 M.L.J. 90: I.L.R. 57 Mad. 426.
3. (1941) 2 M.L.J. 588.
4. A.I.R. 1939 Patna 500.
5. (1907) 17 M.L.J. 313: I.L.R. 30 Mad. 326.
6. A.I.R. 1945 Lah. 313.

Co-operative Societies Act could be regarded as Courts they could not be considered to be Civil Courts and that, therefore, section 25 of the Debt Conciliation Act which prohibits only proceedings in a Civil Court did not apply; and support for this distinction was sought in some observations of Somayya, J., in *Venkatachalamiah* v. *Venkatiah*[1]. While holding that the Registrar and the Arbitrators were Courts within the meaning of section 52 of the Transfer of Property Act the learned Judge observed as follows :—

> " We are not now concerned with the question whether the Registrar is a Civil Court but whether he is a Court under section 52 of the Transfer of Property Act."

This, of course, does not amount to a decision that the Registrar and the Arbitrators are not Civil Courts. Mr. Ch. Ramakrishna Rao argued that it is only Courts constituted under the Madras Civil Courts Act, III of 1873, that could be called Civil Court. Putting it in another way he contended that it is only the Courts governed by the Code of Civil Procedure that could be called Civil Courts. No authority was cited for placing such a construction on the words ' Civil Courts'. In their ordinary acceptation, those words mean Courts which adjudicate on Civil rights. A Civil proceeding is defined in Stroud's Judicial Dictionary as a

> " process for the recovery of individual right or redress of individual wrong ; inclusive in its proper legal sense of suits by the Crown ".

(*Bradlaugh* v. *Clarke*[2].) Therefore Courts which decide disputed rights between subjects or between a subject and the State would be Civil Courts as opposed to Criminal Courts where the State vindicates wrongs committed against the public. It is in this sense that the words " Civil Courts " have been interpreted by the Privy Council in *Nilamoni Singh Deo* v. *Taranath Mukerjee*[3]. That arose under the Bengal Rent Act X of 1859 under which certain classes of rent suits were made exclusively triable by Revenue Officers in accordance with the procedure laid down therein. The question was whether the Revenue Officials exercising the powers under the Act were acting as Civil Courts. The Act contained several provisions making a distinction between the Revenue Courts and the Civil Courts. On the strength of these provisions it was contended that the rent Courts were not Civil Courts. In repelling this contention, Lord Hobhouse, observed :

> " It must be allowed that in those sections there is a certain distinction between the Civil Courts there spoken of and the rent Courts established by the Act, and that the Civil Courts referred to in section 77 and the kindred sections, means Civil Courts exercising all the powers of Civil Courts as distinguished from the rent Courts which only exercised powers over suits of a limited class. In that sense there is a distinction between the terms ; but it is entirely another question whether the rent Court does not remain a Civil Court in the sense that it is deciding on purely Civil questions between persons seeking their Civil rights, and whether being a Civil Court in that sense, it does not fall within the provisions of Act VIII of 1859."

These observations show that Courts constituted for

> " deciding on purely Civil questions between persons seeking their Civil rights "

must be considered to be Civil Courts, notwithstanding that they are created by a special statute and are mentioned in that statute as distinct from Civil Courts. The true import of such a distinction is that while Special Courts have jurisdiction over a limited class of suits specified in the statute the jurisdiction of the Civil Courts is not limited to any class of suits. To this extent there is a distinction between the two classes of Courts but in respect of the class of suits actually entrusted to the jurisdiction of Special Courts they perform in relation to them functions which but for the Special Act would have been performed by Civil Courts and to that extent the Special Courts can be said to be Civil Courts in a different attire.

In *Pratap Udainath Shah Deo* v. *Madan Mohan Nath Sabi*[4], it was held by the Calcutta High Court following the decision in *Nilamoni Singh Deo* v. *Taranath Mukerjee*[3], that the phrase ' Civil Court ' in the Encumbered Estates Act was comprehensive enough to include Revenue Courts. These decisions furnish the answer to the

1. (1941) 2 M.L.J. 588.
2. (1893) 52 L.J. Q.B. 505.
3. (1883) I.L.R. 9 Cal. 295.
4. (1910) I.L.R. 38 Cal. 288.

contention of the appellant that as the provisions of the Co-operative Societies Act maintain throughout a distinction between Civil Courts on the one hand and the Registrar and the Arbitrators on the other that implies that the latter are not Civil Courts.

It was further argued for the appellant that section 57-B enacts that the Registrar should be deemed to be a Civil Court for the purpose of the application of Article 182 of the Limitation Act and that the word "deemed" is a clear indication that in fact it was not a Civil Court and reliance was placed on the following observations of Viscount Dunedin in *The Commissioner of Income-tax, Bombay Presidency* v. *The Bombay Trust Corporation Ltd.*[1].

"Now when a person is 'deemed to be' something the only meaning possible is that whereas he is not in reality that something the Act of Parliament requiries him to be treated as if he were".

But this argument ignores the history of the enactment of section 57-B. In *Abdul Razack Sahib* v. *Krishna Reddi*[2], the facts were that a society having obtained a decision before the Assistant Registrar of Co-operative Societies applied to the Tahsildar for execution of the same. Thereafter an application was filed in the Civil Court for execution. At the time of this application more than three years had elapsed from the dates of the decision but if the application to the Tahsildar could be regarded as application "to the proper Court for execution" limitation would be saved under Article 182 (v) (*b*). The question was whether the Tahsildar acting under the Act was a Court. Cornish, J., held that he was not and that the application in the Civil Court was barred by limitation. To nullify the effect of this decision, section 57-B was introduced by an amendment. It gave effect to the view that the authorities functioning under the Madras Co-operative Societies Act were acting as Courts. The Legislature had not in mind the distinction between a Court and a Civil Court. On the other hand, while the decision in *Abdul Razack Saheb* v. *Krishna Reddi*[2], held that the authorities under the Madras Co-operative Societies Act were not Courts, the amendment declared they were Civil Courts showing thereby that there was no distinction between the two.

On behalf of the respondent reliance was placed on the decision of this Court in *Subramania Iyer* v. *Official Liquidator, Mocheri's Co-operative Society*[3]. In that case the petitioner had preferred a claim to certain movables which had been attached in execution proceedings before the Deputy Registrar of Co-operative Societies. That having been dismissed, he filed a claim suit. A dispute arose as to the court-fee payable on the plaint. If the Deputy Registrar was a Civil Court within the meaning of Article 17 (1) of Schedule II of the Court-fees Act, a fixed court-fee of Rs. 15 would be sufficient. If not, *ad valorem* court-fee would be payable on the value of the movables which was Rs. 750. It was held by Mack, J., that the Deputy Registrar was a Civil Court and the court-fee of Rs. 15 was sufficient. He observed:

"There are only three categories of Courts so far as I am aware; (1) Criminal (2) Civil and (3) Revenue. I have no hesitation in finding that a Registrar acting under section 57-A and in accordance with the rules framed by the Government must be deemed to be a Civil Court for purposes of Article 17-1 of Schedule II of the Court-fees Act".

I agree with this decision though the soundness of the distinction between Civil and Revenue Courts might in the context be open to argument.

As against this the appellant cited the decision in *Venkatasami Naicker* v. *Chinnayapuram Co-operative Stores*[4], where Basheer Ahmed Sayeed, J., held that an award of the Deputy Registrar of Co-operatives Societies could not be equated to a decree of a Civil or Revenue Court for purposes of section 7 (*iv-a*) of the Court-fees Act. In coming to this conclusion he followed the decision in *Govinda Chettiar* v. *Uttukottai Co-operative Society*[5], in which Venkataramana Rao, J., had held that an order of a liquidator determining under section 42, the amount of contribution payable was

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1. (1929) 58 M.L.J. 197 : L.R. 57 I.A. 49 : I.L.R. 54 Bom. 216 (P.C.).
2. (1935) 70 M.L.J. 31.
3. (1949) 1 M.L.J. 107.
4. (1952) 1 M.L.J. 8.
5. (1937) 1 M.L.J. 640 : I.L.R. (1938) Mad. 63.

not a decree and the decision in *Kalla Surayya & Sons* v. *The Province of Madras*[1], where Satyanarayana Rao and Govinda Menon, JJ., held that an order of the Deputy Commercial Tax Officer levying tax under the Madras General Sales Tax Act was not a decree. But the point for decision in this appeal is not whether a decision or order passed by the authorities acting under the Co-operative Societies Act is a decree but whether the proceedings before them are proceedings in a Civil Court. Indeed it may be a question whether the decision in *Govinda Chettiar* v. *Uttikottai Co-operative Society*[2], which relates as already mentioned to an order made under section 42 of the Act would apply to an award passed on a reference under section 51. In *Govada Bala Bharathi Co-operative Credit Society* v. *Venkatakrishnayya*[3], Somayya, J., was inclined to take the view that such a decision would amount to a decree and that appears to have been the view of Walsh, J., in *Velayudha Mudali* v. *The Co-operative Rural Credit Society*[4]. Whatever that be, these authorities do not bear directly on the question that falls to be decided in this appeal.

Considerable reliance was placed for the appellant on the decision in *Muhammad Amin Sahib* v. *Tiruvannamalai Co-operative Societies*[5]. That was a decision on section 57-A of the Madras Co-operative Societies Act. A society which had obtained a mortgage decree in the District Munsif's Court of Tiruvannamalai applied to the Registrar to execute it under section 57-A and under this execution properties were sold. The validity of the proceedings was challenged on the ground that the decree-holder had not obtained an order under section 39 of the Code of Civil Procedure transferring the decree for execution to the Registrar and that, therefore, the latter obtained no jurisdiction to execute the same. This objection was over-ruled by Rajamannar, C.J. and Krishnaswami Nayudu, J., on the ground that the Civil Procedure Code did not apply to the proceedings taken before the Registrar. The following observations of the learned Chief Justice might be quoted :

> "The short answer to this argument is that the execution to which section 38 refers is an execution under the Code of Civil Procedure. The proceedings taken by the Registrar under section 57-A of the Act may be of the same nature and may have the same result but they are not execution proceedings in a Civil Court governed by the Civil Procedure Code. Section 39 says that the Court which passed the decree may on the application of the decree-holder send for execution to another Court for any of the reasons mentioned in clauses (*a*) to (*d*). Clearly clauses (*a*), (*b*) and (*c*) do not apply. Clause (*d*) is in the following terms:—'If the Court which passed the decree considers for any other reason which it shall record in writing that the decree should be executed by such other Court'; we think that such a Court must be a Court governed by the Code of Civil Procedure and not a body which might have functions almost exactly similar to those of a Civil Court but is not governed by the Code of Civil Procedure. It may be that the Registrar acting under section 57-A could be deemed to be Civil Court for some purposes, section 57-B expressly says that the Registrar will be a Civil Court for purposes of Article 182 of the Limitation Act. For purposes of court-fee a learned Judge of this Court has held that the Registrar may be deemed to be a Civil Court. (Vide *Subramania* v. *The Official Liquidator*[6]. But there is no authority for the position that the Registrar can be treated as a Court within the meaning of section 39 of the Civil Procedure Code)."

What was laid in this decision is that the provisions of the Code of Civil Procedure apply only to courts governed by it which is what had been held by the Privy Council in *Ramabhadra Raju Bahadur* v. *Maharaja of Jeypore*[7]. There is nothing either in the observations or in the decision in *Muhammad Amin* v. *Tiruvannamalai Co-operative Society*[5] to support the contentions of the appellant.

It has also to be noted that a decision or an award under the Madras Co-operative Societies Act can be executed either before the Registrar or a Civil Court and likewise as happened in *Muhammad Amin Sahib* v. *Tirumvannamalai Co-operative Society*[5] a decree obtained by a Co-operative Society in a Civil Court could be executed either by the Civil Court or by the Registrar and there seems to be no sufficient reason for holding that the proceedings taken in execution of the same decree or award should be held to be civil proceeding if it is taken in one jurisdiction and not if in another.

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1. (1949) 1 M.L.J. 379: I.L.R. 1950 Mad. 34.
2. (1937) 1 M.L.J. 640 : I.L.R. 1938 Mad. 63.
3. (1940) 2 M.L.J. 388.
4. (1933) 66 M.L.J. 90 : I.L.R. 57 Mad. 426.
5. (1949) 2 M.L.J. 682 : I.L.R. (1950) Mad. 692.
6. (1949) 1 M.L.J. 107.
7. (1919) 37 M.L.J. 11 : L.R. 46 I.A. 151 : I.L.R. 42 Mad. 813 (P.C.).

Turning now to the provisions of the Debt Conciliation Act it will be seen from the definition of debt under that Act that it is comprehensive enough to include a debt payable to a Co-operative Society. A Co-operative Society is expressly included in the definition of creditor and the policy of the Act was clearly to provide for settlement of debts due to Co-operative Societies, subject only to the proviso in section 14 under which the consent of the Registrar has to be obtained for such settlement. Section 25 of the Debt Conciliation Act is as follows:

"When an application has been made to a Board under section 4 any suit or other proceeding then pending before a Civil Court in respect of any debt for the settlement of which application ha been made shall not be proceeded with until the Board has dismissed the application".

On the language of this section the intention of the Legislature would appear to be to prohibit all proceedings whether by way of suits or otherwise in respect of debts which are the subject-matter of the application for settlement and. Civil proceedings in the section must accordingly be interpreted as comprehending all proceedings for the recovery of debts mentioned in the petition wherever they might be taken. On this construction the proceedings before the Registrar would be within the prohibition enacted by this section.

I am accordingly of opinion that the proceedings taken by the Society in E.P. No. 503 of 1940-41 were proceedings in a Civil Court within the contemplation of section 25 of the Madras Debt Conciliation Act and that the sale held on 29th April, 1942, is accordingly void. The decisions of the Courts below are affirmed and this appeal is dismissed with costs.

No leave.

R.M. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. VENKATARAMA AYYAR.

V. Peddarangaswami Shrati .. *Appellant**

v.

The State of Madras, represented by the Collector of Bellary, and another .. *Respondents.*

Mining Lease—Conditions under a Prospecting Licence—If can be enforced in a Civil Court.

Mining Lease—Grant of—Powers of Board of Revenue in granting lease—If can be questioned in civil suit.

Mining Rules—Nature of—Failure to observe—Effect—Civil Procedure Code (V of 1908), *section* 35-*A —Scope—Compensatory costs—When allowed.*

The grant of prospecting licences and mining leases is regulated by rules made by the Government of India. These rules are really in the nature of administrative instructions for the guidance of revenue authorities who are entrusted with the grant of the licences and the leases. These rules do not confer rights enforceable in a court of law, not can the infringement of any of the rules give rise to a cause of action on which an action can be founded. It is true that once a grant has been made either of a licence or of a lease validly and in accordance with the rules by the competent authority, *i.e.*, either by the Government or by such authority to whom the Government may delegate their powers, then such a grant may be binding on the Government and confer rights on the grantee. But no one has an absolute right to obtain a licence or a lease which can be enforced against the Government in a civil court.

The Board of Revenue to whom the power of granting mining leases had been delegated would be acting within the scope of their authority in considering the merits and demerits of applications from several persons. They have the power and jurisdiction to decide to whom the lease should be granted. Even if their decision may not be strictly according to the Mining Rules, a civil court cannot set aside their decision on that ground.

The award of compensatory costs is now governed by section 35-A of the Code of Civil Procedure. It is intended to deal with exceptional cases in which the exercise of the ordinary discretion under section 35 would not afford a sufficient compensation. So before awarding compensatory costs the Court should satisfy itself that the claim was false or vexatious to the knowledge of the unsuccessful party and that the interests of justice require compensatory costs to be awarded.

Appeals against the decrees of the District Court, Bellary, in O.S. Nos. 7 of 1946 and 11 of 1946 respectively on its file.

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* Appeals Nos. 792 and 793 of 1948. 10th November, 1952.

V. N. Shama Rao for Appellant.

The Government Pleader (*P. Satyanarayana Raju*), *C. V. Mannadiar* and *B. V. Ramanarasu* for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—These two appeals arise out of two suits tried together along with another suit (which however has not come up in appeal) and disposed of by a common judgment by the learned District Judge of Bellary. The appellant is the plaintiff in both the suits. For a determination of the questions which arise in these appeals it is necessary to relate the events which led up to the suits. It is sufficient to commence the narration with the grant of a prospecting licence to the appellant on 28th May, 1941 (Ex. A-1) which conferred on him the sole right subject to the conditions contained in the licence, to mine, bore, dig and search for iron and work and carry away red oxide of iron within an area of 76 acres being a portion of S. No. 326 of Janikunta village in Bellary district. The licence was for a term of one year commencing from 28th May, 1941. The contesting respondent in the appeals, one Vishnu Nimbkar, obtained a similar prospecting licence for red oxide on 11th June, 1941 (Ex. B-1) in respect of S. No. 3 in the village of Thumti in the same district measuring 288 acres. This S. No. was adjacent to the area in respect of which the appellant had been granted a licence. Nimbkar also obtained a regular mining lease for a term of ten years commencing from 5th January, 1942, of two other portions of S. No. 326 comprising about 304 acres [Ex. B-26 (*a*)]. It is common ground that the appellant did not do any prospecting during the period covered by the licence in his favour. It is also clear from the evidence that Nimbkar who was represented by his agent C. Srinivasa Rao was engaged regularly in working and extracting ore in considerable quantities. On 19th February, 1942, the appellant wrote to the District Collector, Bellary, complaining that Srinivasa Rao, the agent of Nimbkar, had removed about 50 tons of red oxide from the area covered by his prospecting licence. This communication was forwarded by the Collector for inspection and report. On 23rd April, 1942, the appellant requested the Collector of Bellary to grant him a prospecting licence for one more year as he had not been able to do any prospecting owing to "unavoidable circumstances". The Collector granted this request and directed a renewal of the prospecting licence for a period of one year from 28th May, 1942, (Ex. B-6). Apparently no fresh licence was executed, because the office took the view that a fresh licence was not necessary for a renewal, as the conditions were the same and it was sufficient for the Collector to issue proceedings to the effect that the licence had been renewed (*vide* Ex. B-6). On 20th October, 1942, Srinivasa Rao on behalf of Nimbkar applied for the grant of a mining lease for the same area for which the appellant had obtained a prospecting licence (Ex. B-2). The appellant raised objections as to the genuineness and validity of this application which were also pressed before us. But in our opinion there is no substance in these objections. The application was produced from proper custody and its genuineness is conclusively established by the challan [(Ex. B-2 (*a*)] obtained on 21st October, 1942, for the deposit of a sum of Rs. 500 as the prescribed security which should accompany an application for a mining lease. Whether this application was duly stamped or not, it is difficult to be certain. But the absence of a stamp is a matter only for the consideration of the Government authorities, and the appellant cannot rely upon any defect, even assuming there was one. The appellant also presented an application for the grant of a mining lease for the same area on 6th November, 1942 (Ex. B-3). But this was not accompanied by the deposit of any security. It must however be mentioned, that the appellant had deposited a sum of Rs. 100 in connection with the grant of the prospecting licence to him and under the rules this deposit could be, carried over to his credit in connection with the application for the mining lease. On 26th November, 1942, the appellant sent in another similar application.

Meanwhile the appellant filed a suit against Nimbkar in the Court of the District Munsif of Bellary, O.S. No. 487 of 1942 on 21st September, 1942, for the

recovery of 65 tons of red oxide alleged to have been removed by him from the area covered by the prospecting licence in favour of the appellant or their value, Rs. 585 and for the issue of an injunction restraining Nimbkar from entering on the said area or removing any minerals therefrom. Nimbkar *inter alia* pleaded that the ore was not dug from the area granted to the appellant. This suit was dismissed by the District Munsif on 5th February, 1943, on the ground that it was not maintainable because there was no valid prospecting licence in plaintiff's favour, the renewal of the licence not having been registered. On 18th March, 1943, the Collector passed an order directing that neither party, *i.e.*, neither the appellant nor Nimbkar, should work in the disputed area for a period of one month. Nimbkar's agent protested against this order, but apparently with no effect. Meanwhile the term of the prospecting licence in favour of the appellant which had been renewed was drawing to a close. Therefore, on 6th April, 1943, he wrote to the Collector requesting him to grant the lease on or before the expiry of the period of the licence and in any event to extend the term of the licence until the lease was granted. He followed it up with another application for a lease on 27th May, 1943 (Ex. B-71). On the same day he also prayed that the licence may be extended till the grant of the lease. He repeated his request by his letter dated 17th July, 1943. On 21st August, 1943, the Collector passed an order permitting Nimbkar's agent to remove the ore from the disputed area after depositing Rs. 9 a month. The Circle Officer reported to the Collector on 30th September, 1943, that under the orders of the Range Officer the boundary between Janikunta and Thumti had been revised and the portion under dispute had been included in Janikunta.

Against the dismissal of his suit by the District Munsif the appellant filed an appeal to the District Court (A.S. No. 77 of 1943) but that appeal was dismissed on 24th March, 1944. Thereupon he filed a second appeal (S.A. No. 1997 of 1944) which was eventually allowed by Kuppuswami Aiyar, J., on 8th August, 1945. The suit was remanded to the Court of first instance for trial and disposal. After remand it was transferred to the file of the District Judge where it was numbered as O.S. No. 11 of 1946.

On 9th May, 1944, the Collector submitted to the Board of Revenue his report on the two applications for the grant of a mining lease made by the appellant and Nimbkar respectively, in which he strongly recommended the grant of the lease to Nimbkar. The following portion of his report fully sets out the reasons for his recommendation :

"5. Now both the parties have applied for the entire area of 76 acres on mining lease. Mr. Subbarangiah Chetti has not made any attempt to prospect for ore or even enter upon the land and he cannot therefore complain of encroachment. The prospecting licence held by him for the period from 28th May, 1942 to 28th May, 1943, is an unregistered one and not therefore valid. He has not undertaken any mining operations ever since the licence was granted to him. He appears to be a mere speculator who wants to keep away the other applicant out. His application for the mining lease was also received late on 20th November, 1942 and is not accompanied by a security deposit of Rs. 500 as laid down in rule 36. The application of Sri C. Srinivasa Rao was received much earlier on 20th October, 1942 and was followed by the security deposit of Rs. 500 which was credited into the Imperial Bank of India in challan No. 263, dated 21st October, 1942. He has also enclosed to his application a statement showing the areas held by him in the province under mining concessions. He holds a certificate of approval renewed for 1944 and published at page 158 of Mis. Notifications, Part II of the Fort St. George Gazette, dated 8th February, 1944. He has been carrying on mining operations and it appears he had been supplying the Government of India, Supply Department, with the ore in large quantities and he is not therefore a mere speculator. He holds mining concessions in the adjoining lands in the same field and other fields in the vicinity. I therefore request that the Board may be pleased to accord sanction for the grant of a mining lease for the entire area of 76 acres in S. No. 326 of Janikunta village for red oxide of iron."

The Board called for certain files relating to the matter and they were duly sent with a covering letter by the Collector (Ex. B-70). The Board, while calling for the files, also asked the Collector to ascertain from both the applicants whether they were willing to have the lease for a period of five years subject to the condition that it would be liable to termination without compensation if the Government required the land after the War. In pursuance of this direction the Collector, on 14th August, 1944, addressed letters to both the applicants (Exs. A-4 and B-39).

In the letter addressed to Nimbkar's agent, the Collector, as directed by the Board, informed him that he should stop further mining in the disputed area until final orders were passed by the Board of Revenue The agents of both the appellant and Nimbkar on their behalf expressed their willingness to accept a lease for a period of five years subject to the condition suggested by the Board (Exs. B-14 and B-40). Nimbkar's agent also complained against the order directing him to stop further work in the disputed area. On 7th December, 1944, the Board of Revenue passed proceedings with the previous approval of the Government sanctioning the grant of a mining lease for a period of five years to Nimbkar subject to certain special conditions which are not very material. The order directing Nimbkar to stop further work was consequently withdrawn. The Collector intimated to the appellant that his application had been rejected. A temporary lease was executed in favour of Nimbkar on 28th December, 1944 (Ex. B-16) and a pucca lease subsequently. The Government by that time had apparently realised that there had been a muddle as regards the boundaries of the areas granted under the prospecting licence to the appellant and Nimbkar and evidently adopted the solution of granting the lease to Nimbkar of the entire area of 114 acres in S. No. 326. Nimbkar was also granted a lease for S. No. 3 in Thumti village in accordance with the revised boundaries (Ex. B-43 dated 7th July, 1945).

The appellant filed a petition to the Government of Madras protesting against the grant of the licence to Nimbkar and the rejection of his application, but the petition was rejected (Ex. A-5). He appears to have filed another petition to His Excellency the Governor. But that petition also was rejected [Ex. A-5 (*a*), dated 29th May, 1945]. On 3rd December, 1945, he issued a notice to the Government under section 80, Civil Procedure Code and filed a suit in the District Court on 7th February, 1946 (O. S. No. 7 of 1946) praying that the Government may be directed to specifically perform the agreement to lease by executing and registering a mining lease for at least a period of five years from 14th August, 1944, in respect of the area covered by the prospecting licence in his favour. He also claimed from the Government and Nimbkar or either of them a sum of Rs. 20,000 or such other sum as the Court may determine, by way of damages and mesne profits and also future profits from the date of plaint till the date of delivery of possession.

In the plaint the appellant based his claim on two grounds. One was that under the provision contained in paragraph IV of the prospecting licence in his favour he was entitled as of right to a mining lease. The other was that the communication from the Collector enquiring whether the appellant was willing to accept a lease for a period of five years and his reply constituted an offer and acceptance and therefore there was a completed contract. The learned District Judge held that the suit was not maintainable by the appellant who was a mere licensee and that there was no contract between him and the Government for the grant of a mining lease for five years. He therefore dismissed the suit. A.S. No. 792 of 1943 is the appeal from this suit.

Mr. Shama Rao, learned counsel for the appellant, did not seriously press before us the second of the two grounds on which the plaint was based, and we think, very rightly. In no sense was there an offer by the Government to grant a lease. The Government were only enquiring from both the applicants whether they would be willing to have a lease for a shorter period than what they had asked for. Pressed to its logical conclusion the result of accepting the appellant's contention would be that there would be two concluded contracts between the Government on the one hand and the appellant and Nimbkar respectively on the other in respect of the same area.

The main question which falls to be decided in this appeal is, whether the appellant is entitled to any right enforceable in a court of law under any of the provisions of the prospecting licence in his favour. The licence contains covenants by the licensee, the powers of the Government and the rights of the licensee. Appellant relies on paragraph IV (1) and (2) which run as follows :

"1. During the subsistence of this licence the licensee shall have the right subject to compliance with the said rules to a mining lease in accordance with the said rule in respect of red oxide of iron over so much of the said land as the licensee may desire and the Governor shall think fit to grant and to the first offer such mining lease in respect of precious stones within the said lands as the Governor may think fit to grant.

2. If during the term hereby granted the licensee shall apply in accordance with the said rules a mining lease of the said lands or any part thereof this licence shall upon the expiration by efflux of time of the term hereby granted if the licensee shall by notice in writing to the Collector so require be extended for a further term to end either on the date on which such lease shall be granted or on such other date as the Collector shall in his discretion prescribe."

The appellant's contention is that under paragraph IV (1) he has a right to obtain a mining lease as he has complied with the relevant mining rules; he is also entitled, till the grant of a regular licence, to the extension of the term of his prospecting licence under paragraph IV (2).

The contention on behalf of the Government and Nimbkar is two-fold. They plead firstly that the appellant has not complied with some of the relevant rules and secondly that even if the appellant is aggrieved as regards any of his alleged rights under the licence, his only remedy is to refer the question to the Governor whose decision is final and binding on the parties, as provided by paragraph V of the licence. That paragraph in so far as it is material for this case is as follows:

"If and whenever any dispute or question shall arise regarding the construction, meaning or effect of these presents or the rights, powers, liabilities or duties of the licensee hereunder or as to the amount of payment of any royalty or other money payale by virtue hereof or otherwise however in relation to these presents such dispute or question shall be referred to the Governor whose decision thereon shall be final and binding on the parties hereto."

The defaults on the part of the appellant alleged by the respondents are (1) the failure to deposit a security of Rs. 500 along with his application for a mining lease, and (2) his failure to do any prospecting work during the period of the prospecting licences in his favour. Rule 36 provides that with the application for the grant of a mining lease the applicant shall deposit as security in respect of the preliminary expenses such sum not exceeding Rs. 500 as the Collector may determine; or with the Collector's permission give security to the like amount to the satisfaction of the Collector. If the application relates to an area for which the applicant holds a prospecting licence, any amount held in deposit in respect of such prospecting licence will be carried to his account. The appellant did hold a prospecting licence and had deposited a sum of Rs. 100 in respect of it. That would be carried to his account under this rule. We think that the appellant would be under an obligation to deposit further amounts only if the Collector determined a sum to be deposited in excess of Rs. 100 already held in deposit on appellant's account. There is no substance in this objection.

There is however more substance in the other objection, namely, that the appellant failed to do any prospecting work. This is a matter of admission on the part of the appellant. Under rule 38-A the Collector, on receipt of an application for the grant of a mining lease is bound to initiate enquiries to satisfy himself (*a*) that the applicant is a suitable person to hold a mining concession, (*b*) that he intends to undertake operations immediately, and (*c*) that he is not a mere speculator who wants to keep the other applicants out. The Collector in his report, already referred to earlier in this judgment, in unequivocal terms expressed his satisfaction that the appellant was a speculator who wanted to keep the other applicant out and who had no real intention of undertaking operations. It may therefore be said that the appellant was not on this account entitled as of right to a mining lease.

There is also considerable force in the contention on behalf of the respondents that paragraph V precludes the appellant from resorting to any remedy except that provided therein. As the only right which the appellant claims is a right under paragraph IV (1) of the licence, it may be said that the question which has arisen is regarding the construction, meaning and effect of the licence and the rights of the licensee thereunder. Mr. Shama Rao, learned counsel for the appel-

lant, tried to escape from the mischief of this provision by contending that the provision was in the nature of an arbitration clause, and the respondents, if they wanted to rely upon it as such, had to follow the proper procedure, namely, they should have applied for a stay of the suit and made a reference to arbitration. He also contended that the clause should be held to be null and void as it virtually made one of the parties to a dispute the sole arbiter of the dispute. No one can be a Judge in his own cause, he urged. We do not think that the clause relied upon by the respondents is in the nature of an arbitration clause, though the provision contained in the proviso to that paragraph is certainly in the nature of an arbitration clause. As for the other objection, the reply is that such rights as the appellant seeks to enforce are rights which he claims under the licence which he has accepted and he must be bound by the provisions of that licence. Actually we find that the appellant has resorted to the remedy provided in paragraph V of the licence. He has filed a petition to the Governor and that has been rejected. He cannot have any further remedy under the licence.

Apart from these objections there is one more formidable objection to the maintainability of the suit. The grant of prospecting licences and mining leases is regulated by rules made by the Government of India. These rules are really in the nature of administrative instructions for the guidance of revenue authorities who are entrusted with the grant of the licences and the leases. These rules do not confer rights enforceable in a Court of law, nor can the infringement of any of the rules give rise to a cause of action on which an action can be founded. It is true that once a grant has been made either of a licence or of a lease validly and in accordance with the rules by the competent authority, *i.e.*, either by the Government or by such authority to whom the Government may delegate their powers, then such a grant may be binding on the Government and confer rights on the grantee. But no one has an absolute right to obtain a licence or a lease which can be enforced against the Government in a Civil Court.

These rules are similar in their scope and application to the Darkhast rules. Both relate to the grant of rights and privileges as regards lands in which the State has full rights of ownership and power of disposal. It has been consistently held that the Darkhast rules do not by themselves confer any rights on any one to claim and obtain a grant of land on darkhast. As early as 1876 Holloway, J., expressed the opinion that these rules do not constitute rights enforceable in a court of law (*Fakir Muhammad* v. *Thirumalachariar*[1].) The decision in *Subbaraya Mudali* v. *Sub-Collector, Chingleput*[2], takes the same view. In that case though certain mirasidars of a village were entitled to claim the benefit of a preference under the Darkhast rules, it was held a Civil Court could not compel the revenue authorities to grant a patta to the mirasidars in preference to strangers. They had a preferential claim under the Darkhast rules, but the revenue authorities had an uncontrolled discretion. Bhashyam Aiyangar, J., in *The Secretary of State for India in Council* v. *Kasturi Reddi*[3], drew a distinction between the enforcement by a private person of a claim based on an actual grant by an officer on behalf of the Crown and the enforcement of a claim to obtain a grant from the State based on rules relating to darkhast. The learned Judge observed :

> " It may be that no one can advance in a civil Court any claim against the Crown or any one claiming under it, to the grant to him, under the darkhast rules, of land for which he has applied to the Revenue authorities under these rules (*Subbaraya* v. *Sub-Collector, Chingleput*[2]. . . . . But when a person claims that a grant has been made to him by an officer on behalf of the Crown, the mere fact that the alleged grant purports to have been made under the darkhast rules does not affect the jurisdiction of civil Courts to determine whether a grant has been made which would bind the Crown or any one claiming under it subsequent to such grant." (*The Collector of Salem* v. *Rangappa.*[4])

See also the observations of Bhashyam Aiyangar, J., in *Sappani Asari* v. *The Collector, Coimbatore*[5]. In *Muthuveera Pandyan* v. *Secretary of State for India*[6], it was held that

1. (1876) I.L.R. 1 Mad. 205 at 222 (F.B.).
2. (1883) I.L.R. 6 Mad. 303.
3. (1902) 12 M.L.J. 453 : I.L.R. 26 Mad.
4. (1889) I.L.R. 12 Mad. 404.
5. (1902) 12 M.L.J. 417 and 13 M.L.J. 472 : I.L.R. 26 Mad. 742 at page 754.
6. (1906) I.L.R. 30 Mad. 270.

the propriety of a decision of a darkhast authority acting within the scope of its powers cannot be a subject of investigation by the Civil Courts. The question whether a Revenue officer acting within the scope of his authority did nor did not adhere to the prescribed rules cannot be investigated by a Civil Court. Miller, J., who agreed with Benson, J., in that case said :

> "The Deputy Collector was undoubtedly acting within the scope of his authority in hearing and determining the appeals; and in my opinion the civil courts have no power to investigate the question whether his decision of the appeal was one which he could or could not have arrived at by strictly following the rules laid down for the guidance of officers in disposing of applications for waste lands."

Applying this principle to the facts of the present case, it follows that the Board of Revenue to whom the power of granting mining leases had been delegated were acting within the scope of their authority in considering the applications of the appellant and Nimbkar. They had the power and jurisdiction to decide to whom the lease should be granted. Even if their decision may not be strictly according to the mining rules, a Civil Court cannot set aside their decision on that ground. The appellant cannot, therefore, maintain the suit, and it was rightly dismissed. The appeal is also dismissed with costs.

We cannot however support the lower Courts' award of compensatory costs to the Government and Nimbkar separately in addition to the award of ordinary costs, two sets. The award of compensatory costs is now governed by section 35-A, Civil Procedure Code. It is intended to deal with exceptional cases in which the exercise of the ordinary discretion under section 35 would not afford a sufficient compensation. So, before awarding compensatory costs the Court should satisfy itself that the claim was false or vexatious to the knowledge of the appellant and that the interests of justice require compensatory costs to be awarded. We are unable to agree with the learned Judge that the claim of the appellant can be said to be false or vexatious to his knowledge. The appellant might have thought that the provision in paragraph IV (1) of the prospecting licence in his favour conferred a right on him to obtain a mining lease. It may be that this contention of his has been found to be untenable. But, on that ground, it cannot be said to be false or vexatious. We set aside the decree of the Court below in so far as it awards compensatory costs to the Government and Nimbkar. The award of ordinary costs of the suit will, of course, stand.

The learned Judge also dismissed the other suit filed by the appellant, from which A.S. No. 793 of 1948 has arisen, to recover from Nimbkar the value of the ore alleged to have been dug and removed by him from the area covered by the prospecting licence in the appellant's favour. He held that the appellant had not proved any trespass on his land or that he has suffered any damage. Now, it is clear that the only substantial question which arises in the suit is whether the pits from which Nimbkar dug the ore in dispute were situated within the area covered by the prospecting licence in favour of the appellant. If that question were to be decided in favour of the appellant, he would certainly be entitled to relief. Equally, if the finding on that issue was against the appellant, the suit must fail. Learned counsel for the respondent, Nimbkar, was unable to point to us a considered finding of the learned District Judge on this issue. In paragraphs 7 and 8 the learned Judge no doubt referred to some of the documentary evidence relating to this issue. But he did not attempt to solve what he calls the "survey tangle". He referred to the Government solving the tangle by the grant of a licence of a further 1·14 acres in S. No. 326 of Janikunta to Nimbkar. But that was subsequent to the period with which we are concerned in this suit and cannot obviate the necessity of finding whether the pits worked by Nimbkar were situated in the area covered by the appellant's prospecting licence. As we have decided to remand the suit for fresh and satisfactory disposal, we do not wish to say anything on the merits. However, we must say in justification of this course that it appears to us that something can be said in favour of the appellant. There is evidence to show that the officers of the Government, on investigation and enquiry, came to the conclusion that the disputed area really fell within the ambit of the appellant's licence. No doubt, this opinion

of the officers of the Government is not conclusive of the matter. We have only mentioned it to show that the learned Judge was not warranted in brushing aside the appellant's case without fully discussing the evidence adduced on the point.

We allow Appeal No. 793 of 1948 and set aside the decree of the District Judge dismissing the suit. The suit will be remanded to the District Court of Bellary to be tried and disposed of in accordance with law. The appellant will be entitled to a refund of the court-fee paid on the memorandum of appeal. The costs of this appeal will abide the result of the suit.

R.M. *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

K. Ramaswami Mudaliar .. *Appellant.**

v.

Poongavanam .. *Respondent.*

Workmen's Compensation Act (VIII of 1923), section 2 (1) (n) and item 26 (a) Schedule II—" Workman" —Cartman employed through clearing agents to transport oil barrels of appellant (dealing in oil) from the Railway station to the go-downs—Injury to while unloading barrels—Right to compensation for—Tests.

Though the appellants, whose business is to purchase and sell oil as such, are not directly in any sense doing the business of transporting goods from one place to another, nevertheless the transport of the goods in which they are dealing is vitally connected with their business and should be considered to be part and parcel of their business in the selling of oil. If their business was one of merely entering into contracts for sale of oil, which would be stocked at any particular place, without their having to do anything in the matter of the stocking of such oil, certainly the transport of such oil could be separated from their business. The transport of goods from one station to another may in one sense be said to be incidental to the business of selling the oil.

The phrase " within the precincts of a warehouse in item 26 of Schedule II of Workmen's Compensation Act would not restrict the area of operation by the workman to the area contained within the four walls of the warehouse. The term precincts would naturally include the space that may be required for the loading and unloading of goods within the warehouse or without the warehouse, so that a distance of about ten feet that may be required for the cart being brought near to the warehouse of the appellants for being unloaded, will certainly be within the precincts of the warehouse, so that it cannot be argued that when the cart stands outside on the road and unloads itself into the warehouse, the workman was not employed in handling or transporting goods within the precincts of the warehouse.

Case-law referred.

Appeal against the Order of the Court of the Additional Commissioner for Workmen's Compensation at Madras, dated 25th January, 1949 and made in W.C. No. 183 of 1948.

M. K. Mohanarangam Pillai and *M. V. Gopalaraman* for Appellant.

T. M. Venugopala Mudaliar for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal against an order of the Additional Commissioner for Workmen's Compensation passed on a claim preferred by the respondent-cooly under section 10 (1) of the Workmen's Compensation Act. The respondent-cooly was employed under the appellants for the purpose of loading and unloading oil barrels from the Beach Railway Station to the warehouse of the appellants. The nature of the employment was that the cooly was working directly under the clearing agents, who were doing the work of transporting oil barrels from the station to the warehouse. The cooly was paid wages by the clearing agents, who received in turn the charges for transporting the oil barrels to and from the appellants. On the 23rd of August, 1947, the respondent-cooly when he was unloading oil barrels, which he had carried in a hand cart from the Beach station to the warehouse of the appellants in Ibrahim Sahib Street suffered an accident by reason of

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* A. A. O. No. 182 of 1949. 4th December, 1952.

six barrels in the hand cart slipping down. As a result of the accident, he broke one of his legs below the knee. He had to be removed to the hospital wherefrom he was discharged after being attended to by the doctor, who applied plaster of Paris to the injured part. This plaster of Paris had to be kept on by the respondent-cooly for nearly three months. He could not engage himself in any work during that period and his case was that even after the period of three months, he could not walk with ease. He claimed compensation for the injury caused to him in the course of his employment under the appellants at the rate of Rs. 60 per month, which he said was the average wage he was earning before the accident. The learned Commissioner for Workmen's Compensation, after recording the evidence of three witnesses on behalf of the claimant and two witnesses on behalf of the present appellant, awarded compensation in a sum of Rs. 1,470 holding that the respondent-cooly was a workman within the definition of the term under section 2 (1) (n) of the Workmen's Compensation Act read with item 26-*a* as well as item 28 of Schedule II of the Workmen's Compensation Act. The appellants have preferred this appeal against the said order.

The first point that has been raised by the learned counsel for the appellants, Mr. Mohanarangam Pillai, is that the learned Commissioner for Workmen's Compensation had awarded a sum of Rs. 1,470 whereas the actual claim made by the respondent-cooly was only Rs. 1,260. But actually Mr. Mohanarangam Pillai does not seriously press the quantum of damages if once it is held that the respondent was a workman within the definition of the term as contained in the Workmen's Compensation Act. It is, therefore, unnecessary to go into the question as to whether the claim should have been allowed only as made or any difference should not have been permitted.

The main point however that has been urged by the learned counsel for the appellants is that the claimant does not come within the scope of the definition of the term " Workman " provided for in the Workmen's Compensation Act. " Workman " has been defined in sub-clause (*n*) of section 2 of the Workmen's Compensation Act. " Workman " means any person (other than a person whose employment is of a casual nature and who is employed otherwise than for the purpose of the employer's trade or business) who is (i) a railway servant as defined in section 3 of the Indian Railways Act of 1890 not permanently employed in an administrative, district or sub-divisional office of a railway and not employed in any such capacity as is specified in Schedule II or employed on monthly wages not exceeding Rs. 400 in any such capacity as specified in Schedule II. In Schedule II of this Act, the persons who are classified as workmen within the meaning of section 2 (1) (*n*) of the Workmen's Compensation Act are set out. Item 26 is the relevant item for the purpose of this appeal. It is to the following effect :

" employed in the handling or transport of goods in, or within the precincts of (*a*) any warehouse or other place in which goods are stored and in which on any one day of the preceding 12 months ten or more persons have been so employed."

Sub-clause (*b*) of item 26 is not relevant for this appeal. The learned Commissioner for Workmen's Compensation referred to item 26 (*a*) as well as to item 28 of Schedule II of the Workmen's Compensation Act but in that schedule we do not see item 28 at all. Obviously that is a mistake.

Taking the facts of this case as disclosed in the evidence, it is the contention of the learned counsel for the appellants that the respondent could not be considered to be a workman falling within the scope of the meaning of section 2 (1) (*n*) and item 26 (*a*) of Schedule II of the Workmen's Compensation Act. In the first place, Mr. Mohanarangam Pillai urges that this workman was not employed under the appellants as he was not being paid wages by the appellants ; nor was there any contract of service between the appellants and the said respondent. On the other hand, he was being paid for his services by the clearing agents and even those services were not in the nature of an employment by the clearing agents for and on behalf of the appellants but the services of the respondent were simply engaged by the said clearing agents who alone were responsible for the transport

of the oil barrels from the Beach station to the warehouse of the appellants. That such a person could not be considered to be a workman falling within the definition contained in the Workmen's Compensation Act is the contention of the learned counsel. Further, the learned counsel contends that the respondent was not employed by the appellants in the course of their business, their business being only that of vending oil and not transport of goods from one place to another. The business of transport was not the business of the appellants but that was the concern of the clearing agents. The clearing agents were the persons who were doing the business of transporting the goods from one place to another whereas the appellants were only enagaged in purchasing and selling the oil so that the point raised by the learned counsel is that if the Workman suffered any injury in the course of the transport of goods from one place to another, he could look up only to the clearing agents for whose business he was employed and not the appellants whose business was quite different. He points out that the learned Commissioner has gone wrong in assuming that the business of transport of the oil barrels from the Beach station to the warehouse of the appellants was the businesses of the appellants whereas in fact it was merely the business of the clearing agents.

In the next place the learned counsel points out that the respondent could not be considered to be a "Workman" within the meaning of section 2 (1) (*n*) for the simple reason that he was not an employee of the appellants much less an employee of the clearing agents, for, according to the learned counsel, the evidence discloses that he was only engaged as a casual labourer and not as an employee as contemplated by the provisions of the Act. On this ground, the learned Counsel would urge that the learned Commissioner for workmen's compensation has gone wrong in the appreciation of the evidence and also the interpretation of the provisions of the Workmen's Compensation Act in relation to the facts of the present case.

The entire order of the learned Commissioner for Workmen's Compensation and also the evidence both for the claimant as well as for the appellants has been read out to me. It cannot be disputed that the question whether the respondent in this case is a workman or not is a question of fact. On the question of fact, there can be no appeal.

The point then arises as to whether the evidence in this case is sufficient to bring the present respondent within the scope of the definition as contained in the Workmen's Compensation Act. I may at once state that it is difficult to gather from the evidence that the respondent in this case is a casual worker. On the other hand, the evidence let in on behalf of the respondent would seem to show that far from his having been a casual worker engaged for the purpose of transporting oil barrels from the Beach station to the warehouse of the appellants, he has been a regular employee under the clearing agents who in turn have been employed by the appellants. Therefore on this point, I do not think I can agree with the learned Counsel that on the facts as revealed by the evidence, the respondent could be understood to be merely a casual worker.

It is true that the appellants are not engaged in the business of transporting goods from one place to another and that their business is to purchase and sell oil as such. But it cannot be forgotten that the appellants cannot purchase and cannot sell oil unless the oil is bought from one place and transported to their godowns before they could sell the oil. In this case, the oil which they have to sell would appear to be received by them at a particular place and stocked by them at another place which is distinct from the place whereat it is delivered to them. Though they are not directly in any sense doing the business of transporting goods from one place to another, nevertheless the transport of the goods in which they are dealing is vitally connected with their business and should be considered to be part and parcel of their business in the selling of oil. If their business was one of merely entering into contracts for sale of oil, which would be stocked at any particular place, without their having to do anything in the matter of the stocking of such oil, certainly the transport of such oil could be separated from their business. But as long as they have to get oil and have to stock them in order to sell them, the trans-

port is a very material and a very necessary, part of their business and if in the course of such transport any worker is employed, it cannot be doubted that this employee is employed to work in the course of their business even though there might be an intermediary who employs the services of workmen who ought to do the work of transporting for the appellants. The transport of goods from one station to another may in one sense be said to be incidental to the business of selling the oil. Even in that case, it cannot be said that the workman is not an employee for and on behalf of the appellants to do work for them in the course of their business. In such circumstances the contention that a workman employed in the transport of oil barrels from one place to another is not employed in the course of and for the business of the appellants does not appeal to me. In my view the workman must be said to be employed in the business of the appellants which involves very necessarily the transport of the commodity in which they are dealing from one place to another. In this case, the respondent was employed in the handling or transport of goods from one place to another when he suffered the injury while goods were being so transported for and on behalf of the appellants who were dealing in the goods *viz.*, oil in barrels.

The other point raised by the learned counsel is that the unloading of the barrels was not done in the warehouse of the appellants themselves. I do not think that I can agree with the contention of the learned Counsel on this point either, for item 26 of Schedule II of the Workmen's Compensation Act provides that such employment in the handling or transport of goods may be in or within the precincts of any warehouse. The phrase "within the precincts" in item 26 of Schedule II of the Workmen's Compensation Act would not restrict the area of operation by the workman to the area contained within the four walls of the warehouse. The term precincts would naturally include the space that may be required for the loading and unloading of goods within the warehouse or without the warehouse, so that a distance of about ten feet that may be required for the cart being brought near to the warehouse of the appellants for being unloaded, will certainly be within the precincts of the warehouse, so that it cannot be argued that when the cart stands outside on the road and unloads itself into the warehouse, the workman was not employed in handling or transporting goods within the precincts of the warehouse. In this case, I think that it would be quite right to hold that the workman was employed in the handling of goods within the precincts of the warehouse.

A few authorities have been cited by the learned counsel. One of them is the one relied on by the learned Commissioner for Workmen's Conpensation, viz., *Arumugham* v. *Nagammal*[1]. In this case, Mack, J. has held that the cooly, who was unloading the wagon at the time of the accident, was employed in the business of the contractor. The contractor was no doubt doing the business of loading and unloading under the Military at the Avadi station. If the learned Commissioner was right in holding that the appellants were doing the business of transport of oil barrels from one place to another, this case would have direct application to the facts of the present case. But as it is, the business that the appellants were doing was really that of vending the oil, which involved the transport of goods from one place to another. Looked at from that aspect, this case will have only an indirect bearing. The next case relied upon by the learned counsel for the appellants is the one reported in *Rabia* v. *The Agent, G.I.P. Railway*[2]. There the G.I.P. Railway entered into a contract with a company under which the latter was to construct a transmission line to carry electric power to various sub-stations on the railway. It was held that the setting up of an overhead electric cable for the purpose of transmitting electrical power to the railway was not ordinarily part of the trade or business of the principal. I do not think that that case has any application to the facts of the present case. In this case the commodity that was being transported was the very commodity in which the appellants were dealing.

1. (1948) 2 M.L.J. 639. 2. (1928) I.L.R. 53 Bom. 203.

Mr. Mohanarangam Pillai next referred me to a decision of Satyanarayana Rao, J. in *Masenu* v. *Narasamma*[1]. In that case, there was specific agreement with one *M* and the owner of a boat whereunder it was agreed that in consideration of *M* paying as hire to the owner of the boat a sum of money, the boat should be allowed to carry a particular cargo. Further the owner was under no responsibility for anything including the salaries of the crew. Of the crew, the respondent's husband met with death through an accident when the boat was returning from its destination. The widow of the deceased workman claimed compensation from the owner of the boat under the Workmen's Compensation Act. It was held that the contract with the owner was the demise of the boat and the owner should not be made liable for the damages claimed. This case was based on a specific contract which excluded the owner of the boat from any responsibility and the learned Judge held that if the widow had impleaded, *M*, who hired the boat, perhaps a decree might have been passed against him. Mr. Mohanarangam Pillai further referred me to paragraph 1114 in Volume 34 of the Hailsham's Edition of Halsbury's Laws of England. Sub-paragraph 2 of that paragraph says

> " a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business, not being a person employed for the purposes of any game or recreation and engaged or paid through a club."

Then the learned author addss that " no general definition can be given of the expression " employment of a casual nature "; it seems to imply something midway between the regular employment of a workman and an engagement for a single day." " The word ' casual ' is used colloquially, not as a term of precision." The further part of the paragraph is that

> " if the employment though casual is for purposes of the employer's trade or business, it is within the Act."

Though it is difficult to define what exactly is meant by " casual worker " I do not think that that point arises for consideration in this appeal for the simple reason that I have held that the worker in this case is not a casual worker but is a worker employed in the regular service of the clearing agents for the purpose of transporting the goods of the appellant. Even if he be a casual worker but if he is employed in the business of the appellants according to the English Act, the workman will be entitled to compensation.

In the result, I am of the opinion that the compensation awarded by the learned Commissioner is just and proper. I do not think there are any circumstances which call for my interference with the order of the learned Commissioner.

The appeal is, therefore, dismissed.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AYYAR.

P. Arumugham and others .. *Petitioners.**

v.

The State of Madras through the Chief Secretary, Fort St. George, Madras and another .. *Respondents.*

Madras Restriction of Habitual Offenders Act (*VI of* 1948)—*Validity*—*Constitution of India* (1950), *Articles* 14, 19 *and* 20—*Scope and effect.*

The Madras Restriction of Habitual Offenders Act does not offend the provisions of Article 14 of the Constitution of India (1950). It is not discriminatory on the ground that it left to the discretion of the Government or the Magistrate to take action under section 110 of the Criminal Procedure Code or under the provisions of the Act. A comparison of section 110, Criminal Procedure

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1. (1951) 2 M.L.J. 456.

* C. M. P. No. 6867 of 1951. 24th October, 1952.

Code with section 2 (4) of the Act which defines 'habitual offender' and section 16 (1) of the Act which brings certain registered members of tribes notified under the Criminal Tribes Act within the Act demonstrates the difference in the scope of the two enactments. Persons dealt with under section 110, Criminal Procedure Code may not necessarily fall within the definition of 'habitual offender' though a 'habitual offender' within the meaning of section 2 (4) of the Act may be proceeded against under section 110, Criminal Procedure Code. In that case there is nothing to prevent such a person being dealt with both under the Act and section 110 of Criminal Procedure Code. It will not be accurate to say that the same person is being punished twice for the same offence because neither a declaration under section 3 (1) of the Act nor an order under section 110 of the Code can be said to be tantamount to punishment of an offence. Both enactments only provide for safeguards in the public interests, in one case the safeguard consisting in the execution of a security bond for good behaviour and in the other consisting in restriction of movement and an obligation to intimate the whereabouts of the person.

There is also no discrimination between persons coming under section 2 (4) and persons coming under section 16 (1) of the Act. A person may be registered as a member of a notified tribe under the Criminal Tribes Act even if he has not actually committed any of the offences mentioned in section 2 (4) of the Act and even though he may not have been required to give security for good behaviour under section 110 of the Code. He might have been registered because he happened to be a member of a tribe which is addicted to the systematic commission of non-bailable offences. The Government may cancel the declaration which is deemed to have been made under section 3 (1). This the Government can do not only in the case of persons falling within section 2 (4) but also in the case of persons falling under section 16 (1) of the Act. Though it might have been more satisfactory if even persons falling under section 16 (1) had been given an opportunity to show cause against the automatic application of the Act to them, yet it cannot be held that because there is no such provision the Act is discriminatory.

Obviously the purpose of the Act is to prevent the commission of crime by persons who by reason of hereditary and traditional inclinations or by inherent nature are prone to commit serious offences. Any legislation which has such a purpose must necessarily be in the interests of the general public who must be protected against a comparatively small section of the community likely to injure the members of the entire community. Section 5 of the Act only requires every notified offender to intimate to the prescribed authority his place of residence and every change or intended change thereof and every absence or intended absence therefrom. It cannot be said to impose any restrictions on the right of free movement, still less any unreasonable restrictions on the right.

Section 6 provides for the restriction of the movement of notified offenders. The Government, however have to consider several important facts and circumstances before making any declaration. The obvious intention is that these restrictions are imposed only on persons whose record shows that they are likely to be a menace to the general public. If the movement of such persons are not restricted and they are allowed to be at large it may be difficult for the Government through their police to have a control over them and prevent them from committing offences. The section is not therefore void as the restrictions imposed by it are reasonable and in the interests of the general public.

An opportunity to show cause against the application of the Act to a person coming under section 12 (1) was evidently thought unnecessary, presumably because such persons had the opportunity before he was notified under the Criminal Tribes Act. It would have been satisfactory if before the Act was made applicable, the person concerned had been given an opportunity to show cause against it and the Government had a discretion either to issue or not to issue a notification under section 3 (1). But the expression 'reasonable' is so wide and elastic that a Court shall not ordinarily strike down any restrictive provisions as void as being not reasonable, unless it appears to the Court that a different view could not be taken with any justification.

There is no violation of Article 20 of the Constitution of India as the words 'prosecuted and punished' have definite meaning and significance in the administration of criminal justice and in that sense the impugned Act does not provide for prosecution or punishment except it be for contravening the provisions of the Act itself.

There is no substance in the contention that the notices issued under the Act are vague as the language of section 16 (1) is that a 'notification shall be deemed to have been issued under section 3 (1) of the Act.' No overt action on the part of the Government is necessary for the application of section 16 (1). If any person satisfied the conditions laid down in the sub-section then he automatically comes within the scope of the operation of the Act.

It is not the province of the Court to embark on matters of policy like reclaiming even the worst offenders. The legislature might feel that certain restrictions are necessary in the interests of the general public and security and a Court will not interfere merely because these restrictions are not in consonance with the social ideas of the Court.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a *writ of certiorari* calling for the records connected with the notice on the 1st Petitioner in pursuance of the proceedings in Reference No. D/7014/49, dated 12th May, 1951 and also directing the District Magistrate, Tiruchirapalli not to issue such notices on the other petitioners and

others and to quash the proceedings of the District Magistrate of Tiruchirapalli as illegal and *ultra vires.*

K. Bhashyam for the Petitioners.

The Advocate-General (*V. K. Tiruvenkatachar*) assisted by *R. Santhanam* for the Public Prosecutor on behalf of the State.

Judgment of the Court was delivered by

Rajamannar, C.J.—The main question in this application is whether the Madras Restriction of Habitual Offenders Act (Act VI of 1948) in its entirety or any of its provisions has become void after the coming into force of the new Constitution as being inconsistent with the provisions of Part III of it. The 16 petitioners are residents of Ramjeenagar, a village in Tiruchirapalli taluk of Tiruchirapalli District. One of them, namely, the first petitioner, was served with a memorandum of the proceedings of the District Magistrate, Tiruchirapalli, dated 12th May, 1951. It is alleged that similar notices were intended to be served on the other petitioners and other persons. The memorandum is in the following terms :

" Memorandum for imposing restrictions on Habitual Offenders.

It is hereby informed that as the person whose name and address is described below has been registered under the Criminal Tribes Act, 1924, and as he within a period of five years immediately preceding 29th April, 1948, had been either ordered to give security for good behaviour with reference to section 110 of the Code of Criminal Procedure or convicted of an offence under section 24 of the said Act or of a non-bailable offence under any other law, a notification is deemed to have been issued under section 3, sub-section (1) of the Restriction of the Habitual Offenders Act, 1948, he is declared to be subject to all the provisions of the said Act, and further subject to all the restrictions imposed under the Criminal Tribes Act before the 29th April, 1948.

" Further the said person is informed that he is bound to intimate to village or police officers of the place mentioned in column 5 of the Schedule hereunder every change or intended change of his residence.

(By Order).

(Sd.) G.M. MUTHUSWAMI,
for District Magistrate.

Facsimile of Muthukannu, Huzur Head Clerk.

Schedule.

No.	No. under Criminal Tribes Act.	Name.	Father's name.	Residence	Particulars of the place to which the person is confined.
1	2	3	4	5	6
14	266/TRI/KEP.	Arumugham Servai.	Ponniah Palaniandi.	Ramjeenagar.	Within five miles round Ramjeenagar Area."

To understand the implication of this notice and the contentions of learned counsel for the petitioners it is necessary to refer to the provisions of the impugned Act as well as the prior enactments, namely, the Criminal Tribes Act, 1924, and the Madras Restriction of Habitual Offenders Act, 1943.

The Criminal Tribes Act was passed by the Indian Legislature in 1924 and was amended by the Criminal Tribes (Madras Amendment) Act, 1943 and another amending Act of 1945. It is useful to first refer to its main provisions as they stood before the amendments. Under section 3 of that Act, if the Provincial Government had reason to believe that any tribe, gang or class of persons or any part thereof was addicted to the systematic commission of non-bailable offences, it was empowered to declare by notification that such tribe, gang or class or part thereof was a criminal

tribe for the purposes of that Act. Sections 4 to 9 deal with the registration of members of any criminal tribe or part of a criminal tribe by the District Magistrate. The District Magistrate had to publish a notice at the place where the register was to be made and other places as he thought fit calling upon all the members of the criminal tribe to appear at a time and place specified before the person appointed in that behalf and to give that person such information as may be necessary to enable him to make the register. The District Magistrate was given the power of exempting any member from registration. After the preparation of the register, no person's name could be added to the register nor any register cancelled except by or under an order in writing by the District Magistrate. Section 7, sub-section (2) expressly provides that before the name of any person is added to the register the Magistrate shall give notice to the person concerned. Section 8 is as follows :—

"Any person deeming himself aggrieved by any entry made or proposed to be made, in such register, either when the register is first made or subsequently, may complain to the District Magistrate against such entry, and the Magistrate shall retain such person's name on the register, or enter it therein or erase it therefrom, as he may think fit."

Under section 10 the Provincial Government may, by notification, issue in respect of any criminal tribe either or both the following directions, namely, that every registered member shall in the prescribed manner (*a*) report himself at fixed intervals and (*b*) notify his place of residence and any change or intended change of residence and any absence or intended absence from his residence. Section 11 provided that if the Provincial Government considered it expedient that any criminal tribe or any part or member of such tribe should be restricted in its or his movements to any specified area or settled in any place of residence, it could declare that such tribe, part of the tribe or member shall be restricted in its or his movements to the areas specified in the notification or shall be settled in the place of residence so specified as the case may be. Before making such a declaration the Provincial Government had to consider certain matters set out in section 11 (2). Power to vary the specified area of restriction was given to the Government under section 12. Sections 16 to 19 dealt with the establishment of industrial, agricultural or reformatory settlements and provided for placing members of the tribe in such settlements. There is also provision for establishing schools for children of the criminal tribe. Section 20 confers on the Provincial Government the power to make rules. Sections 21 and 22 deal with the penalties for breach of the sections or rules framed under the Act. Section 24 is a special section providing for punishment even when no actual offence is committed. It is in these terms :

"Whoever, being a registered member of any criminal tribe, is found in any place under such circumstances as to satisfy the Court,—

(*a*) that he was about to committ or aid in the commission of, theft or robbery, or

(*b*) that he was waiting for an opportunity to commit theft or robbery, shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine which may extend to one thousand rupees."

The other provisions are not material for this application.

This Act was amended by Madras Act XXIX of 1943. The important amendments carried out by this Act are as follows :

(1) The epithet "criminal" was substituted by "notified" in describing the tribe.

(2) In section 3 of the Act a proviso was added that before a notification was issued reasonable opportunity should be given to the tribe, community, group or class or part thereof which will be affected by the notification to show cause against the issue.

(3) Likewise, in section 5 a proviso was added that before registering any member the District Magistrates shall give him a reasonable opportunity to show cause against such registration.

(4) A similar proviso was added to sub-section (2) of section 7.

(5) Section 8 was deleted.

Along with this Amending Act another Act was passed, Madras Act XXX of 1943, called the Madras Restriction of Habitual Offenders Act. "Habitual Offender" was defined for the purpose of the Act as meaning any person

" (a) who has committed not less than three non-bailable offences, or

(b) who has been ordered to give security for good behaviour with reference to section 110 of the Code of Criminal Procedure, 1898, or

(c) who, by repute as established at a magisterial enquiry, is addicted to the commission of offences against the public peace or against property or is of such a character that it is necessary to impose restrictions on him under this Act."

Under Section 3 (1) of this Act, if the Provincial Government were satisfied that any person was a habitual offender they could declare that he shall be subject to any of the provisions of the Criminal Tribes Act, 1924 and the rules made thereunder with modifications and restrictions, if any. Section 3 (3) provided for a reasonable opportunity being given to the person concerned before any notification was issued in respect of him to show cause against such issue. Section 5 barred the jurisdiction of Courts to question the validity of any notification issued under the Act. Under section 6, the Provincial Government was empowered to make rules to carry out the purposes of the Act.

The Criminal Tribes Act was repealed so far as Madras was concerned by the Criminal Tribes (Madras Repeal) Act, 1947, except for the purpose of section 3 of the Madras Restriction of Habitual Offenders Act, 1943.

The Madras Restriction of Habitual Offenders Act, 1948, came into force on the 29th April, 1948. It repealed the Madras Restriction of Habitual Offenders Act, 1943. The definition of a " habitual offender ' for the purposes of this Act is as follows :

" ' Habitual offender ' means a person who before or after the commencement of this Act, has been sentenced to a substantive term of imprisonment, such sentence not having been set aside in appeal or revision, on not less than three occasions, for one or another of the offences under the Indian Penal Code set forth in the schedule, each of the subsequent sentences having been passed in respect of an offence committed after the passing of the sentence on the previous occasion :

Explanation.—The passing of an order requiring a person to give security for good bahaviour with reference to section 110 of the Code of Criminal Procedure, 1898, shall be deemed to amount to the passing of a sentence of substantive imprisonment within the meaning of this clause."

Section 3, sub-section (1), provides that the Government may by notification declare that a person shall be subject to the provisions of the Act to such extent and subject to such restrictions if any as may be specified if they are satisfied that he is a habitual offender. They may also cancel or modify such declaration. Sub-section (2) of section 3 provides for reasonable opportunities being given to the person concerned to show cause against such issue or modification, if the modification was to his disadvantage. Under section 4 the Government were empowered to delegate their powers under section 3 to a District Magistrate. The disabilities of a habitual offender are contained in sections 5 and 6. Every notified offender shall intimate to the prescribed authority his place of residence, every change or intended change thereof and every absence or intended absence therefrom (section 5). The Government may by notification declare if, in their opinion it was expedient to do so, that any notified offender shall be restricted in his movements to a specified area. Before making such a declaration the Government had to consider the nature of the offences, the circumstances in which they were committed, whether the offender follows any lawful occupation genuinely or only as a pretence and the suitability of the area to which his movements are to be restricted, the manner in which he should earn his living in such area and the adequacy of the arrangements therein. Under section 7 the Government may cancel any declaration made under section 6 or alter any notified area. Sections 8 to 10 deal with the establishment of settlements. Section 11 relates to rule making, and sections 12 to 14 to

penalties and procedure. Section 16 is the most important section for the purpose of this application, and may be cited in full :

"(1) In respect of every person who stood registered under the Criminal Tribes Act, 1924 (hereinafter in this section referred to as the said Act) at the commencement of this Act and who, within a period of five years immediately preceding such commencement had been either ordered to give security for good behaviour with reference to section 110 of the Code of Criminal Procedure, 1898, or convicted of an offence under section 24 of the said Act or of a non-bailable offence under any other law, a notification shall be deemed to have been issued under section 3, sub-section (1) of this Act, declaring him to be subject to all the provisions of this Act; and this Act shall apply to every such person accordingly.

(2) Every notification issued in respect of any person under section 3 of the Madras Restriction of Habitual Offenders Act, 1943, and in force at the commencement of this Act, shall be deemed to have been issued under section 3, sub-section (1), of this Act, all references in that notification to the provisions of the said Act and the rules made under it being construed as references to the corresponding provisions of this Act and the rules made under it.

(3) Any notification or order issued or made under the said Act in respect of any person referred to in sub-section (1) or sub-section (2), and in force at the commencement of this Act, restricting the movements of such person or placing him in a settlement shall be deemed to have been issued or made under this Act.

(4) All settlements established under section 16 of the said Act and existing at the commencement of this Act shall be deemed to have been established under section 8 of this Act."

It was not disputed that the petitioners before us stood registered under the Criminal Tribes Act, 1924 at the commencement of Madras Act VI of 1948, *i.e.* 29th April, 1948. Therefore, if any of them had, within a period of five years immediately preceding 29th April, 1948, been either ordered to give security for good behaviour under section 110 of the Code of Criminal Procedure or was convicted of an offence under section 24 of the Criminal Tribes Act or of a non-bailable offence under any other law, a notification shall be deemed to have been issued under section 3, sub-section (1) of the Act declaring him to be subject to all the provisions of the Act. It was not denied by the petitioner's counsel that one or other of these conditions is fulfilled in respect of every one of the petitioners. If so, under section 16 (1), a notification shall be deemed to have been issued under section 3, sub-section (1). Section 16 (1) does not contemplate the issue of a fresh notification. Nevertheless the District Magistrate apparently thought it better to bring to the notice of the petitioners and others similarly situated the effect of section 16 of the Act of 1948. We read the memorandum of the District Magistrate referred to earlier in this judgment, as nothing more than an intimation to the concerned persons of the effect of the enactment. Section 16 (3) declares that any notification or order issued or made under the said Act (Criminal Tribes Act) in respect of any person referred to in sub-section (1) or sub-section (2) which was in force at the commencement of the Act restricting the movements of such person or placing him in a settlement shall be deemed to have been issued or made under this Act. Though the memorandum of the Magistrate does not mention the relevant provisions of the Act in detail, the purport of the proceedings is clear. It is merely a reminder to the petitioners and similar prsons and does not purport to be a substantive order passed under any section of the Act.

If this is realised, the objection, that the notices issued are vague in character and indefinite in particulars, in that they do not give the offences committed by the petitioners, the date of conviction and other details, disappears. The learned judges who directed a rule *nisi* to issue made a note as follows :—

"We think, however, this petition should be admitted on another ground, namely, the defects in the notification bringing the petitioners within the scope of the Act. The notification does not *inter alia* indicate the particulars of previous convictions or registration under the Criminal Tribes Act applicable to each petitioner and is merely couched generally in terms of the alternative mentioned in section 16 (1) of Act VI of 1948."

We too were inclined to take the same view at first. But on closer examination of the provisions of section 16 it became evident that there was no question of any fresh notification being contemplated under that Section. The language employed in section 16 (1) is

"a notification shall be deemed to have been issued under section 3 (1) of this Act."

No overt action on the part of the Government is necessary for the application of section 16 (1). If any person satisfied the conditions laid down in that sub-section, then he automatically comes within the scope of the operation of the Act. Now it is not denied that the petitioners are all persons who stood registered under the Criminal Tribes Act, 1924, at the commencement of Madras Act VI of 1948. Nor is it denied that every one of them has been convicted of a non-bailable offence or an offence under section 24 of the Criminal Tribes Act within a period of five years immediately preceding the commencement of Act VI of 1948. The schedule appended to the counter-affidavit filed on behalf of the State, the accuracy of which was not disputed, clearly establishes the fact that every one of the petitioners comes within the mischief of section 16 (1). We therefore find that this objection is without substance.

Mr. Bhashyam's main contentions on the constitutional invalidity of the provisions of the Act were based on Articles 14 and 19 (1) (*d*) of the Constitution. Article 14 was sought to be invoked on two grounds. The first is that the Act was discriminatory because it left to the discretion of Government or the Magistrate to take action in respect of the same class of persons, *viz.*, habitual offenders either under section 110 of the Code of Criminal Procedure or under the provisions of the Act. Section 110 of the Code of Criminal Procedure runs thus :

"Whenever a Presidency Magistrate, District Magistrate, or Sub-Divisional Magistrate or a Magistrate of the first class specially empowered in this behalf by the Provincial Government receives information that any person within the local limits of his jurisdiction—

(*a*) is by habit a robber, house breaker, thief, or forger, or

(*b*) is by habit a receiver of stolen property knowing the same to have been stolen, or

(*c*) habitually protects or harbours thieves or aids in the concealment or disposal of stolen property, or

(*d*) habitually commits, or attempts to commit, or abets the commission of, the offence of kidnapping, abduction, extortion, cheating or mischief, or any offence punishable under Chapter XII of the Indian Penal Code, or under section 489-A, section 489-B, section 489-C, or section 489-D of that Code, or

(*e*) habitually commits, or attempts to commit, or abets the commission of, offences involving a breach of the peace, or

(*f*) is so desperate and dangerous as to render his being at large without security hazardous to the community.

Such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit to fix."

A comparison of this section with section 2 (4) which defines "habitual offender" and section 16 sub-section (1) which brings certain registered members of tribes notified under the Criminal Tribes Act within the Act demonstrates the difference in the scope of the two enactments. Persons who can be dealt with under section 110 of the Code of Criminal Procedure may not necessarily fall within the definition of "habitual offender" in the Act though a "habitual offender" within the meaning of section 2 (4) of the Act may be liable to be proceeded against under section 110 of the Code of Criminal Procedure. In that case there is nothing to prevent such a person being dealt with both under the Act and under section 110 of the Code. It will not be accurate to say that the same person is being punished twice for the same offence because neither a declaration under section 3 (1) of the Act nor an order under section 110 of the Code can be said to be tantamount to punishment for an offence. Both enactments only provide for safeguards in the public interests, in one case the safeguard consisting in the execution of a security bond for good behaviour and in the other consisting in restriction of movement and an obligation to intimate the whereabouts of the person.

Mr. Bhashyam relied on the decision in *Deodat Rai* v. *State*[1] in support of this contention of his. There the learned Judges were dealing with the provisions of an Act similar to Madras Act VI of 1948 but certainly not in *pari materia*. The

[1] A.I.R. 1951 All. 718.

main provision of that Act is section 3 which lays down that if a magistrate is, on a police report or otherwise, satisfied with respect to any person that he is by repute a bad character and is either a habitual offender or a person who habitually manufactures, imports or sells an intoxicant in contravention of the provisions of the Excise Act of that State or is a keeper of a gambling den or a person who has committed or is about to commit a non-bailable offence contained in Chapter XVI or XVII of Indian Penal Code or that he is a person who habitually commits or attempts to commit or abets the commission of offences involving a breach of the peace or that he is a person who is so dangerous as to render his being at large without security hazardous to the community, he (that is, the Magistrate) may cause to be served on such person a notice to show cause why he should not be ordered to enter into a bond for his good behaviour or keeping the peace or both. In addition to the order, requiring the person to enter into a bond the Magistrate may also require such person to leave the State if he is not a resident of that State or to leave such area as may be specified or to report his presence or movements in such manner as may be specified. The learned Judges held that the Act is discriminatory; the discrimination lay in the fact that some are left to be prosecuted under section 110 of the Code while the others are prosecuted under the Act, according to the fancy or whim of the Magistrate or the Police who moved him.

Desai, J., says :

"It was open to the Legislature of Uttar Pradesh to make a special law regarding habitual criminals or offenders. Making one law for habitual criminals and another law for other criminals would not, by itself, contravene Article 14. Habitual Criminals would, of necessity, require a different treatment; so long as the treatment meted out to them has some reasonable connection with their being habitual criminals, they cannot complain on the ground of inequality of laws. But the law regarding habitual criminals must apply to all habitual criminals alike and should not discriminate between some and others. The impugned Act, however, discriminates between habitual criminals who have acquired a bad reputation and others who have not and the difference in the treatment meted out to them has no intelligible connection with the acquisition, or non-acquisition of a reputation as bad character. There is no reason why habitual criminals who have not acquired a bad reputation should be dealt with under section 110 of the Code while those who have acquired a bad reputation may be dealt with under the Act."

Earlier on in his judgment the learned Judge sums up the law as regards the classification and discrimination thus :

"The law that I gather from the above authorities is this. It is absurd to speak of one law for all circumstances; it is sheer impossibility because there must be different laws to deal with different circumstances. What the equal protection clause means is simply this that the same law should govern those similarly circumstanced; it cannot and does not prohibit different laws for those differently circumstanced. The Legislature has full freedom to classify people according to circumstances, and enact different laws for different classes; but it must treat equally all similarly circumstanced or falling in one class and the difference in treatment must have some intelligible or rational connection with the differences in circumstances and not be arbitrary. Discrimination among persons in one class or similarly circumstanced whether apparent on the face of the statute or resulting in practice is all that is prohibited under the clause. It is competent for the Legislature to leave it to the discretion of an authority to apply different laws to people in different circumstances but always provided that it lays down a rational standard to guide its discretion or such a standard can be presumed to exist; it cannot leave it to its arbitrary or naked discretion."

With these general observations we are in entire agreement, Whether, applying these general principles, the learned Judges were right in holding that the Uttar Pradesh Act which they were considering was unconstitutional in certain respects, it is not necessary for us to say. But clearly these principles have not been violated by the provisions of the Madras Act, which differs widely from the Uttar Pradesh Act. It is obvious that all persons against whom action can be taken under section 110 of the Code of Criminal Procedure would not necessarily fall within the definition of "habitual offenders" in section 2 (4) or within section 16 (1) of the Act. There may be instances of overlapping in the sense that the same person may fall within the scope of both the enactments. But then, in such a case action could be taken under both.

Mr. Bhashyam then contended that the Act also made a discrimination between persons coming under section 2 (4) and persons coming under section 16 (1)

of the Act. Under section 3 (1) the discretion is vested in the Government or the District Magistrate to whom the powers of Government are delegated to declare or not to declare a person to be subject to the provisions of the Act. It is also provided that before any notification is issued in respect of any person under sub-section (1) of section 3 a reasonable opportunity shall be given to him to show cause against such issue of a notification. But under section 16, sub-section (1), there is no discretion vested in the Government nor is there any provision for a reasonable opportunity being given to a person who is deemed to be subject to all the provisions of the Act. Undoubtedly this difference is real. But the question is whether persons falling within section 2 (4) and persons falling within section 16 (1) can be said to be both similarly situated. We think not. A person may be registered as a member of a notified tribe under the Criminal Tribes Act even if he has not actually committed any of the offences mentioned in section 2 (4) of the Act and even though he may not have been required to give security for good behaviour under section 110 of the Code of Criminal Procedure. He might have been registered because he happened to be a member of a tribe which is addicted to the systematic commission of non-bailable offences. If before the registration under the Criminal Tribes Act a person is given an opportunity to show cause why his name should not be entered in the register or if after the registration a person included in the register is given an opportunity of getting his name removed, it may be said that the legislature did not find any necessity for again giving him an opportunity to show cause against the application of the Act to him. But the Government may cancel the declaration which is deemed to have been made under section 3 (1). This the Government can do not only in the case of persons falling within section 2 (4) but also in the case of persons falling under section 16 (1) of the Act. Though it might have been more satisfactory if even persons falling under section 16 (1) had been given an opportunity to show cause against the automatic application of the Act to them, yet we cannot hold that because there is no such provision the Act is discriminatory.

The next contention of Mr. Bhashyam was that the provisions of the Act are inconsistent with Article 19 (1) (*d*) of the Constitution which confers the right on all citizens 'to move freely throughout the territory of India'. Sub-clause (*d*) has of course to be read with Article 19 (5) which runs as follows :—

"Nothing in sub-clause (*d*), (*e*) and (*f*) of the said clause (clause 1) shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Schedule Tribe."

Undoubtedly the Act does impose restrictions on the right of free movement. The question therefore is whether the restrictions imposed can be held to be reasonable and in the interests of the general public, because in this case it is not suggested that the restrictions are for the protection of the interests of any Schedule Tribe. It has been pointed out time and again that there cannot be any precise or exhaustive definition of the term "reasonable" nor can any definite tests be laid down to ascertain whether a particular restriction is or is not in the interests of the general public. In this case, however, we do not think that it can be seriously contended that the restrictions imposed by the Act are not in the interests of the general public. Obviously the purpose of the Act is to prevent the commission of crime by persons who by reason of hereditary and traditional inclinations or by inherent nature are prone to commit serious offences. Any legislation which has such a purpose must necessarily be in the interests of the general public who must be protected against a comparatively small section of the community likely to injure the members of the entire community.

Are the restrictions then reasonable? Mr. Bhashyam contended that they are not. He impugned both the substantive and procedural provisions of the Act as not being reasonable. Section 5 only requires every notified offender to intimate to the prescribed authority his place of residence and every change or intended change thereof and every absence or intended absence therefrom. The section

does impose obligations on a notified offender which it does not impose on other citizens. But there are many other conceivable cases in which intimation of change of residence and notice of absence is necessary. Sometimes such intimation is necessary for official purposes. We see nothing in the provisions of this section which can be said to impose restrictions on the right of free movement, still less any unreasonable restrictions on that right.

Section 6 undoubtedly, indeed expressly, provides for the restriction of the movements of notified offenders. It is not every notified offender that is made subject to the restrictions under this section. It is only if, in the opinion of the Government, it is expedient to do so in the case of any particular notified offender that a notification declares him to be restricted in his movements to a specified area. Before making such a declaration the Government have to consider several important facts and circumstances, for example, the nature of the offences of which the offender has been convicted and the circumstances in which they were committed and whether the offender follows any lawful and *bona fide* occupation. The suitability of the area to which his movements are to be restricted has also to be considered and the Government should have regard to the orpportunity which the offender is likely to have to earn his living in such area adequately. The obvious intention is that these restrictions are imposed only on persons whose record shows that they are likely to be a menace to the general public. The Government are also empowered under section 7 to cancel any declaration made under section 6. In *Dr. N. B. Khare* v. *State of Delhi*[1] the Supreme Court upheld an externment order which restricted the movements of Dr. Khare in the interests of public safety. It is true that the action in that case was taken under a temporary enactment, whereas the Restriction of Habitual Offenders Act is a permanent one. It is also true that the notification imposing restriction under section 6 need not fix any period. If the Government do not choose to cancel the declaration the restrictions may continue till the end of the life of the notified offender. Nevertheless we think that the validity of the impugned provisions must be upheld as reasonable because of the purpose behind such restriction. It is assumed that the notified offenders are persons who commit serious offences by habit and not on momentary provocation. If the movements of such persons are not restricted and they are allowed to be at large it may be difficult for the Government through their police to have a control over them and prevent them from committing offences. In spite of the provisions of the Criminal Tribes Act being applied to them we find from the schedule appended to the counter-affidavit filed on behalf of the State that some of the petitioners who belong to Tiruchirapalli District have been convicted of offences at Jamshedpur, Jullundur, Poona, Bombay, Alipore and Ranchi. We hold, therefore, that section 6 of the Act is not void as the restrictions imposed by it must be deemed to be reasonable and in the interests of the general public.

Mr. Bhashyam then contended that the procedural provisions of the Act are not reasonable in so far as they relate to persons coming under section 16 (1) of the Act. There are safeguards against hasty, and ill-considered action so far as persons falling within the definition of section 2 (4) of the Act are concerned. Firstly, they are given an opportunity to show cause against the issue of a notification under section 3 (1). The Government are given discretion to issue or not to issue a notification. The rules framed under the Act provide even for the filing of a written statement and permit the person against whom action is intended to be taken to appear in person or by pleader. But in the case of a person coming under section 16 (1), learned counsel submitted there is no such opportunity given. He drew our attention to the two decisions of the Supreme Court of United States in *Minnesota Ex. Rel. Pearson* v. *Probate Court*[2] and *Buck* v. *Bell*[3] to show that before fundamental rights of a citizen are curtailed adequate safeguards are provided to ensure against the misapplication of the provisions of a statute which has

1. (1950) S.C.J. 328 (S.C.).
2. 84 Law. Ed. 744.
3. 71 Law. Ed. 1000.

the effect of so curtailing his rights. There is some force in this complaint. An opportunity to show cause against the application of the Act to a person coming under section 16 (1) was evidently thought unnecessary, presumably because such person had that opportunity before he was notified under the Criminal Tribes Act. Section 8 of the original Act gave an opportunity to any person deeming himself aggrieved by any entry made or *proposed to be made* in the register of notified persons to complain to the District Magistrate. The amendments to the Act made by Act XXIX of 1943 expressly provided for a reasonable opportunity to show cause against the issue of a general notification under section 3 and before the registration of any member of the notified tribe. The fact, however, remains that such opportunity would have been given only before the passing of Madras Act VI of 1948 and a long time might have elapsed since the registration under the Criminal Tribes Act. It would have been more satisfactory, if, before the new Act of 1948 was made applicable, the person concerned had been given an opportunity to show cause against it and the Government had a discretion either to issue or not to issue a notification under section 3 (1). Nevertheless we do not feel constrained to hold that on this account section 16 (1) is void. The expression "reasonable" is so wide and elastic that a Court should not ordinarily strike down any restrictive provision as void as being not reasonable, unless it appears to the Court that a different view could not be taken with any justification.

Lastly, Mr. Bhashyam contended that the provisions of the Act imposing obligations and restrictions are inconsistent with Article 20 (2) of the Constitution which says :

"No person shall be prosecuted and punished for the same offence more than once."

It is impossible to describe the restrictive precautions taken under the Act as prosecution and punishment. "Prosecuted and punished" have definite meaning and significance in the administration of criminal justice, and in that sense the impugned Act does not provide for any prosecution or punishment except it be for contravening the provisions of the Act itself, in which case there is no question of any person being prosecuted and punished for the same offence more than once. There is nothing in this objection.

Mr. Bhashyam referred to the general policy of all civilised governments to reclaim even the worst offenders and to make them honest citizens of the land by improving their conditions and giving them opportunities to lead a clean life and urged that the Act is not in accordance with such a policy as it more or less segregates certain persons as perpetual offenders. It is not the province of this Court to embark on considerations of policy. The legislature might feel that certain restrictions are necessary in the interests of general security and make special provision for settling those persons, though it is neither adequate nor comprehensive. In any event we cannot hold that any of the provisions of the Restriction of Habitual Offenders Act is unconstitutional and void because it is not in consonance with social idea.

The application is therefore dismissed. There will be no order as to costs.

V.P.S. *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Borra Ramayya and another .. *Appellants**

v.

Borra Venkatachellamma and another .. *Respondents.*

Arbitration Act (X of 1940), section 47—Proviso—Scope.

Prima facie section 47 of the Arbitration Act governs references to arbitration by parties in a pending suit without reference to or knowledge of the Court. The Act does not provide for arbitration in pending suits except through Court. According to the proviso to section 47, an award on the footing of an arbitration in a pending suit may only form the basis of a decree by consent.

Where in a private arbitration in a pending suit without the knowledge of the Court, arbitrators begin to differ from each other, give each other the lie, if not begin to quarrel with each other, another dispute is in consequence created and the only course is for a Court to ignore the arbitration and decide the suit on its merits.

Appeal against the order of the Court of the Subordinate Judge, Guntur, dated 24th September, 1949, in A.S. No. 189 of 1949 preferred against the decree of the Court of the District Munsif, Guntur, in O.S. No. 362 of 1948.

B. V. Ramanarasu for Appellants.

M. S. Ramachandra Rao and *M. Krishna Rao* for Respondents.

The Court delivered the following

JUDGMENT :—The appellants are the plaintiffs, who sued the two defendants on 25th June, 1948, for a permanent injunction restraining them from opening a doorway into an alleged private lane belonging to them and for a mandarory injunction directing the removal of a wall which encroached on their site. This appeal arises out of a reference to arbitration outside court subsequent to the filing of the suit, which degenerated into a regrettable fiasco as between the arbitrators themselves, three of them giving the lie direct to the fourth arbitrator one S. Rattiah. The learned District Munsif accepted the evidence of three arbitrators examined for the plaintiffs as P. Ws. 1, 2 and 3 that there was an award in writing signed by all the four arbitrators and decreed the suit in accordance with a copy kept by P. W. 1. The finding on their evidence was that Rattiah suppressed the signed award. The learned Subordinate Judge in appeal preferred to believe Rattiah and remanded the suit for fresh disposal.

The relevant facts briefly are these. The suit was preceded by the usual preliminary canter in the Magistrate's court. The first defendant, who is a woman, one Venkatachellamma, bought a site next to the plaintiff's house and started building. The second defendant is said to be some relation of hers but said to be looking after her affairs. When they were obstructed by the plaintiffs, they filed M.C. No. 7 of 1948 in the Magistrate's court and got an *ex parte* order under section 144, Criminal Procedure Code, on 18th June, 1948. The Plaintiffs retaliated by filing M.C. No. 9 of 1948 for cancellation of this order and followed it up with the suit O.S. No. 362 of 1948. On 17th July, 1948, both parties referred their dispute to the arbitration of four persons by a signed reference Ex. A-1. It is common ground that on 5th August, 1948, the four arbitrators took measurements. According to three of them P. Ws. 1 to 3, they were all in agreement as to the terms of the award which was written in Rattiah's house and the parties who were waiting outside were orally informed. The award was left with Rattiah for further action. Then on 10th August, 1948, the defendants issued a notice Ex. B-1 to the arbitrators not to proceed with the enquiry. On 16th August, 1948, the three arbitrators, P. Ws. 1 to 3 appeared in the Criminal Court and filed a memo there Ex. A-6 embodying the terms of their award, alleging that the original signed by all the four arbitrators had been left with Rattiah. The terms of the award were, *inter alia* that the door way into the lane was to be closed, but the wall alleged to

* A. A. O. No. 15 of 1950. 22nd January, 1953.

be an encroachment was to be permitted to remain and the defendants were to pay Rs. 100 to the plaintiffs by way of compensation. The criminal proceedings were withdrawn and O.P. No. 52 of 1948 was filed in the suit by the plaintiffs for a decree in terms of the award on 5th October, 1948. This was countered by an application by the defendants to set aside the alleged award. The only witnesses examined were the four arbitrators, three ranging themselves on one side and swearing that they had signed an award, which was left with Rattiah, who stoutly swore to the contrary that the measurements which were begun could not be completed because the parties themselves started disputes which nearly led to their beating each other. He was prepared to swear that he and the other arbitrators went and reported the matter to one Anne Sanjivayya, who advised the execution of a document choosing him as a fifth arbitrator but that this was not done. According to P.W. 1, each party deposited Rs. 500. According to Rattiah, R.W. 1, Rs. 900 of this deposit is with him and Rs. 100 is still due from the defendants. It would appear that plaintiffs chose two of the arbitrators and defendants, two, a rather unsatisfactory arrangement, but in the present case we have three of the arbitrators including one chosen by the defendants, all sticking together and swearing to all four of them signing an award in agreement with each other and entrusting the award to Rattiah. The learned District Munsif, who heard the arbitrators, accepted the sworn testimony of three of them as against Rattiah. The learned Subordinate Judge took the view that there was absolutely no motive for Rattiah to take sides, admitted as he was to be a very respectable man and he considered him at least as good and respectable, if not better than the other three arbitrators. He concluded his comparative estimate of respectability of the arbitrators in paragraph 52 of his judgment by the following sentence :

"I opine that he is a much better man than respondents 3 to 5."

One of the numerous grounds on which the learned Subordinate Judge set aside the award was that there was no proper selection of arbitrators, there being some evidence that two of them P.Ws. 1 and 2 were not well disposed to the defendants. He however, overlooked the fact that the third arbitrator selected by the defendants supported them in the witness box. The parties were not examined. The non-examination of Anne Sanjivayya has been stressed on behalf of the appellants as a defect in the case of the defendants as it left Rattiah's testimony alone and uncorroborated, whereas if as he deposed all the arbitrators went to Anne Sanjivayya when they could not agree, this man would have given evidence of great value to demolish the case of the plaintiffs that there was in fact a written award signed by all the arbitrators. The learned Subordinate Judge was of the view that the plaintiffs could as well have cited him to show that he was not approached at all. It is difficult to see how they could do this, anticipating the evidence given by Rattiah.

I have found great difficulty in following and appreciating the numerous grounds given in several brief paragraphs by the Subordinate Judge for rejecting the evidence of three of the arbitrators P.Ws. 1 to 3. One was that the award, if written should have been served on the parties then and there. Another was the failure to purchase the requisite stamp then and there on the afternoon of 5th August, 1948 and so on. It is regrettable that the four arbitrators to whom the parties by a signed reference entrusted their dispute for resolution who are seemingly respectable persons should give each other the lie direct in this way. The reasons given by the Subordinate Judge for reversing the finding of the District Munsif, who had the great advantage of hearing all the arbitrators in the witness box are so unconvincing, that in fairness to the arbitrators themselves the rejection *in toto* of the evidence of three of the arbitrators, P.Ws. 1 to 3 should not, I think be permitted to stand. It is often difficult and embarrassing for a court to resolve so strong and direct a conflict in oral testimony between seemingly respectable persons. The view to which I am inclined is that there was, as P.Ws. 1 to 3, have deposed, an agreement as between them and Rattiah as regards the award which should be passed and that it was in fact reduced to

writing and signed at any rate by P. Ws. 1 to 3 before they left the award with Rattiah. It is probable that Rattiah was influenced to change his mind, it may be after a conversation with Anne Sanjivayya, who has avoided the witness box and that he did not in fact sign the award at all. I find it extremely difficult to believe that P.Ws. 1 to 3 would have gone to the length of swearing falsely that they all signed an agreed award which was left with Rattiah in whose custody the deposit money was also kept for formal notice to the parties and for further action.

The far more important point of law that remains is whether such an "award" can be made the basis of a court decree without the consent of parties.

Prima facie it would appear that section 47 of the Arbitration Act governs such references to arbitration by parties in a pending suit without reference to or knowledge of the Court. Under the proviso to section 47, an award otherwise obtained, that is, not under the specific provisions of the Act, may, with the consent of all parties interested, be taken into consideration as a compromise or adjustment of a suit by any court before which the suit is pending. Chapter II of the Act provides for arbitration without the intervention of court; Chapter III, for arbitration with the intervention of Court where there is no suit pending; and Chapter IV for arbitration in suits through the Court. The Act does not provide for arbitration in pending suits except through Court; and according to the proviso to section 47, an award on the footing of such arbitration may only form the basis of a decree by consent.

A different view was taken by Leach, C.J., and Lakshmana Rao, J., in *Arumugha Mudaliar* v. *Balasubramania Mudaliar*[1]. In that case there was a reference in a pending suit to a single arbitrator who passed a signed award to which objection was taken. It was held that the Arbitration Act of 1940 did not change the law as laid down in *Subbaraju* v. *Venkataramaraju*[2], by a Full Bench of our High Court that an award in a private arbitration in a pending suit can be treated as an agreement for compromise and form the basis of a decree under Order 23, rule 3, Civil Procedure Code although the parties did not accept it. The correctness of this Bench decision has been doubted by single Judges of this Court and my attention has been drawn to a reference to a Full Bench by Venkatarama Aiyar, J., in C.R.P No. 1783 to 1785 of 1949. That reference was made in view also of some Bench decisions outside Madras where a different view was taken. It may also be said the correctness of this decision was doubted by Happell and Govindarajachari, JJ., in C.M.A. No. 623 of 1946 in a reference to a Full Bench which however did not specifically determine the point for reasons which need not be gone into.

I have carefully considered the bearing of the decision in *Arumugha Mudaliar* v. *Balasubramania Mudaliar*[1] on the present case, which can, I think, be readily differentiated, as there is here no original award produced signed by all the arbitrators as in that Bench decision and also in *Subbaraju* v. *Venkataramaraju*[2]. When in a private arbitration in a pending suit without the knowledge of the Court arbitrators begin to differ from each other, give each other the lie, if not begin to quarrel with each other, another dispute is in consequence created and the only course is for a Court to ignore the arbitration and decide the suit on its merits.

For these reasons, I dismiss this appeal with a direction to the District Munsif to give this long pending suit as expeditious a disposal as possible. I would further direct the parties to bear their own costs both in the appeal in the lower appellate court and also in this civil miscellaneous appeal irrespective of the result of the suit.

No leave.

R.M. *Appeal dismissed.*

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1. (1945) 1 M.L.J. 463 : I.L.R. (1946) Mad. 39.

2. (1928) 55 M.L.J. 429 : I.L.R. 51 Mad. 800 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATA-RAMA AYYAR.

S. M. Abdul Azeez and Sons ... *Plaintiffs**

v.

Paruchuri Subrahmanyam and others .. *Defendants.*

Vegetable Oils and Oilcakes (Forward Contracts Prohibition) Order (1944), clause 4—If void—Defence of India Rules, rule 81 (2)—*Powers under—If exceeded.*

None of the provisions of the Vegetable Oils and Oilcakes (Forward Contracts Prohibition) Order, 1944, is void or *ultra vires.* Clause 4 of the Order does not go beyond the power conferred by clauses (*a*), (*b*) and (*f*) of sub-rule (2) of rule 81 of the Defence of India Rules. The regulation or prohibition is only in respect of distribution and disposal of articles or things. The provision for payment of difference on the basis of the rates fixed by the Government may be viewed as incidental or supplementary to the total prohibition under rule 81 (2) (*f*) of the Defence of India Rules.

Cases referred to the High Court by the First Additional Subordinate Judge of Vijayawada under the proviso to section 113 of the Civil Procedure Code, 1908, in his letter Dis. No. 2308, dated 8th August, 1951, in O.S. Nos. 17, 24 and 28 of 1950 on his file.

T. G. Krishnamurthi, M. S. Ramachandra Rao and *M. Krishna Rao* for Plaintiffs.

D. Narasaraju, K. V. Krishnamurthi and *T. R. Srinivasan* for Defendants.

The Advocate-General (*V. K. Thiruvenkatachari*) for the Government Pleader (*P. Satyanarayana Raju*) on behalf of the State.

The Judgment of the Court was delivered by

Rajamannar, C.J.—These three cases have been referred to this Court by the First Additional Subordinate Judge of Vijayawada under the proviso to section 113 of the Code of Civil Procedure recently inserted by Act XXIV of 1951. These references arise out of three suits pending in the Court of the Subordinate Judge in which the validity of the Vegetable Oils and Oilcakes (Forward Contracts Prohibition) Order (1944) was questioned.

The particular provision whose validity is challenged in these three suits is that contained in clause 4 of the Order. Clause 3 provides that no person shall, after a specified date, enter into any forward contracts in certain articles. Clause 4 runs thus :—

"Notwithstanding any custom, usage or practice of the trade, or the terms of any contract or any regulation of an Association relating to any contract—

(1) every forward contract in any article to which this order applies outstanding at the close of business on the specified date shall be deemed to be closed out at such rate as the Central Government may by notification in the Official Gazette fix in this behalf, and different rates may be fixed for different classes of contracts ;

(2) All differences arising out of any contract so deemed to be closed out shall be payable on the basis of the rate fixed as aforesaid and the seller shall not be bound to give, and the buyer shall not be bound to take delivery ;

(3) payment of all difference legally due from a member of an association to another member of such association in respect of any forward contract closed out under this clause shall be made to the clearing house of the Association and for the purposes of calculating such differences, the rate fixed by the Central Government under sub-clause (1) shall be deemed to be the settlement rate fixed by the Association under its by-laws or other regulations which shall, for the relevant purpose, continue to have effect subject to the provisions of this order."

It is common ground that the order was issued in purported exercise of the powers conferred by sub-rule (2) of rule 81 of the Defence of India Rules. The following clauses of that sub-rule are material for the consideration of the question which falls now for our decision :

" (*a*) for regulating or prohibiting the production, treatment, keeping storage, movement transport, distribution, disposal, acquisition, use or consumption, of articles or things of any description whatsoever and in particular for prohibiting the withholding from sale, either generally or to

* Referred Case Nos. 33, 39 and 40 of 1951. 2nd January, 1953.

specified persons or classes of persons, of articles or things kept for sale to be sold either generally or to specified persons or classes of person or in specified circumstances;

(*b*) for controlling the prices or rates at which articles or things of any description whatsoever may be sold or hired and for relaxing any maximum or minimum limits otherwise imposed on such prices or rates;

* * * * * * *

(*f*) for any incidental and supplementary matters for which the Central Government or the Provincial Government thinks it expedient for the purposes of the order to provide, including, in particular, the entering search and inspection of premises to which the order relates with a view to securing compliance with the order, the seizure subject to the provisions of sub-rule (3-cc) by a person authorised to make such search of any articles in respect of which such person has reason to believe that a contravention of the order has been, is being or is about to be committed, the grant of issue of licences, permits, certificates and other documents and the charging of fees therefor; and an order under this rule may be made so as to apply either to persons or undertaking generally or to any particular person or undertakings or class of persons or undertaking, and so as to have effect either generally or in any particular area."

The argument of Mr. Narasaraju is that the provision for payment of differences on the footing that forward contracts outstanding on the date specified in accordance with the terms of the order shall be deemed to be closed out at such rates as the Central Government may, by notification, fix in this behalf, is not a provision which can be said to fall within the scope of either clause (*a*), (*b*) or (*f*) of sub-rule (2). He concedes that the total prohibition of forward contracts in future which is provided in clause (3) of the order as well as the provision in clause 4 (2) of the order discharging the seller and the buyer from their respective obligations to give and take delivery would fall within clause (*a*) of sub-rule (2). That would be prohibiting the distribution and disposal of articles. But he contends that the provision for payment of differences on the basis of the rates fixed by the Government cannot be deemed to be a provision for regulating the production, treatment, distribution, disposal, acquisition, or use of the articles. The contention is not without some force. The language is not for regulating contracts of sale. The regulation or prohibition is only in respect of distribution and disposal of articles or things. But, in our opinion, the provision for payment of differences in respect of forward contracts entered into before the coming into force of the Prohibition order falls within clause (*f*) of sub-rule (2) as either an incidental or supplementary matter for which the Central Government thinks it expedient for the purpose of the order to provide. The position in respect of contracts subsisting on the date of the coming into force of the order is this: They are deemed to be closed but at a particular date. The seller is not bound to give and the buyer is not bound to take delivery. In other words, the contract is being compulsorily closed and the parties are being prevented from performing it. As incidental to this prohibition or performance of contracts already entered into and subsisting, the Central Government evidently thought it expedient to provide for payment of differences. It was evidently thought that it was equitable that in cases where contracts which were perfectly legal when they were entered were being interfered with and the performance under those contracts was being prohibited, to provide for some compensation. Any adjustment of the rights of the parties on the basis of the compulsory closing out of the contract would certainly be either an incidental or a supplementary matter within the meaning of that expression under clause (*b*) of sub-rule (2). It is not necessary to decide whether it is an incidental or supplementary matter. The two terms taken together practically exhaust all contingencies. We, therefore, hold that the provisions of clause 4 of the order in question do not go beyond the power conferred by clauses (*a*), (*b*) and (*f*) of sub-rule (2).

The learned Subordinate Judge who has referred the case to us was impressed by the decision of a learned Judge of the Nagpur High Court in *Kissen Lal* v. *Vithal*[1]. The learned Judge took the view that a provision similar to clause 4 of the order before us in effect provided for the substitution of one kind of contract between the parties thereto to an entirely different contract. The learned Judge says:—

"No doubt, power there is under clause (*a*) to prohibit the doing of a certain specified thing or regulate it. But, where, acting under that power, the doing of a thing is forbidden, no further question of regulating it arises . . . . . True, there would be a scope for regulating the manner

1. A.I.R. 1951 Nag. 320.

of performance of pre-existing contracts. But even there, if the actual performance of the contract is forbidden, what is there to be regulated? It is said that the rights of the parties remain to be adjusted and that the provision in that regard would amount to regulating the contract. The 'regulating' can, however, be of the things specified in clause (a). Adjusting rights of parties to a contract pertaining to 'disposal or acquisition' of an article is not regulating the 'disposal or acquisition' of that article."

So far, we are also inclined to take a more or less similar view. The learned Judge then deals with clause (*f*). He was inclined to place a very narrow construction on the words "incidental and supplementary" in that clause. He observes:

"It seems to me that having closed out a contract, it was wholly unnecessary to provide for the adjustment of the rights of the parties if the purpose of so doing was merely to secure 'compliance' with the order closing out the contract."

The learned Judge places reliance on the words "with a view to secure compliance with the order". With respect to the learned Judge we must point out that these words related to particular subject-matter only, namely, "the entering, search and inspection of premises". It is only in respect of these things that it is necessary that they should be for securing compliance with the order. So far as the main general power is concerned, it is found in the opening words of clause (*f*) which are not qualified by the later provision contained in the phrase "with a view to secure compliance with the order." It is sufficient if we are able to hold that the language of the provision is to provide for an incidental or a supplementary matter for which the Central Government thinks it expedient for the purpose of the order to provide. That we are prepared to hold to be in this case. We are unable to follow the reasoning of the learned Judge of the Nagpur High Court, in his construction of clause (*f*) of sub-rule (2).

In the result, we answer the references as follows:—None of the provisions of the Vegetable Oils and Oilcakes (Forward Contracts Prohibition) Order, 1944, is void or *ultra vires*.

R.M. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AYYAR.

The India Sugars and Refineries, Ltd., by its Director V. T. Padmanabhan .. *Appellant**

v.

The Estate of the late V. Ramalingam, represented by executors, Rukh-Ul-Mulk S. Abdul Wajid and others .. *Respondents.*

Companies Act (*VII of* 1913), *section* 87 (c) (*inserted by Act XXI of* 1936)—*Managing Agent's commission—Whether he could stipulate to draw additional remuneration—Agent employed by Managing Agent—How far justifiable—Separate business of Managing Agent with assistance of company's staff—Fiduciary capacity—Right of the company to claim such profits—Limitation—Limitation Act* (*IX of* 1908), *Articles* 120, 36 *and* 90—*Applicability.*

(1) Where a company appointed a Managing Agent before the commencement of the Indian Companies Amendment Act of 1936,

Held, that there was nothing illegal in the Managing Agent stipulating for and drawing any remuneration additional to the remuneration fixed under the resolutions passed by the company. Section 87 (*c*) applied only to the cases of Managing Agents after the commencement of the Amending Act of 1936.

(2) Where the Managing Agent employed another firm to do the work for himself and the company wanted him to refund the remuneration received by him as the Managing Agent because he was prevented during the period of the employment of that other firm to draw the commission,

Held, that in so far as the company did not enter into any agreement to the effect that the other firm should be paid and not the Managing Agent, the company could not claim refund of moneys that he had drawn as commission.

(3) As regards profits earned by the Managing Agent in a separate business of his own carried on by him with the assistance of the company's staff, etc.,

* Appeals Nos. 766 and 767 of 1948. 31st October, 1952.

Held, that in so far as this is a case of advantage taken by a person in his fiduciary capacity, the law was explicit that he should not keep to himself any gain but give it up to the person to whom he owed fiduciary duties. Hence the amount of profit on his separate business could be claimed by the company. To such a suit no other article of the Limitation Act is applicable and therefore Article 120 must apply. Article 36 or Article 90 of the Limitation Act would not apply.

Raja Kumar v. *Fateh Bahadurlal*, (1917) 38 I.C. 525 ; *Raja Khatter Kristo Mitter* v. *Kumar Dinendra Narain Roy*, (1899) 3 C.W.N. 202 and *Subbiah Thevar* v. *Samiappa Mudaliar*, (1938) 1 M.L.J. 334: I.L.R. (1938) Mad. 586 (F.B.), referred to.

Appeal against the decrees of the District Court, Bellary, dated 25th March, 1948, in O.S. No. 53 of 1945 and O.S. No. 51 of 1945.

The Advocate-General (*V. K. Thiruvenkatachari*), *N. V. B. Sankara Rao* and *G. Vasanta Pai* for Appellant.

K. R. Venkatarama Sarma and *Messrs. Short Bewes & Co.* for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—These two appeals arise out of two suits filed by the appellant, the India Sugar Refineries, Ltd., by its Director and Managing Agent, T. Padmanabhan, for recovery of sums of money from the estate of one V. Ramalingam, who was a director of the company and also its sole managing agent from 16th November, 1936, till the date of his death 18th December, 1942. The plaintiff company was incorporated under the Indian Companies Act with the principal object of manufacture of Sugar at Hospet. By its memorandum of association, Messrs. Ranganathan & Co., a partnership firm, were appointed managing agents of the company. The firm continued to hold that office till they resigned that office in or about July 1935. Subsequent to this, an agreement was entered into by the company with V. Ramalingam under which the latter was appointed its sole managing agent on terms set out in the agreement. V. Ramalingam as the managing agent was entitled to receive a salary of Rs. 800 per mensem together with a commission of $7\frac{1}{2}$ per cent. per annum on the total net annual income of the company. Besides these he was also entitled to a commission in respect of work done by him in capacities other than that of a Managing Agent. More detailed reference will be made to the material terms in due course in this judgment.

In the two suits out of which these appeals arise, the company claimed various amounts on the ground that Ramalingam had wrongfully been paid those amounts, or had drawn those amounts or was otherwise liable to pay the company the amounts which he had received. The learned District Judge of Bellary who tried both the suits dismissed them with costs. There was another suit which was tried along with these two, claiming more or less similar reliefs, and that too was dismissed.

In the two appeals, the learned Advocate-General who appeared for the appellant company pressed before us only certain items among the several items claimed by the company in the suits originally. In Appeal No. 766 of 1948, the learned Advocate-General pressed only one item, namely, the aggregate of the amounts drawn by Ramalingam as commission on the sales of sugar effected through him as commission agent. The rate of commission was $1\frac{1}{2}$ per cent. on the price. The amount of such commission was in the aggregate Rs. 34,929-6-0. Ramalingam drew this commission in accordance with the terms of the agreement executed between the company and him. The material clause in the agreement runs as follows :

"2. (*e*) The said allowances and commission of $7\frac{1}{2}$ per cent. shall be exclusive of and shall not include . . . . (iii) remuneration to the agent as commission agent and selling agent for the company in relation to work as commission agent and selling agent and the work of shipping, landing, clearing and storing materials, goods and plant purchased out of and imported into India and the work of purchasing out of and importing into India materials, goods and plant for the purpose and benefit of the company which work shall be done by the agent upon such terms as to remuneration and otherwise as may be mutually agreed upon in writing from time to time."

Clause 3 of the agreement is in general terms and runs thus :

"The Managing Agent may also in addition to his duties as Managing Agent as hereunder mentioned perform any other duties and work for the company which the directors may decide and shall receive such reasonable and proper remuneration for such work as shall be from time to time

agreed upon between the Managing Agent and the Directors, such remuneration being in addition to the remuneration aforesaid."

It is clear that the commission in question which was drawn by Ramalingam would certainly fall within one or other of these two clauses. Article 115, clause 22 conferred on the directors of the company the power to appoint the firm of agents as brokers or selling agents of the company for the sale of sugar or other articles manufactured by the company on such terms as to remuneration or commission and otherwise as the directors may in their discretion think proper, such remuneration to be in addition to the agency remuneration payable under the agency agreement. In exercise of this power and in pursuance of the term in the agency agreement, it is common ground that the Board of Directors fixed a rate of 1½ per cent. on the sale amounts. Three of the relevant resolutions have been marked as Exs. B-21, B-22 and B-23 dated 10th December, 1940, 13th November, 1941 and 4th December, 1942, respectively. The contention of the learned Advocate-General is that the Managing Agent was not entitled to claim and the directors of the company were not entitled to pay any remuneration in addition to the remuneration fixed under the agreement which shall be a fixed percentage of the net annual profits of the company, together with an office allowance. His contention was based entirely on the provisions of section 87-C which was inserted in the Indian Companies Act by the Amending Act of 1936 (Act XXI of 1936). Sub-section 2 of this section is as follows :

" Any stipulation for remuneration additional to or in any other form than the remuneration specified in sub-section (1) shall not be binding on the company unless sanctioned by a special resolution of the company."

The flaw in the argument of the learned Advocate-General is this : The Amending Act came into force on 15th January, 1937, the agreement between the company and the Managing Agent was executed on 16th November, 1936, about 2 months before the Act came into force. Section 87-C expressly says that the provisions of that section would only apply

" where any company appoints a managing agent after the commencement of the Indian Companies (Amendment) Act, 1936."

It follows, therefore, that the company is not entitled to rely upon section 87-C, sub-section (2). It was not contended that, under the law as it stood before the insertion of this section, there was anything illegal in the managing agent stipulating for and drawing any remuneration additional to the remuneration drawn by him as managing agent. The learned Advocate-General's contention must therefore be overruled. As no other matter was argued in this appeal, this appeal fails and is dismissed with costs of contesting respondents 1 to 3.

In the next appeal, Appeal No. 767 of 1948, there are two items of claim. The first relates to a payment of Rs. 4,500 to Messrs. Parry & Co. in the following circumstances : Ramalingam requested Messrs. Parry & Co., to lend him technical assistance to manage the affairs of the company and Messrs. Parry & Co. agreed to do so for a consideration of Rs. 1,500 per month Ramalingam practically assigned all his powers as managing agent to Parry & Co. during these three months, and Messrs. Parry & Co., acting under a power of attorney, executed by Ramalingam in their favour did all the duties of a managing agent during that period. Though the contract was really between Ramalingam and Messrs. Parry & Co. eventually the Board of Directors by a resolution dated 10th December, 1940, sanctioned the remuneration payable to Messrs. Parry & Co. to be paid out of the funds of the company. The resolution runs thus :

" Remuneration to Messrs. Parry & Co. for the period from 15th January, 1940 to 14th April, 1940, Rs. 1,500 per month is sanctioned."

The learned trial Judge found that the result of the arrangement under which Messrs. Parry & Co. practically came to the aid of Ramalingam was that Messrs. Parry & Co. assumed practically full control as managing agent. The learned Judge therefore considered that

"strict honesty required Ramalingam not to draw his own remuneration as managing agent during this period or to draw any commissions or allowances appertaining to his position as such during this period."

Unfortunately, however, requirements of strict honesty cannot be the basis of any claim unless it is also supported by a legal principle. Strictly speaking, Messrs. Parry & Co. worked as agents of Ramalingam and not as agents of the company. Ex. A-46 is the letter addressed by Messrs. Parry & Co. to Ramalingam confidentially in which Messrs. Parry & Co. offered to send a qualified Sugar Chemist with administrative experience along with an accountant and assistant in consideration of a cash payment of Rs. 1,500 per month. There is no evidence to show that this arrangement was entered into by the company as such, indeed the company could not enter into any such agreement as the entire managing agency had been entrusted to Ramalingam. As between Ramalingam and the company Ramalingam was entitled to demand and to receive and the company was liable to pay, the remuneration stipulated in the managing agency agreement. Actually what happened was that though in strict honesty it was Ramalingam who should have paid Messrs. Parry & Co. from his pocket, he somehow managed to get the company to make the payment. We agree that it was not strictly honest on the part of Ramalingam to have done so, but that would not make his receipt of the stipulated remuneration illegal. If anyone could be blamed in this matter, it was the Board of Directors who made a payment which was wholly unjustified. It may be that they will be liable to be surcharged, but surely there is no legal basis for a claim by the company against Ramalingam or his estate in respect of the amount of Rs. 4,500 or any other sum. The learned Judge thought that Ramalingam's estate should refund the sum of Rs. 2,400 at Rs. 800 per month for a period of 3 months when Messrs. Parry & Co. acted as managing agents, but did not grant a decree to the company because he held that the claim was barred by limitation. We hold that the claim itself was unsustainable.

The last item pressed upon us relates to a sum of Rs. 8,510 which is the profit earned by Ramalingam on certain transactions which we shall now mention. The Sugar Control Order came into force in April, 1942 and the prices of sugar were fixed both ex-factory and in the open market. What Ramalingam did was, he got himself appointed as a sugar dealer, purchased large quantities of sugar at Rs. 31-15-0 the controlled price ex-factory, and sold it to outsiders at Rs. 32-8-0 the controlled price for outside sales, and pocketed the difference of nine annas per bag. The learned Judge has found on the evidence that the sugar purchased by Ramalingam continued to remain in the company's factory premises and Ramalingam used the company's staff and premises for his own business as a sugar dealer. The ledger folio of Ramalingam in the company's accounts shows that on 13th June, 1942, Ramalingam purchased 15,128 bags of sugar for over Rs. 4,83,000. But he never paid the amount to the company. His account was debited with this amount. This quantity of sugar which remained in the company's premises was being sold over several days and the amounts fetched by the sales were being credited in his account. The sum of Rs. 8,510 represents the difference between the price at which Ramalingam purchased calculated at Rs. 31-15-0 and the price at which he sold in the market, namely, Rs. 32-8-0. The learned trial Judge observed that he would have had no hesitation in giving the company a decree for this amount on account of the fact that Ramalingam had utilised the office staff for his own business but ultimately dismissed the company's claim on the ground that it was barred by limitation. We agree with the District Judge that the company was entitled to this amount. Therefore, the question of limitation remains to be considered.

The learned Judge was inclined to hold that Article 36 or Article 90 would apply. The amount of Rs. 8,510 was earned sometime in 1942, and the suit was instituted on 14th December, 1945. It was contended by the learned Advocate-General that neither article applies and the proper article to apply was Article 120. Article 36 runs as follows :

Description of suit.	*Period of limitation.*	*Time from which period begins to run.*
For compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein specially provided for.	Two years ..	When the malfeasance, misfeasance or non-feasance takes place.

If this Article were to apply, clearly the claim is barred, but in our opinion, it is not the appropriate article. In the first place, it may be mentioned that this article contemplates an action for compensation for a wrong in the nature of a tort. Secondly, the suit to which this article would apply is a suit for compensation. If the suit is for the recovery of a particular property or sum of money as such, then the suit cannot fall within Article 36. In *Rasa Kumar* v. *Fateh Bahadurlal*[1], dealing with this article, Atkinson, J., of the Patna High Court observed as follows :

" In my opinion, it (Article 36) has no application whatsoever to the present case. We have only to read the terms of the article to see that it is an article referable to damages for some tortuous act. This is not a case of damages at all. This is a case in which plaintiff seeks to recover a specific sum of money, her property which has been applied by the defendant in the action for his own use, benefit and enjoyment."

In *Rajah Khatter Kristo Mitter* v. *Kumar Dinendra Narain Roy*[2], Maclean, C.J., takes the same view of Article 36. The learned Chief Justice says :

" It seems to me that the first answer to the contention that the case comes within that Article 36 is that this is not a suit for compensation in the true acceptation of the term. What compensation, *qua* compensation does the suit ask for ? I received no answer from the appellant's vakil to that question. If it be not for compensation, that alone would be sufficient to exclude the case from the operation of Article 36."

The learned Chief Justice, Leach, C.J., in the Full Bench decision in *Subbiah Thevar* v. *Samiappa Mudaliar*[3], dealing with this article observed :

" Article 36 applies to torts not specially provided for . . . . . . In the first place, in Article 36 the word ' compensation ' is used, which is the appropriate word to apply in connection with a suit to remedy an injury to a person or a person's property."

The learned Chief Justice was dealing with a case of a suit filed against a trustee to make good the loss sustained by the trust by reason of his omission to collect moneys due to the trust. It was held by the Full Bench that neither Article 36 nor Article 62 applied to the case, but it was Article 120 that applied.

An analysis of the nature of the plaintiff's claim for this amount of Rs. 8,510 would clearly show that Article 36 has no application. Obviously, this amount is not claimed as compensation for any tortuous act on the part of Ramalingam. The basis of the company's claim is really to be found in the well-known equitable principle now embodied in section 88 of the Trusts Act, which is as follows :

" Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealing under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained."

Ramalingam was one of the directors of the company. He was also the sole managing agent. He was bound in a fiduciary character to protect the interests of the company. Here, the finding is that he availed himself of this character and utilised the premises and staff of the company as well as his credit with the company by reason of the position which he occupied and gained for himself a pecuniary advantage in the sum of Rs. 8,510. The company now claims that Ramalingam must hold the advantage so gained for the benefit of the company.

Article 90 would not in this view of the nature of the claim apply to the case. That article is the residuary article dealing with claims of a principal against an agent. We are inclined to hold that the neglect or misconduct contemplated

1. (1917) 38 I.C. 525.
2. (1899) 3 C.W.N. 202.
3. (1938) 1 M.L.J. 334 : I.L.R. (1938) Mad. 586 (F.B.).

by the article is neglect or misconduct in the course of and intimately connected with the agency duties, *qua* agent. It is in this view that this article has been applied to cases where a principal sues the agent to recover the secret profits made by the agent. In the present case, it would not be accurate to speak of the sum of Rs. 8,510 as secret profit made by the agent. It is not as if Ramalingam was appointed an agent of the company to sell at a particular rate and Ramalingam sold at a higher rate and secretly pocketed the difference. As the learned trial Judge observed, it cannot be said that Ramalingam was doing anything *per se* illegal, to use the language of the learned trial Judge, Ramalingam's actions were all *intra vires*. To such a case Article 90 would not have application. This is a case where the basis of the claim is not neglect or misconduct, but the advantage taken by a person in a fiduciary capacity of his position to make a gain. The law says that such a person shall not keep that gain to himself but shall give it up to the person to whom he owes a fiduciary duty. To such a suit there is no other article applicable and therefore Article 120 must apply. The decision of the Full Bench of this Court in *Subbiah Thevar* v. *Samiappa Mudaliar*[1] supports us in this view. The suit was filed in 1945 and is well within the time of six years provided by Article 120. We therefore do not agree with the learned Judge that the claim is barred by limitation. To this extent we allow this appeal and pass a decree in favour of the company for Rs. 8,510. From this amount of Rs. 8,510 will be deducted a sum of Rs. 2,406-1-0 which is the amount debited against Ramalingam towards godown rent. The decree will bear interest at six per cent. per annum from the date of suit. In this appeal, the appellant and the contesting respondents will pay and receive proportionate costs.

Appeal No. 766 of 1948 dismissed and
K.C. *Appeal No. 767 of 1948 allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AYYAR.

Vasudeva Kavu Patteri .. *Appellant* (Plaintiff)*

v.

Mana Naika and others .. *Respondents (Defendants).*

Civil Procedure Code (V of 1908), Order 21, rule 90—Scope of—Sale held on subsequent date without an order of adjournment and further proclamation—Irregularity—Remedy.

Breaches of the provisions of Civil Procedure Code relating to execution against immoveable properties commencing from their attachment down to their sale should be dealt with under Order 21, rule 90 and not otherwise and the order of confirmation under Order 21, rule 92 shall give the final quietus to all objections which could be raised under Order 21, rule 90. So, where a sale is held on a date different from that notified without an order of adjournment and without a further sale proclamation that would amount only to an irregularity and the only remedy open to the party aggrieved is to apply to set aside the sale under Order 21, rule 90 on proof that substantial injury has resulted therefrom. If the sale is not so set aside the title of the purchasers become indefeasible and it is not open to challenge by a separate suit.

Case-law reviewed and discussed.

Appeal against the decree and judgment dated the 1st day of August, 1947 and made in O.S. No. 87 of 1945 by the Subordinate Judge of South Kanara.

K. V. Venkatasubramania Ayyar, C. K. Viswanatha Ayyar and *K. Vittal Rao* for Appellant.

K. Y. Adiga, T. Krishna Rao, K. P. Adiga, M. K. Nambiar and *N. Koteswara Rao* for Respondents.

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1. (1938) 1 M.L.J. 334 : I.L.R. (1938) Mad. 586 (F.B.).

* Appeal No. 234 of 1948. 24th October, 1952.

The Judgment of the Court was delivered by

Venkatarama Ayyar, J.—The plaintiff is the appellant. The facts so far as they are relevant for the purpose of this appeal are these: On 11th August, 1933, one Shivakava Patteri, the father of the plaintiff, executed along with four others a promissory note for Rs. 3,000 in favour of the Canara Bank. For the balance due on this promissory note the Bank filed O.S. No. 427 of 1934 on the file of the Court of the District Munsif of Kasargod; obtained an *ex parte* decree for Rs. 1,869-4-10 on 7th September, 1934; and realised a sum of Rs. 350 in R.E.P. No. 1564 of 1934. The books of the bank show that on 30th July, 1935, a sum of Rs. 1,637-13-6 being the balance due under the decree on that date was received from Mana Naika, the first defendant in this suit (Exhibit D-75). On the same day the bank assigned the decree to him. The first defendant brought himself on record as the assignee decree-holder and after several unsuccessful attempts to realise the decree amount in R.E.P. Nos. 1410 of 1936, 584 of 1938, 1186 of 1938 and 172 of 1939, eventually brought the suit properties to sale in R.E.P. No. 401 of 1940 and they were purchased by defendants 2 to 4 in court auction on 26th January, 1942. An application filed on behalf of the plaintiff who was then a minor represented by his mother as his guardian to set aside the sales under Order 21, rule 90 of the Code of Civil Procedure was dismissed as no security was furnished. The sales were duly confirmed and possession taken by the respective purchasers on 29th June, 1942, 17th June, 1942 and 23rd July, 1943. Defendants 5 to 7 are purchasers of some of the suit properties from defendants 2 to 4. On 2nd October, 1945, the appellant filed O.S. No. 87 of 1945 on the file of the court of the Subordinate Judge, South Kanara, for a declaration that the sales held on 26th January, 1942, were illegal and void on various grounds set out in the plaint and for recovery of possession of the properties with mesne profits. It was also alleged in the plaint that the father of the plaintiff had disappeared in 1935 and had not been heard of since, and must be presumed to be dead. The claim was contested by all the defendants. The Subordinate Judge of South Kanara who heard the suit held that the plaintiff had not established any grounds invalidating the sales and dismissed the suit with costs. The present appeal has been preferred against this decision.

On behalf of the appellant Mr. K. V. Venkatasubramania Iyer pressed two points: (1) Sivakavu Patteri, the father of the plaintiff, was only a surety for the other co-executants of the promissory note, dated 11th August, 1933; that the payment of Rs. 1,637-13-6 to the bank on 30th July, 1935 was really made by Sivakavu Patteri, but that he had the decree nominally assigned in the name of the first defendant so as to enable him to recover the amounts from the other judgment-debtors and that in breach of this arrangement, the first defendant fraudulently executed the decree against the properties of Sivakavu Patteri taking advantage of his disappearance; and that the purchases by defendants 2 to 4 were made in collusion with the first defendant. (2) The execution sale was fixed for 24th January, 1942; it was held not on that date but on 26th January, 1942; there was no order adjourning the sale from 24th January, 1942 to 26th January, 1942; there was no further proclamation, and that the sale is therefore a nullity.

On the first question the burden is heavily on the plaintiff to establish that the payment of Rs. 1,637-13-6 to the bank on 30th July, 1935, was really made by his father; that the first defendant was only a benamidar for him; that the execution proceedings taken by the first defendant were fraudulent; and that the purchasers were parties to the fraud. There is no reliable evidence that it was Sivakavu Patteri that paid the amount of Rs. 1,637-13-6 to the bank. Exhibit D-75 is an extract from the ledger book of the bank. That shows that the payment was made by the first defendant. The plaintiff relies on Exhibit P-16 which is a letter, dated 30th July, 1935, written by the Agent of the Bank at Kasargod to their legal Adviser K. N. Naik. It runs as follows—

"We have received the full amount due from Mr. K. Sivakavu Bhat. So, we need not press for the sale."

This letter might mean either that the amount was received from K. Sivakavu Bhat or that the amount due from K. Sivakavu Bhat was received. If the amount was received from the plaintiff's father, then the Vakil would have been instructed to enter up satisfaction of the decree. But he is instructed only not to press for the sale. If the statement in the letter, meant that it was plaintiff's father who paid the amount, then, it is inconsistent with the entry made in the account books on the same day Exhibit D-75 and for this no explanation has been offered. The Vakil to whom the letter was addressed is stated to be dead. But the Agent who wrote this letter is alive and he has not been examined. P.W. 1 merely proves Exhibit P-16 and has no personal knowledge of the matter. The plaintiff as P.W. 8 stated in cross-examination that the agent was in Bombay or so and it was suggested to him that in fact he was in Cochin. As that Agent was even then in the service of the Bank, it could not have been difficult for the plaintiff to have ascertained his whereabouts and taken steps to have his evidence on commission. P.W. 3 gave evidence in support of the plaintiff. But he is his close relation and has nothing to lose by supporting him, himself having been adjudged insolvent. Thus, the evidence on the side of the plaintiff is totally insufficient to prove that it was Sivakavu Patteri that paid the sum of Rs. 1,637-13-6 and that the assignment in favour of the first defendant was benami for him while Exhibit D-75 is *prima facie* against this contention. It was argued that the first defendant had not gone into the box and that every presumption must be made against him. But he has no interest in this litigation. It is defendants 2 to 4 and their alienees who are in possession of the properties which are sold in Court auction on 26th January, 1952. No presumption against them can be drawn by reason of the first defendant not going into the box. On a consideration of the materials placed before us, we agree with the Subordinate Judge that the plaintiff has failed to establish that the assignment of the decree in favour of the first defendant was benami for his father.

It is the second contention that the sale held on 26th January, 1942, was a nullity that has been strongly pressed on us. The facts are that the sale proclamation fixed 24th January, 1942, as the date on which the sale was to be held. That day was a penultimate Saturday and therefore, a Court holiday. The sale was accordingly held on Monday the 26th January, 1942, being the next working day. It is common ground that no order was passed on 24th January, 1942, adjourning the sale to 26th January, 1942. It is argued for the appellant that as there was no such order, the sale held on 26th January, 1942, was a nullity and no title was acquired under that sale by the purchasers. It cannot be doubted that if a sale is held on a date different from that on which it was notified, it would be at least a material irregularity and if that had resulted in substantial injury, the sale would be liable to be set aside if proceedings are taken under Order 21, rule 90. But the plaintiff seeks to impeach the sale not in proceedings taken under Order 21, rule 90 but in an independent action. The question is whether it is open to the plaintiff to maintain an action for setting aside the sale on the grounds now put forward. In *Swaminatha* v. *Krishnaswami*[1], the facts were that a Bank obtained a decree against a Hindu father on a promissory note executed by him and in execution of the decree sold the joint family properties. The sons of the judgment-debtor filed a suit for a declaration that the sale was not binding on them, on the gtound, *inter alia* that there had been no attachment of the properties and that therefore the sale was a nullity. It was held that the failure to attach the properties was only an irregularity such as would give right to move the court under Order 21, rule 90 and if that was not done, the purchaser obtained a title which could not thereafter be attacked by the sons. Patanjali Sastri, J., delivering the judgment of the Bench observed :

"Are the plaintiffs then entitled to avoid the sale to Sundararaju Pillai, so far as their shares are concerned? Their father the first defendant failed to take any steps to have the sale set aside under Order 21, rule 90, on account of the irregularity, presumably because no substantial injury had resulted, nor did they avail themselves of that remedy which was open to them also as persons whose interests are affected by the sale. See *Bhubaneshwar Prasad Narayan Singh* v. *Bihari Lal*[2], . . .

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1. (1946) 2 M.L.J. 307 : I.L.R. (1947) Mad. 471.
2. (1935) I.L.R. 14 Pat. 436.

* * * * If omission to attach does not affect the jurisdiction of the Court to sell and is a mere irregularity, the purchaser's title cannot, as it seems to us, be displaced by any antecedent irregularity in publishing or conducting the sale, except by resort to the statutory remedy provided by Order 21, rule 90. That remedy not having been availed of, the purchaser's title has become unassailable and the appeals must fail".

The position, therefore, is that if what happened at the conduct of the sale was only an irregularity, it can be questioned only by an application under Order 21, rule 90. But if that would amount to an illegality, such as would render the sale void, then a suit would be maintainable. The point for decision then is whether the sale of the properties on 26th January, 1942, is void on the ground that it was notified for 24th January, 1942 and there was no order adjourning it to 26th January, 1942. The argument on behalf of the appellants is that a sale officer gets his authority to sell only under the orders of Court, that when the sale proclamation fixes the time and place of sale, his authority is limited to a power to sell at the time and place so fixed and therefore, apart from further orders of court, he has no authority to sell at a different time and place from what is mentioned in the sale proclamation. Such a sale, it is urged, is more than an irregularity, it is a nullity and the decisions in *Basharutulla* v. *Uma Churn Dutt*[1], *Motahar Hossain* v. *Md. Yakub*[2], *Jayarama Ayyar* v. *Vridhagiri Ayyar*[3]; *Natesa Pillai* v. *Venkatarama Ayyar*[4] and *Faira* v. *Sangidas*[5] were quoted in support of this position. In *Basharutulla* v. *Uma Churn Dutt*[1], the facts were that the sale was fixed to take place at 12 noon, but it was actually held and concluded before time, at 10-30 A.M. The judgment-debtor filed a suit to set aside the sale on the ground that it was illegal and void. In agreeing with this contention the Court observed as follows:

"By section 287 of the Code (now Order 21, rule 66) it is provided that, when any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court. Such proclamation shall state the time and place of sale and shall specify fairly and accurately certain other things. There is then a provision in the Code that, before a sale takes place, the time and place of sale shall be advertised. . . As a matter of fact the sale in this case did not take place at the time advertised . . . . . . Under these circumstances, it seems to us that there was no sale within the meaning of the Code at all, and that this proclamation of the time and place of sale and the taking place of the sale at the time and place advertised are conditions precedent to its being a sale under the Code at all. Under these circumstances, it appears to us that this property never has been sold under the Code, and consequently the plaintiff is entitled to a declaration that whatever took place when the property was put up for sale has no effect as against him, and that he is entitled to recover this property".

This was followed in *Motahar Hossain* v. *Md. Yakub*[2]; The learned Advocate for the respondents has invited our attention to later pronouncements of the Calcutta High Court in which the corectness of these two decisions has been doubted. Considering the question on principle and apart from authorities, it is difficult to see why the prescriptions as to the time and place of sale in Order 21, rule 66 (2), should alone be held to amount to conditions precedent to a valid sale and not the others. The policy underlying the entire scheme of Order 21, is to ensure due publicity for Court auction sales so that a fair price could be realised for the properties. With this end, elaborate provisions are made for attachment of the properties, rule 54; for settlement of sale proclamation, rule 66; and for its publication, rule 67. The sale is not to be held before the expiry of 30 days from the date of publication, rule 68. The decree-holder is prohibited from purchasing the properties in Court auction, unless he obtains leave of the Court, rule 72. All these provisions are enacted with one purpose and that is, that the properties might fetch the best price possible. If there is a failure to observe any one of these rules, the sale following thereon could in one sense be said to be illegal because illegality consists in the violation of any express provision of law. For such illegalities, however, the Statute provides a remedy and that is an application to set aside the sale under Order 21, rule 90, on proof that substantial injury has resulted therefrom. Order 21, rule 92, prohibits such matters from being made a ground of attack in collateral proceedings by way

1. (1889) I.L.R. 16 Cal. 794.
2. (1924) 40 C.L.J. 311 : A.I.R. 1925 Cal. 201.
3. (1920) 39 M.L.J. 188 : I.L.R. 44 Mad. 35.
4. (1940) 1 M.L.J. 568.
5. I.L.R. (1944) Nag. 584.

of suit. Thus for breach of the rules contained in the Civil Procedure Code, there is a special remedy provided under Order 21, rule 90 and that, under Order 21, rule 92, is the only remedy available to the party. Where the objection to the sale is not that a provision of the Code has been violated, but something apart from the Code, as where the sale is held without the legal representatives being on record, the limitations prescribed by Order 21, rule 90, may not apply and other questions might arise for consideration. But in respect of the matters actually provided by the Code, it is difficult to see why some of them, *viz.*, those relating to time and place should be regarded as fundamental conditions and not the others, which are also prescribed in language as mandatory and intended as much for the protection of the judgment-debtors as the provisions relating to time and place. It comes to this, that in respect of statutory provisions all of them relating to the same subject-matter, some are to be regarded as matters of jurisdiction, while others not. It is true that breaches of some of these rules may be more serious in character and have more damaging effect on the sale than breaches of other rules. But that will be an element legitimately to be taken into consideration on the question of substantial injury under Order 21, rule 90. More than that, on what principle is a distinction to be sustained between breaches of the provisions of the Code wherefore the sale is, without more, to become void, and breaches wherefore the sale could be set aside only on proof of damage? That there is no rational basis for such a distinction was held by Muttuswami Ayyar, J., in *Arunachalam* v. *Kulandasami*[1], where the sale had been held in violation of section 289 (Order 21, rule 67). After expressing the opinion that the

> "Legislature did not probably intend to differentiate between infringements of different rules of procedure relating to sales in execution of immovable property, but intended to treat them all alike and required proof of substantial injury, notwithstanding any irregularity, before the sale is set aside,"

the learned Judge observed as follows :—

> "The term 'irregularity' means in ordinary parlance the state of being irregular or not being in conformity to some recognised rule and in section 311 (Order 21, rule 90) it can only mean "not being in conformity to some one of the rules provided by the Code of Civil Procedure to regulate execution sales. If it had been the intention of the Legislature to make a distinction between illegality and irregularity and to dispense with proving of actual loss in one case and not in the other, they would have expressed that intention clearly in apt language. In one sense whatever is irregular is also illegal, as irregularity connotes want of confirmity to some recognised rule of procedure. * * * * I think that it is violation of an established rule of procedure regarding sales that constitutes an irregularity and it is the consequential loss that constitutes a material irregularity or ground for cancelling the sale."

The question whether failure to observe the provisions of the Civil Procedure Code relating to attachment and sale of properties in execution of decrees would render the sale a nullity has, subsequent to the decision in *Basharutulla* v. *Uma Churn Dutt*[2], come up for consideration by the Judicial Committee and by the Courts in India. The trend of these decisions is clearly to establish that breaches of these rules will not render the sales void, but that they would only be material irregularities furnishing a ground for taking action under Order 21, rule 90. In *Swaminatha* v. *Krishnaswami*[3]; it was held by Patanjali Sastri, and Bell, JJ., that omission to attach the properties before sale would be a material irregularity, but that it would not render the sale void. They observed :

> "The position therefore is this: Attachment is a necessary preliminary to a judicial sale. But a sale without attachment is not a nullity. Omission to attach is a material irregularity which renders the sale liable to be set aside under Order 21, rule 90, if substantial injury is proved".

In *Marudanayagam Pillai* v. *Manickavasagam Chettiar*[4]; the Privy Council had to consider the effect of a failure to observe the provisions of Order 21, rule 66. That rule provides that the sale proclamation should state the time and place of sale and specify the property to be sold and the particulars relating to it such as the revenue

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1. (1895) 5 M.L.J. 70.
2. (1889) I.L.R. 16 Cal. 794.
3. (1946) 2 M.L.J. 307 : I.L.R. (1947) Mad. 471.
4. (1945) 1 M.L.J. 229 : I.L.R. (1945) Mad. 601.

payable thereon, the encumbrances to which it is subject and so forth. It was found by the Privy Council that the particulars given in the sale proclamation as to the valuation of the property were incorrect and that the provisions of Order 21, rule 66 (2) had not been complied with. The legal consequence of this default is thus stated by Sir John Beaumant :

" The position therefore is that this sale took place at a serious under-value occasioned by failure on the part of the Court and of the respondent decreeholder, to carry out their obligations under rule 66, and there can be no doubt that the appellant sustained substantial injury thereby. Their Lordships are of opinion that the case falls within the language of rule 90 and that however dilatory and unsatisfactory the conduct of the appellant may have been, he has not on the facts found debarred himself of the right to have the sale set aside.".

In *Macnaghtan Olpherts* v. *Mahabir Pershed Singh*[1] and *Baliram Singh* v. *Seth Narasingdas*[2] ; the Privy Council have held that the failure to state the amount of revenue as required by Order 21, rule 66 (2) is only a material irregularity. In view of the fact that the specification as to time and place as well as the specification of other particulars concerning the property are all prescribed by the same provision, what applies to one must logically apply to the others and if a breach as regards specification of value or of the revenue payable on the property is only a material irregularity, there is no reason why breaches as regards time and place should be held to be anything more than material irregularities. In *Tassaduk Russul Khan* v. *Ahmed Hussain*[3]; a sale was held before the 30 days prescribed under section 290 (now Order 21, rule 68). In holding that this was only a material irreglarity such as fell within the scope of section 311 (now Order 21, rule 96) and that the sale could be set aside only on proof of substantial injury, the Privy Council observed as follows :

" In the present case the decree-holder failed to comply with the full requirements of section 290, but both on principle and authority their Lordships are of opinion that the case must be treated as the respondents themselves treated it as one of material irregularity to be redressed pursuant to the provisions of section 311, and in the application of that section it was incumbent on the respondents to have proved that they sustained substantial injury by reason of such irregularity ".

In *Gajrajmati Teorain* v. *Akbar Hussain*[4], the question arose with reference to a failure to observe the provisions of section 291 corresponding to Order 21, rule 69. The sale which was fixed for 20th February, 1897, was not held on that date, but on the 23rd February without fresh proclamation. In a suit to set aside the sale on the ground that it was illegal, the Privy Council held that it was a case of material irregularity and the only remedy of the judgment-debtor was to apply under section 311 on proof that there was substantial injury and that a separate suit was barred. Lord Macnaghten observed :

" The Subordinate Judge held that, inasmuch as no fresh proclamation was issued, the sale was void, and therefore he pronounced a decree in favour of the judgment-debtors.

The Court of appeal, assuming that a fresh proclamation ought to have been issued, held that the omission was an irregularity which had involved no loss to the debtor ; that the only course open to the judgment-debtors was to object, as they did, to the confirmation of the sale, and that it was not competent for them to impeach the sale by regular sui .

Their Lordships are of opinion that the decision of the High Court is perfectly right. The provisions of the Code of Civil Procedure are, in their opinion, clear on the point."

In *Rai Radha Krishna* v. *Bishesher Sahay*[5], it was held by the Privy Council that a purchase by a decree-holder who did not obtain permission under section 294 (Order 21, rule 72) did not render the sale a nullity ; and that it was liable to be avoided only on an appropriate application of the judgment-debtor or some other person interested. The principle to be deducted from these authorities is that breaches of the provisions of the Civil Procedure Code relating to execution against immovable properties commencing from their attachment down to their sale should all be dealt with under Order 21, rule 90 and not otherwise and that the order of

1. (1883) L.R. 10 I.A. 25 : I.L.R. 9 Cal. 656 (P.C.).
2. (1923) 45 M.L.J. 403 (P.C.).
3. (1893) L.R. 20 I.A. 176 : I.L.R. 21 Cal. 66 (P.C.).
4. (1906) 17 M.L.J. 112 : L.R. 34 I.A. 37 : I.L.R. 29 All. 196 (P.C.).
5. (1922) 44 M.L.J. 718 : L.R. 49 I.A. 312 : I.L.R. 1 Pat. 733 (P.C.).

confirmation under Order 21, rule 92, should give the final quietus to all objections which could be raised under Order 21, rule 90.

Turning now to the authorities cited on behalf of the respondents, in *Govardhan* v. *Sarat Chandra*[1]; the sale could not be held on the day fixed as it turned out to be a holiday and in consequence it was held on the next day. There being no allegation or proof that any injury had resulted by reason of the change in date, Guha and Ghose, JJ., held that in view of decisions of the Privy Council, the sale could not be treated as a nullity and the decision in *Motahar Hossain* v *Md. Yakub*[2], was not followed. In *Jogendra Nath* v. *Nabi Newaj*[3], the sale was fixed for 20th July, 1935. But, it was not held on that day nor was it adjourned in accordance with Order 21, rule 69. The sale was actually held on 19th August, 1935. On the facts this case is similar to the present one. The Court below having set aside the sale as a nullity for want of an order of adjournment under Order 21, rule 69, Edgley, J., set aside that order and held, relying on the decisions of the Privy Council in *Tassaduk Rasul Khan* v. *Ahmed Hussain*[4] and *Gajrajmati Teorain* v. *Akbar Hussain*[5]; that the sale was not a nullity, and that it could only be set aside under Order 21, rule 90 on proof of substantial injury. The decision in *Govardhan* v. *Sarat Chandra*[1], was followed in preference to that in *Motahar Hossain* v. *Md. Yakub*[2]. In *Pangpur Loan Office, Ltd.* v. *Tarit Bhusan Ray*[6], the sale which was fixed for a particular day was adjourned by the Nazir and the sale held on the adjourned date was held not to be a nullity. As there was an actual adjournment of the sale by the Nazir, this case is not in point. But the observations in the judgment show that the Court doubted the correctness of the decisions in *Basharutulla* v. *Uma Churn Dutt*[7]; and *Motahar Hoosain* v. *Md. Yakub*[2]. The question was again considered in *Asha-Latabasu* v. *Munindra Nath Basu*[8]. There a sale which was fixed for 10th January, 1938, was stayed by the Court on that date, but the order did not adjourn the sale to a specific date. On 15th January, 1938, the Court dissolved the stay and ordered that the sale be held on 17th January, 1938. It was held on that day and the property was purchased by the decree-holder. The judgment-debtor contended that the sale was void on the ground that there was no order adjourning the sale on 10th January, 1938 as required by Order 21, rule 69. This contention was rejected and the sale was upheld. Here again, there was an order of Court dated 15th January, 1938, and therefore, the question now under consideration did not arise directly for determination. But the decisions in *Basharutulla* v. *Uma Churn Dutt*[7] and *Motahar Hossain* v. *Md. Yaukub*[2], were discussed and the opinion was expressed that in view of the decisions of the Privy Council in *Tassaduk Rasul Khan* v. *Ahmed Hussain*[4], and *Gajrajmeti Teorain* v. *Akbar Hussain*[5], their correctness was open to doubt; and the decisions in *Govardhan* v. *Sarat Chandra*[1], and *Jogendra Nath* v. *Nabi Newaj*[3], were approved. Thus, the weight of authority in the Calcutta High Court is decidedly against the view taken in *Basharutulla* v. *Uma Churn Dutt*[7], and *Motahar Hossain* v. *Md. Yakub*[2].

Turning now to the decisions of this Court, in *Jayarama Ayyar* v. *Vridhagiri Aiyar*[9], the proclamation of sale stated that the sale would take place at Cuddalore before the Central Nazir. The process-server entrusted with the duty of publishing the sale proclamation announced in the village that the sale would be held in the Munsiff's Court, Villupuram. In fact the sale was held before the Central Nazir, Cuddalore. Appraised of the mistake made by the process-server, the Court refused to confirm the sale, especially as it found that substantial injury had resulted from it. Against this order, the auction-purchaser appealed. In confirming this decision this Court observed that the sale was illegal and void and not merely

1. A.I.R. 1933 Cal. 486 : 37 C.W.N. 146.
2. (1924) 40 Cal. L.J. 311 : A.I.R. 1925 Cal. 201.
3. A.I.R. 1938 Cal. 699.
4. (1893) L.R. 20 I.A. 176 : I.L.R. 21 Cal. 66 (P.C.).
5. (1906) 17 M.L.J. 312 : L.R. 34 I.A. 37 : I.L.R. 29 All. 196 (P.C.).
6. (1939) 1 Cal. 530.
7. (1889) I.L.R. 16 Cal. 794.
8. I.L.R. (1941) 2 Cal. 570.
9. (1920) 39 M.L.J. 188 : I.L.R. 44 Mad. 35.

irregular ; and that it was not even necessary to find substantial injury, as Order 21, rule 90, had no application. Oldfield, J., observed as follows :

"It seems to me that if, when a proclamation was made any of the usual and effective methods prescribed or permitted by the Code for its publication has been misleading as to details of the matter proclaimed and has been such as not merely not to give information to possible bidders, but to divert them to a place where the sale is not to be held, the result must be in the words of *Bashrutulla* v. *Uma Churn Dutt*[1], that the property had never been sold under the Code at all ".

Seshagiri Ayyar, J., after referring to the decision in *Basharutulla* v. *Uma Churn Dutt*[1] stated thus :

"In that case the question was whether if a sale was held at an hour anterior to the one mentioned in the proclamation the sale was irregularly conducted or whether it was illegally held. The learned Judges came to the conclusion that there was a violation of the fundamental conditions of the sale, namely the time of sale, and that consequently the sale was a nullity. The same argument can be used with reference to a sale held at a place different from the one mentioned in the proclamation.

I concede that it is not easy to draw the line between an irregularity and an illegality, but I am clear that where a substantial provision of law has been violated, and that has the effect of not attracting persons who could be expected to be present for the purpose of bidding at the sale, the sale should be regarded as having been illegally conducted."

The correctness of the decision in *Jayarama Ayyar* v. *Vridhagiri Ayyar*[2], is not open to doubt. There had been a misrepresentation by an officer of Court and the Court had under the circumstances not merely the inherent power, but was under a duty not to confirm the sale (Vide *Raghavachariar* v. *Murugesa Mudali*[3] and *Kandaswami Mudali* v. *Narasimha Aiyar*[4], and this jurisdiction could be exercised whether the sale is illegal or merely irregular and whether it had resulted in substantial injury or not and as the validity of the sale had been disputed at the stage of confirmation of the sale and not in collateral proceedings by way of suit, it was strictly speaking not even relevant to consider whether the sale was a nullity or not. Moreover, the observations that conditions as to time and place of the sale are fundamental and their violation would render the sale void rest on the authority of *Basharutulla* v. *Uma Churn Dutt*[1], and as already mentioned, that decision has not been followed in later authorities of that Court. No reference was made to the decisions in *Tasaduk Rusulkhan* v. *Ahmed Hussain*[5] and *Gajrajmati Teorain* v. *Akbar Husain*[6]. There is thus considerable ground for dissenting from the reasoning on which the decision in *Jayarama Ayyar* v. *Vridhagiri Ayyar*[2], is based. But in the present case we are not concerned with a sale held at a place different from that which was advertised, and therefore, the decision in *Jayarama Ayyar* v. *Vridhagiri Ayyar*[2], does not directly apply. One of the cases discussed in *Jayarama Ayyar* v. *Vridhagiri Ayyar*[2], by Seshagiri Ayar, J., is the decision of the Privy Council reported in *Ranglal Singh* v. *Ravaneshwar Pershad Singh*[7]. There the sale was fixed for 13th July, 1903. But as the Presiding Officer was not in station, the sale was not held on that date, it was actually held on 20th July, 1903, after the Officer had returned. There was no order on 13th July, 1903, adjourning the sale to a specified date. The Privy Council held that even if there was irregularity in the conduct of sale, there was no proof of substantial injury, and the sale could not therefore be set aside. Dealing with this case, Seshagiri Ayyar, J., observed :

"The people in the locality were apparently aware that in consequence of the absence of the presiding officer the monthly sales would not be held on the usual day, but would be held immediately on the return of the presiding officer. On these facts the Judicial Committee came to the conclusion that there was only an irregularity, and that it would not vitiate the sale unless substantial loss was proved. That case is no authority for this case, where there was no proclamation relating to the place where the sale is actually held ".

If this is a sound distinction, the present case will be governed by the decision in *Rang Lal Singh* v. *Ravaneshwar Pershad Singh*[7], and not by *Jayarama Ayyar* v. *Vridhagiri-Ayyar*[2].

1. (1889) I.L.R. 16 Cal. 794.
2. (1920) 39 M.L.J. 188 : I.L.R. 44 Mad. 35.
3. (1923) 44 M.L.J. 680 : I.L.R. 46 Mad. 583.
4. (1951) 2 M.L.J. 623.
5. (1893) L.R. 20 I.A. 176 ; I.L.R. 21 Cal. 66 (P.C.).
6. (1906) 17 M.L.J. 112 : L.R. 34 I.A. 37 : I.L.R. 29 All. 196 (P.C.).
7. (1911) L.R. 38 I.A. 200. I.L.R. 39 Cal. 26 (P.C.).

In *Natesa Pillai* v. *Venkatarama Aiyar*[1], the sale was advertised to begin on 26th July, 1935, and to be concluded on the 5th August, 1935. But it was not closed on the 5th August. The sale was continued till 12th August, on which date it was concluded. In holding that the sale was illegal, Stodart, J., observed :

"Its (Court's) action in selling the property on a date subsequent to that date was positively illegal. A sale which is held on a day on which it has been expressly proclaimed that it shall not take place is not a valid sale at all. For that reason we must hold that this sale was vitiated by illegality, that it was a nullity, and must therefore be set aside.".

But this decision was reversed on appeal by the Judicial Committee (*vide* *Venkataramana Ayyar* v. *Natesa Pillai*[2]). The Board observed :

"In view of the agreement and the order of the Court their Lordships are unable to see that there was any material irregularity in the proceedings, still less any illegality".

Finally, reliance was placed on the decision in *Pakira* v. *Sangidas*.[3] There, it was held that when an adjourned sale is held at a different place without a fresh proclamation, it is not merely irregular but null and void. The Court observed :

"In the absence of any proof that notice of the change of date and place had actually been published on the 16th April to the assembled intending purchasers at Bori Adgaon it must be held that the sale which was held five days later at Khangaon was a nullity, not having been held in accordance with the provisions of the Code, and in the absence of any proclamation whatever that the sale was to take place on that date and at that place. It is not merely an irregularity when a sale is postponed and held at some other place without any actual new proclamation."

There is no discussion of the authorities and the decision is not of much assistance.

On a consideration of the authorities, we have come to the conclusion that when a sale is held on a date different from that notified, without an order of adjournment and without a further sale proclamation that would amount only to an irregularity and the only remedy open to the party aggrieved is to apply to set aside the sale under Order 21, rule 90, on proof that substantial injury has resulted therefrom. Such an application was in fact filed on behalf of the plaintiff, but it was dismissed as no security was furnished as required by the rules. The sale having been confirmed, the title of the purchasers became indefeasible and it is not open to challenge on any of the grounds now put forward. This contention, therefore, fails.

It remains only to state that while the appeal was pending the second and third defendants entered into a compromise with the plaintiff and a decree has been passed in terms of the compromise. The rights of defendants 1, 4, 5, 6 and 7 will be governed by this decision. As against them the appeal is dismissed with costs, one set to be divided in proportion to their interest.

V.P.S. *Appeal dismissed.*

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1. (1940) 1 M.L.J. 568.
2. (1944) 2 M.L.J. 352 (P.C.).
3. I.L.R. (1944) Nag. 584.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Original Matrimonial Jurisdiction.)

PRESENT :—MR. JUSTICE PANCHAPAKESA AIYAR.

In the matter of The Indian Divorce Act of 1869.

Coral Indira Gonsalves, falsely called Iswariah, residing at No. 31, Mookathal Street, Vepery, Madras .. *Petitioner**

v.

Joseph Prabhakar Iswariah, residing at No. 7, Dewan Ramiengar Road, Vepery, Madras .. *Respondent.*

Divorce Act (IV of 1869), sections 19 and 18—Scope—Impotency and continuing and total inability of husband to have sexual intercourse with wife—Petition by wife for declaration of marriage a nullity—Proof of potency—Doctor's certificate—Probative value of—Failure of respondent to prove potency till date of final hearing—Right of wife to decree absolute straightaway.

Courts in this country will be very unwilling to dissolve any Christian marriage and grant a decree for nullity, if it is proved, even on the day of the final hearing, that the respondent, alleged to be impotent, has become potent either by God's grace, or by natural processes or by medical or dietetic treatment. Where it is not proved that the respondent who was impotent at the marriage, had not been made potent and able to have sexual intercourse even on the day the petition came for final hearing and disposal a decree of nullity can be granted. In such a case there is no need to pass a *decree nisi* to be made absolute after six months and the correct procedure is to pass at once a plain, simple and absolute decree of nullity and dissolution.

Where the respondent relies on a doctor's certificate that he was able to have sexual intercourse and was potent that day, the certificate must be strictly proved by the doctor who issues them. Certificates, like these, do not prove themselves. The doctor giving the certificate has to state what tests he carried out to arrive at his conclusion and must stand cross-examination and convince the Court that his conclusion about the potency is correct.

K. Narasimha Aiyar for Petitioner.

Alvares of *Messrs. Pais, Lobo and Alvares* for Respondent.

The Court delivered the following

JUDGMENT.—This is a petition by one Coral Indira Gonsalves, aged 23, for declaring her marriage with Joseph Prabhakar Iswariah a nullity, on the ground of his impotency and continuing and total inability to have sexual intercourse with her. At first the respondent opposed the petition vigorously, alleging that he was not impotent. Both the petitioner and the respondent are Protestant Indian Christians.

The following issues were framed :

1. Is the defendant impotent and unable to have sexual intercourse with the plaintiff, as alleged ?

2. To what relief, if any, is the plaintiff entitled ?

Before the matter came on for final hearing and disposal, the respondent, Iswariah, wanted this Court to have him examined by a competent doctor for finding out whether he was really impotent and totally unable to have sexual intercourse. Ultimately, Lt.-Col. Krishnamoorthi, No. 2, Boag Road, T. Nagar, was appointed by Court as the doctor for examining him carefully and giving a certificate about his potency or impotency and ability or inability to have sexual intercourse. This doctor, after examining him, gave a certificate as follows :

"I have carefully examined Sri Joseph Prabhakar Iswariah on two separate occasions. I am of the opinion that Sri Joseph Prabhakar Iswariah is potent and that he is capable of the act of sexual intercourse."

This certificate was granted on 21st October, 1952. This petition had been filed on 27th February, 1952. So, even if the certificate was proved to be correct (it was not) *it will not prove potency before 21st October*, 1952. Mr. Narasimha Iyer,

* O.M.S. No. 5 of 1952. 27th January, 1953.

for the petitioner, persisted in contesting the potency of the respondent, even on 21st October, 1952, and strongly relied on the letters of the respondent written to the petitioner, including a letter Ex. P-2, wherein the respondent had written to his wife, the petitioner, that he was physically quite unfit to give her any sexual satisfaction, and that she could get such satisfaction by having sexual intercourse with other men, provided that she did not ask him to support any children born out of these extra-marital relationships, and that he hoped that she would go back to him, as he was giving her enough compensation for the sexual satisfaction he was unable to give her, himself. Though the respondent at first contested the genuineness of this letter, and wanted permission to have a photograph of it taken and a handwriting expert appointed to determine whether he had really written and signed such a letter, he finally gave up that idea, and, on 20th January, 1953, his counsel intimated to Court that "the defence was not intended to be pressed." So, the suit was posted to to-day for the petitioner's examination to prove her case.

[After dealing with the evidence of the petitioner as P.W. 1 His Lordship found as follows on Issue 1] :—

Issue 1.—On the evidence on record, I have absolutely no hesitation in holding that the respondent is totally impotent and unable to have sexual intercourse with the petitioner, till to day, as alleged. [His Lordship then dealt with the reasons for such conclusion and proceeded.]

We need not bother about Lt.-Col. Krishnamoorthi's certificate that, in his opinion, the respondent was able on 21st October, 1952, to have sexual intercourse, and was potent, that day. Certificates, like these, do not prove themselves. They must be *strictly proved* by the doctor who issues them. He has to state what tests he carried out to arrive at his conclusion and must stand cross-examination and convince the Court that his conclusion about the potency is correct. Here, not even an attempt has been made to examine him, the respondent, having given up his defence, obviously because it was hopeless.

Of course, it is the law that mere impotency at the time of marriage will not do for getting a decree for nullity, if the respondent in question became potent by the time of the filing of the petition. I shall go further and hold that it is enough if the person becomes *potent before the petition is disposed of* by restorative processes of nature, or by taking vitality-restoring medicines and injections, or through prayer and God's grace, the old-world remedy for what the modern world has to offer in substitution of nature's processes. I am stretching the period up to *the final disposal of the petition*, advisedly, because I think that the Courts in this country will be very unwilling to dissolve any Christian marriage (all such marriages being held to be sacred) and grant a decree for nullity, if it is proved, even on the day of the final hearing, that the respondent, alleged to be impotent, has become potent either by prayer and God's grace, or by natural processes, or by medicinal or dietetic treatment. So, I am not restricting the period of proof of potency to *the date of the presentation of the petition*. In divorce and nullity cases, separating married persons for ever, that is the least the Courts can be expected to do. The Christian maxim "Let not man separate those whom God has joined" cannot be unfortunately literally acted on by the Courts to-day, owing to change in the law. But Courts, nonetheless, keep that maxim in view before they separate married persons for ever, and will not extend the law to make dissolution easier. But, in this case, till this day, when the petition has come up for final hearing and disposal, I am satisfied that neither prayer nor nature nor diet nor medicine has made the respondent, who was impotent at the marriage, potent and able to have sexual intercourse.

It is also clear to me that it is not a mere case of the respondent's being impotent *regarding the petitioner alone*, as happens in some cases, where the peculiar personality of the man or woman in question makes the other spouse frigid and impotent by psychological and physiological inhibitions—I am satisfied that this is a clear case where the respondent is impotent as regards *all women*, and not merely regarding

this petitioner. His letter, Ex. P-2, reinforces this conclusion, as no man, however degraded in morals, who has got even one per cent. chance of being able to have sexual intercourse with his wife even once in his lifetime will write such a letter, and make such an offer, one of the most degrading offers which any husband can ever make to his wife.

The petitioner has sworn that she has remained a virgin till now. Naturally she does not want her life to be blasted by being tied up to this impotent man, and wants a decree for nullity, and I am satisfied that she is entitled to it.

Issue 2.—In view of my finding on issue 1, and the total absence of any collusion, the petitioner is entitled to a decree for nullity. Mr. Narasimha Iyer, for the petitioner, rightly urges that in a petition for nullity, there is no need to pass *a decree nisi*, to be made absolute after six months, and that the correct procedure is to pass at once a plain, simple and absolute decree of nullity and dissolution, as would be passed in a suit for a declaration of nullity of a marriage between non-Christian persons under section 45 of the Specific Relief Act. He cited the ruling in *Grace Isabel Studeman* v. *Anneley Eliardo Baresford de Courcy Wheeler*[1], in support of this proposition. I agree, and grant the petitioner, Coral Indira Gonsalves, an absolute decree declaring her marriage with the respondent a nullity. Of course, there are no children and no claim for maintenance, or costs, is put forth. So, no orders are required either for the maintenance of the petitioner or for children, or regarding any other collateral matter.

In the circumstances all the parties will bear their own costs.

K.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

The Public Prosecutor .. *Appellant**

v.

K. V. R. Annamalai Chettiar .. *Respondent.*

Madras Prevention of Adulteration Act (III of 1918), *section* 6 (3)—*Employee's acts—When employer could escape conviction for.*

Under the Prevention of Adulteration Act, section 6 (3), if a master of a shop has been able to show that he had used due diligence to enforce execution of the Act and what was done by his employee was without his knowledge, consent or connivance, he has got to be acquitted and the employee alone convicted.

Appeal under section 417, Criminal Procedure Code, 1898, against the acquittal of the aforesaid respondent (accused) by the Court of the Additional First Class Magistrate, Coimbatore, in C. C. No. 445 of 1951, on his file.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for Appellant.

N. S. Mani for Respondent.

The Court made the following

ORDER.—This is an appeal preferred by the State against the order of acquittal made by the Additional First Class Magistrate, Coimbatore, in C. C. No. 445 of 1951.

The facts are: On 11th June, 1951, Sanitary Inspectors Natarajan and Hussain Khan went to the shop of K. V. R. Annamalai Chettiar in Rajah Street, Coimbatore. This proprietor was absent and in fact he is stated to be alive at Perundurai. The employee in the shop S. Shanmugham was present. In the show case in front of the shop there was a tin of butter. Sanitary Inspector Natarajan purchased for the purpose of analysis, half a pound of butter from that tin and paid for it. The butter was divided into three parts and the formalities prescribed under the Madras Prevention of Adulteration Act was followed. The butter

1. A.I.R. 1945 Cal. 75 (1).

* Criminal Appeal No. 379 of 1952. 15th January, 1953.

sent to the Government Analyst, Guindy, was found by the latter to be adulterated with 8·1 per cent. of excess water. Thereupon the proprietor of the shop Annamalai Chettiar and the employee Shanmugham have been separately charge-sheeted for an offence under section 5 (1) (*d*) of the Prevention of Adulteration Act.

The defence of the accused was that he was not present at the time of the sale and that the butter from which this ½ lb. was purchased was not butter purchased by him but which had been brought there by Marappan of Vellankurichi for being sold and that this Marappan had executed a letter of warranty and that the sample had been taken before Marappan could return after his leaving this butter in the shop, and wash, clean and drain water from the butter and hand over the same to the accused's shop for sale and that this fact was represented to the Sanitary Inspector by Shanmugham.

In support of this plea this Annamalai Chettiar examined this Marappan as D.W. 1 and an attestor of the Mahazar at the time of the purchase of the butter as D.W. 2.

The learned Additional First Class Magistrate acquitted this Annamalai Chettiar on the ground that it was not proved beyond reasonable doubt that the accused sold the butter or offered the same for being sold and purported to give him the benefit of the doubt. Hence this appeal.

There can be no doubt that the accused was rightly acquitted but on a wrong construction of the law. In *Public Prosecutor* v. *Srinivasa Rao*[1], Lakshmana Rao, J., held that a secretary and an accountant of a Co-operative Society supplying butter to the Sanitary Inspector under section 14 cannot be convicted under section 5 (1) (*d*) and rules 24, 28 and 29 framed under section 20 (2) as supply of sample to the Sanitary Inspector under section 14 is not a sale, nor can the secretary or the accountant be said to offer the butter for sale. This short judgment does not give any reason for this conclusion. Subsequently, Horwill, J., dealt with this matter at some greater length in In re *Bellamkonda Kanakayya*[2] as follows :

"The charge against the petitioner was of offering ghee for sale ; but it was argued that he would be guilty of selling the ghee. A sale is a voluntary transaction, even when it is preceded by an agreement to sell. When a person exhibits articles in his shop he is making a general offer to sell them, and any person who comes into the shop and offers the price accepts his offers but the intending purchaser cannot use physical force or threats to compel the owner to part with the goods. If he does, the transaction is not a sale. If the Sanitary Inspector had not exercised his powers under section 14, but had merely tendered the money and the petitioner had voluntarily handed over the goods, then there would have been a sale ; and the fact that it was subsequently found that the goods were required not for consumption but for analysis, would make no difference to the nature of the transaction that had been entered into. In this case, the petitioner would presumably not have parted with the goods voluntarily when he knew that they would be used for the purpose of bringing a case against him and his master. The petitioner was not therefore guilty of selling ghee. Lakshmana Rao, J., in a similar case held that the parting with a commodity when it is demanded by the Sanitary Inspector in the exercise of his power under section 14 of the Act did not amount to a sale."

These rulings have been considered by Kuppuswami Aiyar, J., in *Public Prosecutor* v. *Narayana Singh*[3], by Govinda Menon, J., in *Public Prosecutor* v. *Ramachandrayya*[4] and by me in *Public Prosecutor* v. *Dada Haji Ibrahim Helari*[5]. The reasonings upon which these three decisions dissented from the two prior decisions, is set out by Govinda Menon, J., in *Public Prosecutor* v. *Ramachandrayya*[4] as follows :

"In *Public Prosecutor* v. *Narayana Singh*[3], Kuppuswami Aiyar, J., has held that when a Sanitary Inspector purchased milk from the accused, tested it and found that it was adulterated, the transaction amounted to a purchase and therefore the accused was guilty under rule 29 (*b*) of the rules and section 5 (1) (*b*) read with rule 27 of the Madras Prevention of Adulteration Act. Moreover, in this case, Exhibit P-2 the receipt contains an admission by the second accused that he was selling buffalo milk to the Maruti Vilas Coffee Hotel and the transaction by which P.W. 1 got the sample is also admitted to be a sale. Apart from the admission contained in Exhibit P-2 when Mr. Venkatasubbiah exchanged money consideration for the milk, he was acting as a purchaser and the society a separate legal entity, was performing a contract of sale in delivering milk. Therefore it may even be

1. (1938) 1 M.L.J. 669.
2. (1942) 2 M.L.J. 172.
3. (1944) 1 M.L.J. 16.
4. (1948) 1 M.L.J. 117.
5. (1952) 2 M.L.J. 565.

unnecessary to decide whether the transaction with P.W. 1 was a sale at all, even though I am convinced that it is also a sale."

Therefore, the lower Court went wrong in holding that the butter was not sold or offered for being sold.

The matter does not rest there because under section 6 (3) of the Act, where an employer is charged with an offence under the Act, he shall be entitled on application duly made by him to have any other person whom he charges as the actual offender brought before the Court at the time appointed for the hearing, and if, after the commission of the offence has been proved, the employer proves to the satisfaction of the Court that he used due diligence to enforce the execution of this Act and that the said other person committed the offence without his knowledge, consent or connivance, the said other person shall be convicted and the employer shall be acquitted. In this case no doubt the procedure prescribed in terms of this clause had not been followed. The substance of it has been complied with. The prosecution itself charged both the master as well as the servant. The plea of the master was that he lives at Perundurai and that he had taken all reasonable precautions like getting letters of warranty for the purchase of butter and that at no time he had consented or connived at with the sale of adulterated butter. Therefore, the mere absence of the proprietor from the shop would not in any way exonerate him, because if that were the case every master would take care to keep away from the shop to get rid of his liability and the entire case-law on the subject has been discussed by me in *Kasi Rajah* v. *The State*[1].

But if the master is able to show that he had used due diligence to enforce execution of the Act and what was done was without his knowledge, consent, or connivance, the employer has got to be acquitted. In the instant case this has been shown and therefore the employer is entitled to be acquitted and in the connected case the employee has got to be convicted and is being convicted.

In the result, the acquittal by the Additional First Class Magistrate is sustained though for an entirely different reason and this appeal is dismissed.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE BALAKRISHNA AIYAR.

Sreenivasan and others .. *Appellants**

v.

Rangachari and others .. *Respondents.*

Hindu Law—Debts—Pious obligation—Suit by an endorsee of a promissory note against the father—Sons could not be impleaded—Execution of decree—Whether sons' shares could be seized.

It is no doubt true that in a suit by an endorsee of a promissory note against the maker of the promissory note, the father of a Hindu joint family, no decree could be made against the son as the plaintiff, who is only an endorsee of the promissory note, is not an assignee of the debt in respect of which the pious obligation of the sons would attach ; but the decree against the father, the maker, itself constitutes a debt which could be enforced in execution against the shares of the sons as well by reason of the pious obligation of the sons to discharge the antecedent debts of the father not tainted with illegality or immorality. If the sons are impleaded in the execution proceedings it would be perfectly open to them to establish, if they can, that the debt was such as would not bind their shares. If they were not however impleaded it is open to them in an independent suit to have the sale to the extent of their shares set aside on the ground that the debt was not one which would bind their interest in the property.

Appeal against the decree of the Court of the Subordinate Judge, Vellore, dated 10th September, 1948, in O. S. No. 67 of 1946.

N. R. Raghavachari for Appellants.

S. V. Rama Aiyangar, P. S. Srinivasa Desikan, D. Ramaswami Aiyangar, P. R. Varadarajan, K. Kalyanasundaram, T. K. Sundarachari and *K. Satyanarayana* for Respondents.

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1. (1952) 2 M.L.J. 848.

* Appeal No. 599 of 1949. 12th January, 1953.

The Judgment of the Court was delivered by

Satyanarayana Rao, J.—The plaintiffs are the appellants and are the sons of the first defendant by his second wife. Defendants 2 and 3 are his sons by his first wife. There is another son Aravamudha Aiyangar, who is not made a party to the suit. In 1931, the first defendant purchased an extent of 73 cents of property for a sum of Rs. 1,000. He paid cash in part and for the balance executed a promissory note in favour of the vendor for a sum of Rs. 570 on the date of the sale. The vendor, in his turn, endorsed over the promissory note to the fourth defendant, one Srinivasachari. The father failed to pay the debt with the result that Srinivasachari, the fourth defendant, instituted a suit on the promissory note O.S. No. 31 of 1934, District Munsiff's Court, Arni and obtained a decree against the father. As he was only an endorsee of the promissory note and was not an assignee of the debt as well, he could not under law implead the sons also as parties to the action and obtain a decree on the debt against the sons. In due course, the decree was put into execution and items 15 to 56 of the plaint schedule properties were sold for a sum of Rs. 1,501 and the decree-holder himself purchased the property. The sale was on 16th September, 1935, and there was also delivery of possession of the property on 17th February, 1938. The purchaser, in his turn, made various alienations, the details of which are not material for the disposal of this appeal. The second wife's sons of the first defendant instituted the present suit for partition of the family properties and in this suit included also the items, which were sold in execution of the decree in O. S. No. 31 of 1934 and claimed partition and separate possession of these items also on the ground that the sale did not affect their interest in the properties. There were also other contentions raised in the suit but we are not now concerned with them in this appeal. The lower Court held that the Court-sale conveyed not only the interest of the father, who was the judgment-debtor, but also the shares of the sons to the purchaser; in other words, it was held that what was sold was the property itself and not merely the right, title and interest of the judgment-debtor. In the result, he negatived the claim of the plaintiffs for a share in items 15 to 56 of the plaint schedule in the possession of defendants 4 to 24. The appeal by the plaintiffs is, therefore, confined to the question whether the decision of the trial Court excluding items 15 to 56 from partition was correct or not.

The learned Advocate for the appellants raised two contentions. In the first place, he urged that as in a suit by an endorsee of a promissory note against a maker, the sons of the maker could not be impleaded as parties to the action and no decree could be passed against them on the debt, the shares of the sons could not be seized in execution of the decree so obtained against the father alone in enforcement of the pious obligation of the sons under Hindu Law. For this contention, however, the learned counsel was not able to cite any authority. It is no doubt true, as held by the Full Bench in *Marudamuthu Naicker* v. *Kadir Badsha Rowther*[1], that no decree in such a suit could be made against the sons as the plaintiff, who is an endorsee of the promissory note, was not the assignee of the debt in respect of which the pious obligation of the sons would attach, but the decree against the father, the maker, itself constitutes a debt which could be enforced in execution against the shares of the sons as well by reason of the pious obligation of the sons to discharge the antecedent debts of the father not tainted with illegality or immorality. If the sons are impleaded in the execution proceedings, it would be perfectly open to them to establish, if they can, that the debt was such as would not bind their shares. If they were not however impleaded, it is open to them in an independent suit to have the sale to the extent of their shares set aside on the ground that the debt was not one which would bind their interest in the property. In this case, no question of illegality or immorality of the debt arises as the debt was not attacked by the sons on that footing. The only question, therefore, is whether in execution of the decree against the father, the sons' shares also could be sold or not. As

1. (1938) 1 M.L.J. 378: I.L.R. (1938) Mad. 568 (F.B.).

pointed out by Bhashyam Aiyangar, J., in *Periaswami Mudaliar* v. *Seetharama Chettiar*[1] the decree itself is a debt and as it is not tainted with illegality or immorality, it could be enforced in execution against the shares of the sons as well.

The second aspect of the case is that the Court sale did not pass in fact the interest of the sons to the purchaser. It is one thing no doubt to say that the Court has got a wider power of selling not only the father's share but also the shares of the sons and it is a totally different thing to decide whether, in fact, what was sold was the smaller interest or the entire property. That would depend upon, as pointed out repeatedly by the Privy Council, as to what was intended to be sold and what was in fact brought to sale. No such contention seems to have been raised in the plaint by the plaintiffs-appellants and it is perhaps for that reason that no material has been placed before the Court such as the sale proclamation, etc., to consider whether what was sold was the property itself or only the right, title and interest of the judgment-debtor. There is the sale certificate, Ex. B-3, which however states that what was sold was the property described in the schedule. It does not state that what was sold was only the right, title and interest of the judgment-debtor. The decision of the Privy Council in *Simbhunatha Pande* v. *Golap Singh*[2], to which our attention was drawn by the learned counsel for the appellants was clearly a case in which from the beginning the interest of the judgment-debtor alone was intended to be sold by the Court. The specification of the property, as stated in the judgment, was the right and interest of the judgment-debtor in a four anna share out of 16 annas of mehal kundwar. It is an obvious case in which the property that was sold was only the right, title and interest of the judgment-debtor and no more. That is not the case in the present action. Even the meagre material that is available to us shows that the property itself was sold.

For these reasons, we are in entire agreement with the view taken by the lower Court and affirm the decision and dismiss the appeal with costs.

R.M. —————— *Appeal dismissed.*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT:—B. K. MUKHERJEA, N. CHANDRASEKHARA AIYAR AND GHULAM HASAN, JJ.

Kalipada Chakraborti and another .. *Appellants**

v.

Minor Srimati Palani Bala Devi, represented by her husband Bibhuti Bhusan Chakraborti and others .. *Respondents.*

Limitation Act (IX of 1908), Articles 124 and 141—Applicability—Alienation of shebaiti right by a Hindu widow—Suit by reversioner for recovery of possession—Limitation—Shebaiti right—Nature of.

The alienation of the shebaiti right by a shebait in favour of a stranger is absolutely void in Hindu Law and cannot be validated even on the footing of a custom. The alienee of the right is, therefore, a trespasser out and out and his possession as against the transferor is adverse from the beginning.

Except where a decree has been obtained fairly and properly and without fraud and collusion against the Hindu female heir in respect of property held by her as a limited owner, the cause of action for a suit to be instituted by a reversioner to recover such property either against an alienee from the female heir or a trespasser who held adversely to her accrues only on the death of the female heir. The right of the reversionary heirs is in the nature of *spes successionis*, and as the reversioners do not trace their title through or from the widow, it would be manifestly unjust if they are to lose their rights simply because the widow has suffered the property to be destroyed by the adverse possession of a stranger.

Case-law discussed.

Whatever might be said about the office of a trustee, which carries no beneficial interest with it, a shebaitship, combines in it both the elements of office and property. As the shebaiti interest is heritable and follows the line of inheritance from the founder, obviously when the heir is a female, she must be deemed to have, what is known, as widow's estate in the shebaiti interest.

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1. (1903) 14 M.L.J. 84 : I.L.R. 27 Mad. 243.

2. (1887) L.R. 14 I.A. 77 : I.L.R. 14 Cal. 572 (P.C.)

* Civil Appeal No. 19 of 1952. 16th January, 1953.

There could be no doubt that there is an element in the shebaiti right which has the legal character of property; but shebaitship is property of a peculiar and anomalous character and it is difficult to say that it comes under the category of immovable property as it is known in law. Article 141 of the Limitation Act refers expressly to immovable property and not to property in the general sense of the word. On the other hand, it is quite settled that a shebaiti right is a hereditary office and as such comes within the express language of Article 124 of the Limitation Act. When there is a specific Article in the Limitation Act which covers a particular case, it is not proper to apply another Article, the application of which is not free from doubt. Accordingly, to a suit by the reversioners for possession of a shebaiti right against the alienee from a Hindu widow Article 124 is the proper Article to be applied. Reading Article 124 of the Limitation Act along with section 2 (8) the conclusion is irresistible that to defeat the title of the plaintiff under Article 124 it is necessary to establish that the defendant had taken possession of the office adversely to the plaintiff or to somebody from or through whom the plaintiff derives his title, more than twelve years prior to the institution of the suit. The reversioners would not be deriving their right to sue through and from the widow and a suit for possession filed within time from the date of the widow's death is not barred.

On appeal from the Judgment and Decree dated the 19th June, 1950, of the High Court of Judicature at Calcutta (Das and Guha, JJ.)[1] in Appeal from Original Decree No. 48 of 1949, arising out of Judgment and Decree dated the 22nd December, 1948, of the Court of the Subordinate Judge, 3rd Court, 24-Parganas in Title Suit No. 53 of 1944.

N. C. Chatterjee, Senior Advocate (*A. K. Dutt*, Advocate, with him) for Appellants.

Panchanan Ghose, Senior Advocate (*Radha Kanta Bhattacharya*, Advocate, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Mukherjea, J.—This appeal is on behalf of the plaintiffs and is directed against the judgment and decree of a Division Bench of the Calcutta High Court dated June 19, 1950[1], reversing on appeal, those of the Subordinate Judge, Third Court, 24-Parganas, passed in Title Suit No. 53 of 1944.

The facts material for our present purpose are not in dispute and the controversy between the parties practically centres round one short point, namely, whether or not the plaintiffs' suit is barred by limitation. The trial court decided this point in favour of the plaintiffs, while the High Court has taken a contrary view in appeal.

The subject-matter of dispute is one-third share of shebaiti right in respect of a private debutter dedicated to an idol known by the name of Dakshineshwar Jew and situated at a village called Dhop Dhopi within the district of 24-Parganas in West Bengal. The deity is an ancient one and its reputed founder and first shebait was one Udhab Chandra Pandit. It is not disputed that by successive devolutions the rights of the shebait came to vest in one Iswar Chandra Chakraborti, who was the common ancestor of the parties to this suit. The following genealogical table will make clear the relationship of the several persons who figure as parties to the present litigation as between themselves and also to their common ancestor.

- Iswar
  - Ashutosh (dead)
  - Govinda
    - Kali (Plff. No. 1)
    - Nimai (Plff. No. 2)
  - Gopal
    - Surendra (adopted) = Tarakali (w)
  - Sadananda
    - Sashi
      - Abani (Deft. 4)
  - Trailokhya
    - Moni (dead)
    - Sarat
      - Bidhu (Deft. 3)
    - Surendra (adopted by Gopal)
    - Nagendra
      - Palani Bala (Deft. 1).
  - Haran = Rajlakshmi.

1. (1950) 54 C.W.N 960.

Iswar died leaving six sons as his heirs and they were Ashutosh, Govinda, Gopal, Sadananda, Trailokhya and Haran. These six sons when they divided the properties of their father, divided the shebaiti right also which devolved upon them in six equal shares, and this division was by the method known as *palas* or turns of worship, which means that to each one of the sons was allotted the right of worshipping the deity for 5 days every month and during these days he alone was to discharge the functions of the shebait and receive the emoluments attached to the office. Gradually, a custom grew up in the family according to which these *palas* could be bought and sold or otherwise alienated amongst the members of the shebait's family. Govinda, who was the father of the plaintiffs and who got 5 days' *pala* every month in his share, sold his interest in the shebaiti to Haran, a brother of his, and the result was that Haran acquired 10 days' *pala* every month or one-third share in the entire shebaiti right. Haran died without any issue leaving him surviving, his widow Rajlakshmi as his sole heir under the Hindu Law and Rajlakshmi continued to hold this one-third share of shebaiti right along with other properties of the deceased. On 17th June, 1920, Rajlakshmi granted an ijara lease of her shebaiti right for a term of two years to one Satish Chandra Dey. On 1st of April, 1921, Satish sold this leasehold interest in respect to the *palas* to one Ram Rakhal Ghose. Previous to that, on 6th of August, 1920, Ram Rakhal had himself taken a lease from Rajlakshmi of her shebaiti right for a period of 5 years, this lease to commence at the close of the previous lease in favour of Satish. Ram Rakhal admittedly got possession of the office of shebait and began to exercise his rights as such on and from the 1st of April, 1921. By a deed of conveyance dated the 7th of November, 1921, Rajlakshmi made an out and out sale of her shebaiti right in favour of Ram Rakhal and twenty days after this purchase, that is to say, on 27th November, 1921, Ram Rakhal in his turn sold this interest to Nagendra and Surendra, two of the sons of Trailokhya. Surendra died some time afterwards and on 20th of June, 1925, his widow Tarakali sold her husband's share in the shebaiti right to Nagendra, her husband's brother. Thus Nagendra in addition to what he had inherited from his own father came to hold the entirety of a third share in the shebaiti right, represented by 10 days' *pala* every month, which was previously held by Haran. Rajlakshmi died on 22nd December, 1943, and the two plaintiffs, who are the two surviving sons of Govinda, filed the suit out of which this appeal arises for recovery of possession of this one-third shebaiti right of Haran on the allegation that they were the next heirs of Haran at the time of Rajlakshmi's death.

Nagendra had died in the meantime and the first and the principal defendant in the suit is his daughter Palani Bala, who is a minor and is represented by her husband as guardian. The second defendant is the receiver, who has been placed in charge of the properties of Palani Bala in a guardianship proceeding pending before the District Judge of 24-Parganas. The defendants 3 and 4 are the surviving descendants of Iswar who hold the remaining interest in the shebaiti right.

The case of the plaintiffs, in substance, is that the one-third share of the shebaiti right, which was held by Haran during his life-time, devolved upon his widow Rajlakshmi who had only the restricted rights of a Hindu widow in respect to the same. On the death of the widow, the interest vested in the plaintiffs, who were the nearest heirs of Haran at the time of Rajlakshmi's death. They, accordingly, prayed for being put in possession of this one-third share of the shebaiti right, represented, as stated aforesaid, by 10 days' *pala* every month after evicting the defendant No. 1 therefrom. There was a claim also for mesne profits from the date of the widow's death. In the plaint a description has been given of the temple, its appurtenant lands and also of the structures standing thereupon but there is no prayer for possession in respect of these properties.

The suit was resisted on behalf of defendant No. 1 and the main contention raised was that as the sale of her shebaiti right by Rajlakshmi, the widow of Haran, was a void transaction which did not create any right in the transferee, the posses-

sion of Ram Rakhal and after him his vendees, who were the predecessors of defendant No. 1 was adverse against all the shebaits, and the defendant No. 1 consequently acquired an indefeasible title to this third share in the shebaiti right by adverse possession and the plaintiffs suit was barred by limitation. Several other contentions were raised but they are not material for our present purpose.

The trial Judge by his judgment dated the 22nd December, 1948, overruled the pleas taken by the defendant and gave the plaintiffs a decree. On the question of limitation, the Subordinate Judge held that although Article 141 of the Indian Limitation Act was not attracted to this case, yet the plaintiffs' suit was not barred by limitation. Two reasons have been assigned for this view. It has been said in the first place that Nagendra purported to purchase only the life interest of Rajlakshmi; consequently his position as purchaser was in recognition of the interest of the reversionary heirs of Haran. It is said further that as Rajlakshmi and Nagendra were both co-shebaits of the deity, the possession of the latter could not have been adverse to the former, they being in the position of co-sharers in law and nothing like ouster being alleged or proved in this case.

Against this judgment, the defendants 1 and 2 took an appeal to the Calcutta High Court and the appeal was heard by a Division Bench consisting of Das and Guha, JJ. The learned Judges while affirming all the other findings arrived at by the trial Judge disagreed with the latter on the question of limitation. It was held by the High Court that the proper Article to apply in this case was Article 124 of the Limitation Act, and as the defendant No. 1 and her predecessors had been in possession of the hereditary office of the shebait adversely to the plaintiff for more than 12 years prior to the institution of the suit, the plaintiffs' claim was barred by limitation. In this view, the judgment of the trial court was reversed and the plaintiffs' suit dismissed.

The only point canvassed before us in this appeal is that of limitation and the arguments that have been advanced before us on this point by the learned counsel on both sides really raise two questions for our determination. The first is, whether on the facts of the present case the plaintiffs' suit is governed by Article 124 or Article 141 of the Limitation Act? If Article 141 is the appropriate Article, it is not disputed that the plaintiffs' suit is well within time; but if Article 124 is applicable, the other point that would require consideration is, when did the defendant or her predecessors take possession of the hereditary office of shebait adversely to the plaintiffs? Was their possession adverse from the very date of the transfer by Rajlakshmi or did it become so only at her death?

The proposition is well established that the alienation of the shebaiti right by a shebait in favour of a stranger is absolutely void in Hindu Law and cannot be validated even on the footing of a custom. The alienee of the right is, therefore, a trespasser out and out and his possession as against the transferor is adverse from the very beginning. Mr. Chatterjee appearing for the plaintiffs appellants has not assailed the correctness of this proposition of law; his contention is that the possession of shebaiti right by defendant No. 1 and her predecessors might have been adverse against Rajlakshmi ever since the date of transfer and on the strength of such possession they might have acquired a statutory title against her in respect of the shebaiti interest; but such adverse possession for more than the statutory period though it might bar the widow would not bar the reversioners who do not derive their title from or through her. This, it is said, is the principle underlying the Law of Limitation in India ever since 1871 and Article 141 of the Limitation Act expressly recognises and gives effect to it. It is contended by Mr. Chatterjee that even if Article 141 does not apply to the facts of the present case and Article 124 is taken to be the appropriate Article, the plaintiffs' suit would be quite within time as the defendant or her predecessors must be held to have taken possession of the office of the shebait adversely to the present plaintiffs only when the widow died and not before that.

On the other hand, it has been argued by Mr. Panchanan Ghose that there is nothing like a general principle of law that adverse possession against a Hindu

widow could not be reckoned as adverse possession against her reversionary heirs. That, it is said, is only a special rule which rests entirely upon the particular provision of Article 141 of the Limitation Act and is confined, in its operation, to cases which come within the purview of that Article. Mr. Ghose's contention is that Article 141 has no application to the facts of this case and consequently there is no reason for holding that adverse possession against the widow if it was continued for the statutory period would not bar the reversionary heirs also. This, he says, was the law prior to the introduction of Article 141 into the statute book and that is the law which governs all cases even now which do not directly come under that Article. According to the leaned counsel, Article 124 is the proper Article which governs this case and the possession of the transferee of the shebaiti interest being admittedly adverse to the holder of the office at the date of the transfer, it would be adverse against the next holder also, no matter whether strictly he derives his title from the previous holder or not. It is urged that in the case of a hereditary office like that of a shebait, the powers of a female shebait are in no way more restricted than those of a male shebait and as the trust estate during the incumbency of a female shebait resides in her completely and effectually as in a male trustee, the male trustee who comes after her cannot claim the benefit of the principle upon which Article 141 of the Limitation Act is founded. The points raised are no doubt important and require careful examination.

It may be mentioned at the outset that in the old Limitation Act (Act XXIV of 1859) there was was no specific provision relating to suits by reversioners for recovery of possession of property held by a Hindu widow in her restricted right. There were provisions only of a most general character contained in sections 12 and 16 of the Act, under which limitation for suits to recover immovable and movable properties was 12 and 6 years respectively " from the time the cause of action arose ". Even before this Act was passed, in a case[1] decided by the Supreme Court of Calcutta, Peel, C.J. made the following observation :—

" It has been invariably considered for many years that the widow fully represented the estate, and it is also settled law that adverse possession which bars her bars the heir after her, which would not be the case if she were a mere tenant for life, as known to the English law,".

In 1863 the case of *Katama Natchier v. Rajah of Shivagunga*[2] was decided by the Judicial Committee of the Privy Council and the proposition was laid down, which has not been questioned since then, that " when the estate of a deceased Hindu has vested in a female heir, a decree fairly and properly obtained against her in regard to her estate is in the absence of fraud or collusion binding on the reversionery heir ". Turner, L.J., who delivered the judgment of the Board, observed in course of his judgment :—

"The whole estate would for the time be vested in her, absolutely for some purposes, though in some respects, for a qualified interest ; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the courts in this country as to tenants-in-tail representing the inheritance, would seem to apply to the case of a Hindu widow ; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow ".

The case proceeded entirely on the footing that although the widow for some purposes has only a partial interest in her husband's estate, for other purposes the whole estate vests in her, and that her interest is somewhat akin to that of a tenant-in-tail under the English law. If the suit was not in respect of a personal claim against the widow but in respect of the estate which, in law, she fully represents, a decree fairly and properly obtained would bind the reversionary interest[3]. There was absolutely no question of adverse possession raised in this case, but the rule enunciated in it was relied upon in deciding several cases under the Limitation Act of 1859, where the question arose as to whether adverse possession for more than the statutory period, which bars the widow, would bar her reversionary heirs also. The leading

1. *Goluckmani* v. *Digambar*, (1852) Macpherson on Mortgage, 2nd edition, 20.
2. (1863) 9 Moo. I.A. 539.
3. *Vide* in this connection *Jugal Kishore* v. *Jotindro*, (1884) L.R. 11 I.A. 66, 73 : I.L.R. 10 Cal. 985 (P.C.).

pronouncement on this point is to be found in *Nobin Chunder* v. *Issur Chunder*[1] upon which Mr. Ghosh has laid very great stress. In that case a trespasser had taken possession of the estate against the widow and it was held that such adverse possession was effective against the reversioners as well. The cause of action, it was said, accrued to the widow and a suit by her or by her reversioner must be brought within 12 years from the date of dispossession as laid down in section 12 of the Limitation Act of 1859. The decision can certainly be justified on the Law of Limitation as it then stood. The Act of 1859 did not provide a separate rule as regards reversioners and all suits for recovery of possession of immovable property had to be brought within 12 years from the date of the accrual of the cause of action. If there was a trespass against the widow, the commencement of the trespass would constitute the cause of action for the suit and a suit against the trespasser would have to be brought within 12 years, no matter whether it was brought by the widow or by the reversioner. The learned Judges could not overlook the fact that it was not possible for the reversionary heirs to institute a suit for possession during the life-time of the widow. The difficulty, however, was got over by invoking the principle of 'representation of the estate by the widow' enunciated in the *Shivagunga case.*[2] Sir Barnes Peacock, C.J., observed as follows :

> "It is said that the reversionary heirs could not sue for possession during the life-time of the widow, and that therefore they ought not to be barred by any adverse holding against the widow at a time when they could not sue. But when we look at the widow as a representative and see that the reversionary heirs are bound by decrees relating to her husband's estate which are obtained against her without fraud or collusion, we are of opinion that they are also bound by limitation by which she, without fraud or collusion, is barred."

Since an adverse decision against a widow was held binding upon a reversioner on the principle of representation of the estate, a similar result was held to follow in the case of adverse possession against her so as to put an end to the reversionary interest. This principle was affirmed by the Privy Council in *Aumirtolall* v. *Rajonee Kant*[3] and Sir Barnes Peacock, who delivered the judgment, expressly affirmed the decision in *Nobin Chunder* v. *Issur Chunder*[1]. It may be noted here that though the Privy Council judgment in this case was passed in the year 1875 it was a decision under the old Limitation Act of 1859.

In 1871 a new Limitation Act was passed which repealed the earlier Act of 1859. Article 142 of this Act (which corresponds to Article 141 of the present Act) expressly prescribed a period of limitation of 12 years for a suit by a Hindu entitled to possession of immovable property on the death of a Hindu female heir, the limitation to run from the time when female heir died. This provision, extended further, so as to include a suit by a Mohammedan, was reproduced in the Act of 1877 and again in Article 141 of the present Act. It seems to us to be a correct view to take that this was a change deliberately made by the Legislature in the existing law. Article 141 speaks of a "like suit" and this means that it is a suit for possession of immovable property which is provided for in the previous Article. The earlier Article relates to a suit by a remainderman or a reversioner in the technical sense of the English lawyers ; and lest there be confusion if the expression "reversioner" is used with reference to the estate of a Hindu or Mahommedan female heir, the Legislature deliberately used the words "a Hindu or Mahommedan entitled to possession of property on the death of a female heir". The estate of a Hindu female heir, as is well known, is extremely anomalous in its character ; it cannot be described either as an estate of inheritance or one for life, though it partakes of the nature of both. The intention of the Legislature in introducing this provision was obviously to do away with these anomalies for the purpose of applying the Law of Limitation and for this purpose the Hindu widow's estate was completely assimilated to that of a tenant for life. This was the view taken, and in our opinion quite rightly, by a Full Bench of the Calcutta High Court in *Srinath Kur* v. *Prosunno Kumar*[4] and by the Bombay High Court in *Vundravandas* v. *Cursondas*[5], the decision

1. (1868) 9 W.R. 505.
2. (1863) 9 Moo. I.A. 539.
3. (1875) L.R. 2 I.A. 113 (P.C.).
4. (1883) I.L.R. 9 Cal. 934.
5. (1897) 21 Bom. 646.

in the latter case being affirmed by the Privy Council in *Ranchordas* v. *Parvati*[1] The decision in *Ranchordas's case*[1] has all along been treated as an authority for the proposition that the statute of limitation does not begin to run against the reversioner when there is dispossession of a Hindu female holding a limited estate; and in such cases the reversioner has a right to institute a suit within 12 years from the death of the female heir when the estate actually falls into possession. It is to be noticed that the Judicial Committee in *Ranchordas's case*[1] expressly laid down that even in respect of movables to which Article 141 does not apply, the reversioner's right to property accrues on the death of the widow and not before that. Opinion was expressed in some cases[2] that the view taken in *Ranchordas' case*[1] was shaken to a considerable extent by the later pronouncement of the Judicial Committee in *Vaithialinga* v. *Srirangath*[3], and that the principle of representation of the estate by the widow upon which the rule in *Shivagunga's case*[4] rested, could be applied to a case of adverse possession against the widow. But all doubts on this point were set at rest by the decision of the Privy Council itself in *Jaggo* v. *Utsava*[5] and the law can now be taken to be perfectly well settled that except where a decree has been obtained fairly and properly and without fraud and collusion against the Hindu female heir in respect to a property held by her as a limited owner, the cause of action for a suit to be instituted by a reversioner to recover such property either against an alienee from the female heir or a trespasser who held adversely to her accrues only on the death of the female heir. This principle, which has been recognised in the Law of Limitation in this country, ever since 1871, seems to us to be quite in accordance with the acknowledged principles of Hindu Law. The right of reversionary heirs is in the nature of *spes successionis*, and as the reversioners do not trace their title through or from the widow, it would be manifestly unjust if they are to lose their rights simply because the widow has suffered the property to be destroyed by the adverse possession of a stranger. The contention raised by Mr. Ghose as regards the general principle to be applied in such cases cannot, therefore, be regarded as sound.

Coming now to the specific points raised in the case, the first thing that requires consideration is, whether the present suit is governed by Article 124 or Article 141 of the Limitation Act? The learned Judges of the High Court have held and quite properly that the benefit of Article 141 could be claimed only if there was a qualified estate in the female heir after whose death the plaintiff was entitled to the property as the heir of the last male holder. According to the learned Judges, however, this condition was not fulfilled in the present case, inasmuch as the subject-matter of dispute was the right of shebaitship and the rights of a female shebait, it is said, are not in any way more restricted or qualified than those of a male shebait, although she cannot transmit this office to her own heirs. Reliance has been placed in this connection upon a decision of the Madras High Court in *Pydigantan* v. *Rama Dass*[6], which was followed by a Division Bench of the Calcutta High Court in *Lilabati* v. *Bishun*[7]. This method of approach seems to us to be open to doubt. Whatever might be said about the office of a trustee, which carries no beneficial interest with it, a shebaitship, as is now well settled, combines in it both the elements of office and property. As the shebaiti interest is heritable and follows the line of inheritance from the founder, obviously when the heir is a female, she must be deemed to have, what is known, as widow's estate in the shebaiti interest. Ordinarily there are two limitations upon a widow's estate. In the first place, her rights of alienation are restricted and in the second place, after her death the property goes not to her heirs but to the heirs of the last male owner. It is admitted that the second element is present in the case of succession to the rights of a female shebait. As regards the first, it is quite true that regarding the powers of alienation, a female

1. (1899) L.R. 26 I.A. 71 : I.L.R. 23 Bom. 725 (P.C.).
2. Vide *Aurobinda* v. *Monorama*, (1928) I.L.R. 55 Cal. 903.
3. (1925) 49 M.L.J. 769 : L.R. 52 I.A. 322 : I.L.R. 48 Mad. 883 (P.C.).
4. (1863) 9 Moo. I.A. 539.
5. (1929) 57 M.L.J. 160 : L.R. 56 I.A. 267 : I.L.R. 51 All. 439 (P.C.).
6. (1904) I.L.R. 28 Mad. 197.
7. (1907) 6 C.L.J. 621.

shebait is restricted in the same manner as the male shebait, but that is because there are certain limitations and restrictions attached to and inherent in the shebaiti right itself which exist irrespective of the fact whether the shebaitship vests in a male or a female heir[1].

But although we may not approve of this line of reasoning adopted by the High Court, we are in agreement with the learned Judges that the proper Article to be applied in this case is Article 124 and not Article 141. There could be no doubt that there is an element in the shebaiti right which has the legal characteristics of property; but shebaitship is property of a peculiar and anomalous character, and it is difficult to say that it comes under the category of immovable property as it is known in law. Article 141 refers expressly to immovable property and not to property in the general sense of the word. On the other hand, it is quite settled that a shebaiti right is a hereditary office and as such comes within the express language of Article 124 of the Limitation Act. We think that when there is a specific Article in the Limitation Act which covers a particular case, it is not proper to apply another Article, the application of which is not free from doubt. We hold, therefore, that Article 124 is the proper Article to be applied, and the question now arises as to whether the plaintiffs' suit is barred by limitation under this Article, as has been held by the learned Judges of the High Court?

Article 124 relates to a suit for possession of a hereditary office and the period of limitation prescribed for such suit is 12 years from the date when the defendant takes possession of the office adversely to the plaintiff. The intention of the legislature is obviously to treat hereditary office like land for the purpose of barring suits for possession of such office and extinguishing the right to the possession thereof after a certain period. The question is, when did the defendant or her predecessor take possession of the office of shebait adversely to the plaintiffs? It is conceded that the possession was adverse to Rajlakshmi, the holder of shebaiti at that time; but the contention of Mr. Chatterjee is that as the plaintiffs did not claim through or from Rajlakshmi, the defendant could not be regarded as taking possession of the office adversely to the plaintiffs. He refers in this connection to the definition of "plaintiff" in section 2 (8) of the Limitation Act, where it is stated that plaintiff includes any person from or through whom a plaintiff derives his right to sue. In answer to this, it is argued by Mr. Ghose that a shebait like a trustee represents the entire trust estate and the next trustee, even though he may not strictly claim through or from the previous holder of the office, must be deemed to be bound by acts or omissions of the latter; and in support of this contention he relies upon the judgment of the Judicial Committee in *Gnanasambanda* v. *Velu*[2]. We do not think that this contention is right. Article 124 relates to a hereditary office and this means that the office goes from one person to another solely by the reason of the latter being a heir to the former. Under the Hindu Law of Inheritance, when a female heir intervenes, she holds during her lifetime a limited interest in the estate and after her death succession opens out not to her heirs but to the heirs of the last male holder. It has not been and cannot be disputed, that the same rule applies in the case of successsion to shebaitship. Reading Article 124 of the Limitation Act along with section 2 (8), the conclusion is irresistible that to defeat the title of the plaintiff under Article 124 it is necessary to establish that the defendant had taken possession of the office adversely to the plaintiff or somebody from or through whom the plaintiff derives his title, more than 12 years prior to the institution of the suit. This is exactly what is laid down in *Gnanasambanda* v. *Velu*[2]. In this case two persons, who were hereditary trustees of a religious endowment, sold their right of management and transferred the entire endowed property to the defendant-appellant. The sales were null and void and the possession taken by the purchaser was adverse to the vendors from the very beginning. The plaintiff Velu was the son and heir of one of the hereditary trustees and he instituted the suit more than 12 years after the date of the transaction

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1. Vide *Angurbala* v. *Debabrata*, (1951) S.C.J. 394: (1951) S.C.R. 1125, 1136 (S.C.).

2. (1899) 10 M.L.J. 29: L.R. 27 I.A. 69: I.L.R. 23 Mad. 271 (P.C.).

claiming possession of the office along with the heir of the other trustee who was joined as a defendant in the suit. It was held by the Judicial Committee that the plaintiff's suit was barred and the reason given is that " the respondent Velu could only be entitled as heir to his father Nataraja, *and from him and through him,* and consequently his suit was barred by Article 124 ". This portion of the judgment, it seems, was overlooked by the learned Judges of the Calcutta High Court and also by the Madras High Court in the case referred to above. The fact that under the ordinary law of inheritance the plaintiffs would come as the heirs of the husband of Rajlakshmi is immaterial. That would not be deriving their right to sue through and from the widow, and in this view of the case the plaintiffs' suit cannot be held to be barred. The result, therefore, is that we allow the appeal, set aside the judgment and decree of the High Court and restore those of the trial Judge with costs to the appellants in all Courts.

Agent for Appellants : *Sukumar Ghose.*

Agent for Respondent No. 1 : *R. R. Biswas.*

Appeal allowed.

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT :—MEHRCHAND MAHAJAN, S. R. DAS AND GHULAM HASAN, JJ.

The Gaya Electric Supply Co., Ltd. .. . *Appellant**

v.

The State of Bihar .. *Respondent.*

Arbitration Act (*X of* 1940), *section* 34—*Scope—Stay under when permissible—Scope of inquiry in application under section* 34.

Where an arbitration clause in an agreement was that " if any difference or dispute arises between the parties over the payment of the balance which may be found due after valuation such dispute shall be submitted to the sole arbitration of a single arbitrator," the scope of the arbitration clause is a very narrow one. It only confers jurisdiction on the arbitrator on the question of valuation of the undertaking (electricity undertaking taken over by State Government) pure and simple and does not say that all disputes arising out of the agreement or in respect of it will be decided by arbitration. Questions relating to the breach of contract or its rescission are outside the reach of this clause. The arbitrator has not been conferred the power by this clause to pronounce on the issue whether the plaintiff was justified in claiming that time was of the essence of the contract and whether the State Government committed a breach of the contract by not making a valuation within the time specified in the agreement. A suit by the plaintiff against the State Government averring that the State Government committed breach of the agreement and failed to make any valuation of the undertaking or pay the balance of the compensation money, that time being of the essence of the contract, the defendant failed and neglected to complete the valuation within the time originally fixed or the extended time, and that by reason of the breach of contract, the plaintiff rescinded the agreement and forfeited the sum of rupees five lakhs and that it is entitled to compensation for the wrongful deprivation of the use of its property, such matters may well be said to arise out of the agreement and if the arbitration clause was broadly worded and stated that all disputes arising out of the agreement would be referred to arbitration, the scope of the suit would have been within the ambit of the arbitration clause and the suit will have to be stayed. But the wording of the arbitration clause in the instant case is not so widely worded. *Heyman* v. *Darwins, Ltd.*, 1942 A.C. 356, *Governor-General in Council* v. *Associated Livestock Farm, Ltd.*, A.I.R. 1948 Cal. 230; and *Harinagar Sugar Mills, Ltd.* v. *Skoda (India) Ltd.* (1936) 41 C.W.N. 563 distinguished.

In an enquiry under section 34 of the Arbitration Act the validity of the plaintiff's contention in the suit cannot be gone into as the function of the Court in such proceedings is a very limited one, The only point in such cases to be decided is whether the claim which is brought whether it is good, bad or indifferent—comes within the submission to arbitration.

Monro v. *Bognor Urban Council*, (1915) 3 K.B. 167.

On Appeal by Special Leave from the Order and Decree dated the 30th March, 1951, of the High Court of Judicature at Patna (Ramaswami and Rai, JJ.) in Miscellaneous Appeal No. 19 of 1951, arising out of Order, dated the 18th December, 1950, of the Court of the Additional Sub-Judge, Second, at Gaya in Title Suit No. 47 of 1950.

*Civil Appeal No. 175 of 1951. 3rd February, 1953.

N. C. Chatterjee, Senior Advocate (*Rameshwar Nath*, Advocate, with him) for Appellant.

M. C. Setalvad, Attorney-General for India and *Mahabir Prasad*, Advocate-General of Bihar (*H. J. Umrigar*, Advocate, with them) for Respondent.

The Judgment of the Court was delivered by

Mahajan, J.—This appeal by special leave arises out of an application made by the State of Bihar against the Gaya Electric Supply Co., Ltd., under section 34 of the Indian Arbitration Act, for stay of proceedings in a suit filed by the company on 28th September, 1950. The facts relevant to this enquiry are these :

A licence for the supply of electric energy in the town of Gaya was obtained by one Khandelwal in the year 1928 under the Indian Electricity Act, 1910. With the required sanction of the Government the licence was transferred to the company in 1932. By a notification, dated 23rd June, 1949, the licence was revoked by the Government with effect from 9th July, 1949. Thereupon the company filed a suit against the State for a declaration that the revocation of the licence was arbitrary, *mala fide* and *ultra vires*. During the pendency of the suit negotiations started between the company and the State for a settlement of the dispute and ultimately on 28th October, 1949, a deed of agreement was arrived at between them. The effect of the agreement and the correspondence referred to therein was substantially as follows :—

(*a*) That the company would withdraw the Suit No. 58 of 1949 unconditionally on 25th October, 1949.

(*b*) That within three days of the withdrawal of the suit the State of Bihar would make an advance payment of rupees five lakhs to the company, and simultaneously the company would formally hand over the possession of the undertaking to an authorized officer of the Government.

(*c*) That both parties will make their respective valuations within three months of taking over the undertaking and any balance of money found due to the company as per Government valuation will be paid to the company and in case of over-payment, the excess paid to the company on account of the " on account payment " of rupees five lakhs will be refunded to the Government.

(*d*) That in the case of any difference or dispute between the parties over the payment of the balance which may be found due after valuation *such dispute* shall be submitted to the sole arbitration of a single arbitrator who should be a high Government officer of the Provincial Government of rank equal to or higher than a Divisional Commissioner and his award shall be binding and final on both parties.

The arbitration clause is contained in a letter, dated 13th October, 1949 and was substantially accepted by the company in its letter, dated 17th October, 1949. As set out by the State Government in its application under section 34, it runs as follows :—

" In the case of any difference or dispute between the parties over the valuation as arrived at by the Government and that arrived at by the company, *such difference or dispute*, including the claim for additional compensation of 20 per cent. shall be referred to arbitration. . . . . ."

In pursuance of the agreement the respondent took over the undertaking on 28th October, 1949, and also made a payment of rupees five lakhs to the company.

On the 19th January, 1950, the company sent a statement of valuation of the assets amounting to Rs. 22,06,072 to the Chief Electrical Engineer, Bihar. The Chief Electrical Engineer characterized the valuation of 22 lakhs by the company as fantastic and stated that according to a rough valuation the amount would be approximately five lakhs and that the final valuation would be settled after the company had furnished a detailed history of the plants and machineries. The company declined to give any further details and stated that time was of the essence of the contract and it would be extended from 28th January, to 15th February, 1950. On 6th April, 1950, the Chief Electrical Engineer intimated that the valuation amounted to Rs. 5,56,221. No reply to this letter was received and the State Government intimated to the company that as difference and dispute had arisen relating to valuation, Mr. M. S. Rao, I.C.S., was being appointed as sole arbitrator to decide the dispute.

On 28th September, 1950, the company instituted the suit, the subject-matter of the application for stay, after necessary notice under section 80 of the Code of Civil Procedure. In the plaint it was alleged that as the State Government had failed and neglected to make its valuation or to make payment to the company by the 15th March, 1950, it committed a breach of the agreement and by reason of this breach the company had rescinded the agreement and had forfeited the sum of five lakhs paid as advance by the State. The company prayed *inter alia* for the reliefs of declaration that the electrical undertaking belonged to them, for damages, for appointment of receiver and for injunction. On the 9th October, 1950, the State Government filed the present application under section 34 of the Indian Arbitration Act. It was stated therein that the company had with a dishonest and *mala fide* motive and with a view to avoid the decsision of the matter in dispute in arbitration instituted the suit on incorrect and false allegations that the arbitration agreement was still subsisting and valid and binding on the parties and could not be taken as having been rescinded as alleged by the company, that the cause of action as alleged in the plaint being non-compliance with the agreement, the suit *arose out of and related to* the agreement and was covered by the arbitration clause and that the State Government was ready and willing to have the dispute settled by arbitration. The company denied the allegations of *mala fides* and pleaded that the arbitration clause was no longer in existence and that even assuming it to be in existence, the suit was in no way connected with the same and it was contended that the suit should not be stayed.

The Subordinate Judge held that the suit was not in respect of any matter agreed to be referred, and that the Court had no jurisdiction to stay the proceedings. In the result the stay application was dismissed. Against this order the State Government appealed to the High Court. The High Court held that the dispute in the suit was one which arose out of or was in respect of the agreement and that the question in the suit was directly within the scope of the arbitration clause. By an order of this Court dated 22nd May, 1951, the company was granted special leave under Article 136 (1) of the Constitution.

Section 34 of the Indian Arbitration Act runs thus :—

> "Where any party to an arbitration . . . . . commences any legal proceedings against any other party to the agreement . . . . . *in respect of any matter agreed to be referred,* any party to such legal proceedings may . . . . . . apply to the judicial authority before which the proceedings are pending to stay the proceedings ; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings."

From the language of the section it is quite clear that the legal proceeding which is sought to be stayed must be in respect of a matter which the parties have agreed to refer and which comes within the ambit of the arbitration agreement. Where, however, a suit is commenced as to a matter which lies outside the submission, the Court is bound to refuse a stay. In the words of Viscount Simon, L.C., in *Heyman* v. *Darwins, Ltd.*[1], the answer to the question whether a dispute falls within an arbitration clause in a contract must depend on (*a*) what is the dispute, and (*b*) what disputes the arbitration clause covers. If the arbitration agreement is broad and comprehensive and embraces any dispute between the parties "in respect of" the agreement, or in respect of any provision in the agreement, or in respect of anything arising out of it, and one of the parties seeks to avoid the contract, the dispute is referable to arbitration if the avoidance of the contract arises out of the terms of the contract itself. Where, however, the party seeks to avoid the contract for reasons *de hors* it, the arbitration clause cannot be resorted to as it goes along with other terms of the contract. In other words, a party cannot rely on a term of the contract to repudiate it and still say the arbitration clause should not apply. If he relies upon a contract, he must rely on it for all purposes. Where, however, an arbitration clause is not so comprehensive and is not drafted in the

1. (1942) A.C. 356.

broad language which was used in the House of Lords case, namely, "in respect of "any agreement," or "in respect of something arising out of it", that proposition does not hold good. The arbitration clause is a written submission agreed to by the parties in a contract and like every written submission to arbitration must be considered according to its language and in the light of the circumstances in which it is made.

Now as regards the first question, *viz.*, what is the present dispute about, the answer is to be gathered from paragraphs 14 to 17 of the plaint. It is averred therein that the Government of Bihar committed breach of the agreement and failed to make any valuation of the undertaking or pay the balance of the compensation money, that time being of the essence of the contract, the defendant failed and neglected to complete the valuation within the time originally fixed or the extended time, and that by reason of the breach of contract the plaintiff rescinded the agreement and forfeited the sum of rupees five lakhs and that it is entitled to compensation for the wrongful deprivation of the use of its property. No claim has been made in the plaint for the valuation of the undertaking or for the payment of any compensation for the undertaking; on the other hand, the claim in the suit is founded on the rescission of the agreement containing the arbitration clause and on a breach of that agreement. These are matters which may well be said to arise out of the agreement and if the arbitration clause was broadly worded and stated that all disputes arising out of the agreement would be referred to arbitration, it could then probably have been said that the scope of the suit was within the ambit of the arbitration clause, but the clause here is differently worded.

The clause here is that if any difference or dispute arises between the parties over *the payment of the balance which may be found due after valuation such dispute* shall be submitted to the sole arbitration of a single arbitrator. The scheme of the agreement is that the Government was to make a valuation as laid down in the Indian Electricity Act within three months of taking over the undertaking and any balance of money found due to the company as per Government valuation was to be paid by the Government, and in case of over-payment, the excess paid to the company on account of the "on account payment" of rupees five lakhs mentioned in para. 1 had to be refunded to Government. In the case of any difference between the parties over the valuation as arrived at by the Government and that arrived at by the company, *such difference or dispute*, including the claim for additional compensation of twenty per cent. had to be referred to arbitration. The scope of this arbitration clause is a very narrow one. It only confers jurisdiction on the arbitrator on the question of valuation of the undertaking pure and simple and does not say that all disputes arising out of the agreement or in respect of it will be decided by arbitration. Questions relating to the breach of contract or its rescission are outside the reach of this clause. The arbitrator has not been conferred the power by this clause to pronounce on the issue whether the plaintiff was justified in claiming that time was of the essence of the contract and whether the State Government committed a breach of the contract by not making a valuation within the time specified. This clause is therefore no answer to the company's query "Show me that I have agreed to refer the subject-matter of the suit to an arbitrator." Besides this clause in the agreement, there is nothing else which can deprive the Court of its jurisdiction to decide the plaintiff's suit as brought.

Ramaswami, J., with whom Rai, J., concurred, held that upon a perusal of the terms of contract and of the correspondence it was obvious that no stipulation was made that the compensation money should be paid within the period of three months, and that on the contrary, the intention of the parties was that the Government would pay compensation money only after the award had been made by the arbitrator. Now this is the very point which would be in issue in the suit itself, and the learned Judge was in error in considering and deciding this point in this enquiry under section 34. The validity of the plaintiff's contention in the suit cannot be gone into by that Court exercising jurisdiction under this section as its

function is a very limited one. The only point in such cases to be decided is whether the claim which is brought whether it is good, bad or indifferent—comes within the submission to arbitration. It may be that there are grounds upon which the defendant would be able to satisfy the proper tribunal that the plaintiff's claim was frivolous and vexatious, but those considerations, as pointed out by Bankes, L. J., in *Monro* v. *Bognor Urban Council*[1], are material only if the question to be considered is whether the case made was a frivolous and vexatious one, and ought to have had no weight at all upon the question of what the plaintiff's claim in fact was and one can only find out what his claim is by looking at the plaint.

The learned Judges in the High Court seem to have thought that the arbitration clause here had been drafted broadly and that all "disputes arising out of or in respect of the agreements were referable to arbitration. Their reliance on the decision of the Calcutta High Court in *Harinagar Sugar Mills, Ltd.* v. *Skoda (India) Ltd*[2]., in support of the decision indicates the error. In that case the arbitration clause was drafted in a comprehensive language and stated that a dispute arising out of the agreement had to be referred to arbitration. Their reference to the case of *Governor-General in Council* v. *Associated Livestock Farm, Ltd*[3]., also shows that they were under the same erroneous impression. In this case the arbitration clause was in these terms:—

"Any dispute or difference arising out of the contract shall be referred to the arbitration of the officer sanctioning the contract whose decision shall be final and binding."

It is obvious that these decisions could have no relevance to the arbitration clause as drawn up in the present case. If the nature of the claim is as we have indicated above, it seems plain that it does not come within the scope of the submission.

In our judgment, therefore, the decision of the learned Subordinate Judge was right and the Judges of the High Court were in error in reversing it. In the result the only course open to us is to allow the appeal with costs and to say that the plaintiff's claim is not within the scope of the submission and that the petition under section 34 was rightly dismissed by the Subordinate Judge.

Agent for Appellant: *Rajinder Narain.*

Agent for Respondent: *P. K. Chatterjee.*

G.R./K.S. *Appeal allowed.*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT:—M. PATANJALI SASTRI, *Chief Justice*., B. K. MUKHERJEA, N. CHANDRASEKHARA AIYAR, VIVIAN BOSE AND GHULAM HASAN, JJ.

K. M. S. Lakshmanier and Sons .. *Appellants**

v.

The Commissioner of Income-Tax and Excess Profits Tax, Madras .. *Respondent.*

Excess Profits Tax Act (XV of 1940)—*Second Schedule, Rule* 2-*A*—*Deposits received from constituents in respect of forward contracts with assessees for supply of yarn*—*If "borrowed money" within meaning of Rule* 2-*A*.

Amounts paid by constituents to the assessee in respect of forward contracts in yarn were under three different arrangements for successive periods. The first of these was evidenced by a circular issued on 5th May, 1944, which was in the following terms:—

"You are quite aware of the fact that we are and will be, so long as the existing contracts of bales are closed, transferring the Contract Advance Deposit amounts to the credit of current yarn account for the bales supplied to you then and there.

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1. (1915) 3 K.B. 167.
2. (1936) 41 C.W.N. 563.
3. A.I.R. 1948 Cal. 230.

* Civil Appeal No. 71 of 1952. 23rd January, 1953.

Now what we have decided in this connection is not to do so as stated above, but to keep such advance amounts under the new heading " Contracts Advance Fixed Deposit Account " and return in cash or by bank's cheque or by insured post, the advance amount of the bales booked and supplied in full under certain contract number only after completion of that contract with the bank's commission, etc., expenses that may be incurred therein on your account.

The value of the bales delivered or to be delivered for each and every time, should be paid in full and this system is applicable to our future booking of contracts only ".

This was followed by another circular issued on 5th December, 1944, which ran thus:

" This is to inform you that we have changed the heading of your ' Contracts ' Advance Fixed Deposit Account ' into ' Security Deposit Account.' As such we have transferred the amount which is to your credit in the former to the credit of your latter account. This is with effect from 1st November, 1944, kindly note ".

The arrangement was further modified by the last circular dated 14th February, 1945, which was in these terms :

" Instead of calling for amounts from you towards " Security Deposit " due to bales for which we are entering into forward contracts with you and returning the same to you from the said desposit then and there, as we are doing now, and in order to make it feasible, we have decided to demand from you a certain sum towards " Security Deposit " and keep the same with us so long as our business connection under forward contracts will continue with you,

* * * * * * *

Please note that an interest of 3 per cent. per annum will be allowed as usual to the said deposit amounts until further notice ". On a question whether the amounts deposited by the constituents were " borrowed money " within the meaning of Rule 2-A. of the Second Schedule to the Excess Profits Tax Act, 1940.

Held : The circular of the 14th February, 1945, marks a clear departure from the mode of dealing followed by the parties before the 5th May, 1944. The amount deposited by a customer was no longer to have any relation to the price fixed for the goods to be delivered under a forward contract either in instalments or otherwise. Such price was to be paid by the customer in full against delivery in respect of each contract without any adjustment out of the deposit, which was to be held by the assessee as security for the due performance of his contracts by the customer so long as his dealings with the appellants by way of forward contracts continued, the assessees paying interest at 3 per cent. in the meanwhile, and having the use of the money for their own business. It was only at the end of the " business connection " with the assessee that an adjustment was to be made towards any possible liability arising out of the customer's default. Apart from such a contingency arising, the assessees undertook to repay an equivalent amount at the termination of the dealings. The transaction had thus all the essential elements of a contract of loan and the desposits received under the final arrangement constitute " borrowed money " for the purpose of Rule 2-A of the Second Schedule to the Excess Profits Tax Act.

The deposits received from 5th May, 1944 to 14th February, 1945, having regard to the terms of the agreement then in force, partake more the nature of trading receipts than of security deposits. The amounts were treated as advance payments in relation to each " contract number ". Such sums cannot be regarded as borrowed money for the purposes of Rule 2-A.

(1950) 1 M.L.J. 543, reversed.

On appeal from the Judgment dated the 9th January, 1950, of the High Court of Judicature at Madras (Satyanarayana Rao and Viswanatha Sastri, JJ.)[1] in case Referred No. 67 of 1947.

G. S. Pathak, Senior Advocate (*G. R. Jagadisan*, Advocate, with him) for Appellants.

M. C. Setalvad, Attorney-General for India (*G. N. Joshi*, Advocate, with him) for Respondent.

The Judgment of the Court was delivered by

Patanjali Sastri, C. J.—This appeal arises out of a reference made by the Income-tax Appellate Tribunal, Madras Bench, under ssection 21 of the Excess Profits Tax Act, 1940, (hereinafter referred to as the Act).

The appellants are merchants carrying on business in yarn in Madura, and are the sole-selling agents for yarn manufactured by the Madura Mills Co., Ltd., distributing yarn to several constituents under forward contracts in respect of which they obtained advances of moneys from their constituents. During the chargeable accounting period (13th May, 1944 to 12th April, 1945), the appellants received

1. (1950) 1 M.L.J. 543.

from their customers sums amounting to Rs. 7,69,569 and they claimed before the Excess Profits Tax Officer that the said sum should be treated as "borrowed money" within the meaning of Rule 2-A of the Rules in the Second Schedule to the Act and, on that footing, no excess profits-tax was payable by them for the chargeable accounting period. The Excess Profits Tax Officer rejected the claim and assessed them to excess profits-tax of Rs. 25,404, holding that, having regard to the terms of the agreement under which the amounts were received, they could not in law be regarded as "borrowed money" within the meaning of that Rule. Appeals to the Appellate Assistant Commissioner and the Income-tax Appellate Tribunal having failed, the appellants applied to the Tribunal for reference of the question of law arising in the case to the High Court at Madras for its determination, and the Tribunal accordingly referred the following question :

Whether in the circumstances of this case, the moneys deposited by customers with the assessee firm as security deposits were "borrowed money" within the meaning of Rule 2-A, of the Second Schedule to the Excess Profits Tax Act, 1940, either throughout the chargeable accounting period ended 12th April, 1945, or during any part of that chargeable accounting period ?

The reference was heard by a Division Bench of the Court (Satyanarayana Rao and Viswanatha Sastri, JJ.) and the learned Judges by their judgment dated 9th June, 1950[1], decided the question against the appellants but granted them leave to appeal to this Court.

As is well-known, during the period of the war, profits arising from a trade or business were much higher than the pre-war standard of profits and the State wanted to catch a portion of such profits which it deemed to be in excess of the normal or "standard" profits. The Act accordingly charges a tax on the "excess profits" earned under war conditions and makes provision, *inter alia*, for cases where, as here, there is an increase of capital used for purposes of the business in the chargeable accounting period. In such cases the standard profits are to be increased by an amount calculated by applying the "statutory percentage" (varying from 8 to 12 per cent. in different classes of cases) to the increase in capital. Thus, with the increase in the capital employed in the chargeable accounting period, there would be an increase in the standard profits and a decrease in the "excess profits". Where the increase in the capital is brought about with borrowed money, it is but fair that such money, which plays its part in earning the larger profits, of which the State claims a substantial share, should not be deducted in computing the average capital used for the purposes of the business. Rule 2-A of the Rules in the Second Schedule to the Act accordingly provides that in computing the average capital during the chargeable accounting period and the relative standard period "no deduction shall be made in respect of borrowed money". In the present case, the appellants having admittedly received no security deposits during the standard period, the increase in the average capital employed in the chargeable accounting period would be much greater than what it has been computed to be, if the security deposits received, which were all used for the appellants' business, were treated as borrowed money and part of the average capital of their business for the chargeable accounting period, and that, as stated above, would result in a considerable reduction of the excess profits as now assessed. What then is the true legal character of these security deposits ?

The sums in question were received by the appellants under three different arrangements with their customers evidenced by the circulars issued to them. The first of these circulars issued on 5th May, 1944, was in the following terms :

You are quite aware of the fact that we are and will be, so long as the existing contracts of bales are closed, transferring the Contract Advance Deposit amounts to the credit of current yarn account for the bales supplied to you then and there.

Now what we have decided in this connection is not to do so as stated above, but to keep such advance amounts under the new heading "Contracts Advance Fixed Deposit Account" and return in cash or by bank's cheque or by insured post the advance amount of the bales booked and supplied in full under certain contract number only after completion of that contract with the bank's commission, etc., expenses that may be incurred therein on your account.

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1. (1950) 1 M.L.J. 543.

The value of the bales delivered or to be delivered for each and every time, should be paid in full and this system is applicable to our future booking of contracts only.

This was followed by another issued on 5th December, 1944, which runs thus:

This is to inform you that we have changed the heading of your "Contracts Advance Fixed Deposit" account into "Security Deposit" account. As such, we have transferred the amount which is to your credit in the former to the credit of your latter account. This is with effect from 1st November, 1944. Kindly note.

The arrangement was further modified by the last circular, dated 14th February, 1945, which was in these terms:

Instead of calling for amounts from you towards "Security Deposit" due to bales for which we are entering into forward contracts with you and returning the same to you from the said deposit then and there, as we are doing now, and in order to make it feasible, we have decided to demand from you a certain sum towards Security Deposit and keep the same with us so long as our business connection under forward contracts will continue with you.

In your case, we have fixed a sum of Rs. . . . . . for the said deposit, which amount we have to keep with us on your approval. Against the said amount, a sum of Rs. . . . . stands credit with us now in the said deposit. Therefore, the balance of Rs. . . . . . due by you/to you, is to be remitted/will be returned. Kindly let us have your reply immediately in this connection.

Please note that an interest of 3 per cent. per annum will be allowed as usual to the said deposit amounts until further notice.

It will be seen that before the 5th May, 1944, which covers the first seven weeks of the chargeable accounting period, the appellants had two accounts for each constituent, namely, a "contract deposit account" and a "current yarn account", crediting the moneys received from the customers in the former account and transferring them to the yarn account in adjustment of the price of the bales supplied "then and there", that is, as and when deliveries were made under a contract either in instalments or in full. It is clear that the amounts received from the customers under this arrangement were merely advance payments of the price which were to be adjusted against the value of the bales supplied from time to time under the forward contracts and they can in no sense be regarded as borrowed money. This indeed was not disputed by Mr. Pathak. It was also conceded by him that the circular of 5th December, 1944, which merely changed the heading of the account in which the moneys received were credited, did not alter the legal position as it then stood. Accordingly, the question arises only with reference to the amounts received between 5th May, 1944, and 14th February, 1945, which covers the major part of the chargeable accounting period and those received thereafter till the end of that period.

It will be convenient to deal first with the amounts received during the last part of that period, for, if we accept the view of the learned Judges below that those amounts were not borrowed money, then *a fortiori* must amounts received during the second part be held not to be borrowed money.

The circular of the 14th February, 1945, marks a clear departure from the mode of dealing followed by the parties before the 5th May, 1944. The amount deposited by a customer was no longer to have any relation to the price fixed for the goods to be delivered under a forward contract—either in instalments or otherwise. Such price was to be paid by the customer in full against delivery in respect of each contract without any adjustment out of the deposit, which was to be held by the appellants as security for the due performance of his contracts by the customer so long as his dealings with the appellants by way of forward contracts continued, the appellants paying interest at 3 per cent. in the meanwhile, and having, as appears from the course of dealings between the parties, the use of the money for their own business. It was only at the end of the "business connection" with the appellants that an adjustment was to be made towards any possible liability arising out of the customer's default. Apart from such a contingency arising, the appellants undertook to repay an equivalent amount at the termination of the dealings. The transaction had thus all the essential elements of a con-

tract of loan, and we accordingly hold that the deposits received under the final arrangement constitute borrowed money for the purpose of Rule 2-A.

The learned Attorney-General laid great stress on the fact that the amounts were deposited with the object of inducing the appellants to have dealings with the customers and for the specific purpose of being held as security for the due performance by the customers of their forward contracts, and that the appellants themselves fixed the amount to be deposited in each case. These features, according to him, distinguished these transactions from a real borrowing or a real lending which the expression " borrowed money " in Rule 2-A must be taken to connote. We are unable to see how the object which the customers had in view in making the deposits can affect the essential character of the transaction. If *A* pays money to *B* who agrees to return not the identical currency in *specie* but an equivalent sum subsequently, no bailment arises but simply a loan owing by *B* to *A*. The fact that it is called a " deposit " can make no difference. As pointed out by the Judicial Committee of the Privy Council in *Nawab Major Sir Mohammad Akbar Khan* v. *Attar Singh*[1], the two terms are not mutually exclusive :

> " A deposit of money is not confined to a bailment of specific currency to be returned in *specie*. As in the case of a deposit with a banker, it does not necessarily involve the creation of a trust but may involve only the creation of the relation of debtor and creditor, a loan under conditions".

The fact that one of the conditions is that it is to be adjusted against a claim arising out of a possible default of the depositor cannot alter the character of the transaction. Nor can the fact that the purpose for which the deposit is made is to provide a security for the due performance of a collateral contract invest the deposit with a different character. It remains a loan of which the repayment in full is conditioned by the due fulfilment of the obligations under the collateral contract.

The Attorney-General placed strong reliance, as did the learned Judges in the High Court, on the English decisions in *Inland Revenue Commissioners* v. *Port of London Authority*[2] and *Inland Revenue Commissioners* v. *Rowntree & Co., Ltd*[3]. In the first case it was held that the stock issued by the Port of London Authority as consideration for the acquisition of the property of certain dock companies of London, which carried interest and was redeemable after twenty years, could not be regarded as representing " borrowed money " under Rule 2 of Part III of Schedule IV of the Finance (No. 2) Act, 1915, as that expression referred to " a real borrowing and a real lending ". The transaction was held to be a purchase of assets for consideration in the shape of the stock issued, though it was attended with incidents in some respects similar to those which would have ensued if there had been a borrowing. It may well be conceded that the term " borrowed money " must be construed in its natural and ordinary meaning and implies a real borrowing and a real lending. But the holding that " there was nothing of the kind " in the issue of stock as consideration for the purchase of certain assets, where " no money passed directly or indirectly between the parties to the transaction " is not of much assistance in determining the issue whether the security deposits now in question involved a real borrowing and a real lending. For the reasons already indicated, we are satisfied that they do answer to that description and constitute borrowed money within the meaning of Rule 2-A.

The other case cited is still less helpful. Under certain arrangements for financial facilities, *A* drew bills on *B* who accepted them and then as an agent of *A* discounted them with *C* and paid over the proceeds to *A*, who agreed to put him in funds before the maturity of the bills for paying them off. The Court of Appeal held that the money thus raised was not " borrowed money " within the meaning of para. 2 (1) of Part II of the Seventh Schedule to the Finance (No. 2) Act, 1939, which provided that " any borrowed money shall be deducted " (for the purpose of Excess Profits Duty). After referring to the *Port of London case*[2], as authority

1. (1936) 71 M.L.J. 712 : L.R. 63 I.A. 279 : I.L.R. 17 Lah. 557 (P.C.).
2. (1923) A.C. 507.
3. (1948) 1 All E.R. 482.

for the view that the words "borrowed money" require the existence of a borrower and a lender and that there must be a real borrowing in the legal sense of the word, the learned Judges proceeded to inquire who could be the lender, if any, in the circumstances of the case and found there was none—not *B*, for an acceptor of a bill need not have any money in his hands at all to lend, not *C* who was only acquiring certain rights in the bill under the law merchant but was not lending money. They accordingly found it "impossible to discover that there was such a relationship" (of lender and borrower) either between *A* and *B*, or between *A* and *C*. In the present case, the relationship of lender and borrower in all its essential features in plainly recognisable between the depositors and the appellants, and that decision does not affect the matter one way or the other.

On the other hand, a more recent decision of the English Court of Appeal in *Davies* v. *The Shell Company of China*[1], which Mr. Pathak brought to our notice, is more in point. A British Company, which sold petroleum products in China, through Chinese agents, required the latter to deposit with the Company a sum of money in Chinese dollars to be held as security against possible default by the agents in payment for the products consigned to them and to be repaid when the agency came to an end. These deposits were, during the war, transferred to the United Kingdom for reasons of safety and were there held in sterling. Subsequently, when the Chinese dollar depreciated in relation to sterling, the amounts required to repay the deposits in Chinese dollars were much less than the sums held by the Company as the sterling equivalents of the deposits, and the question arose whether such deposits were trading receipts or receipts of a capital nature. In holding that they were capital receipts and the profit was therefore a capital gain, Jenkins, L.J., who delivered the leading judgment, observed:

> If the agent's deposit had in truth been a payment in advance to be applied by the Company in discharging the sums from time to time due from the agent in respect of petroleum products transferred to the agent and sold by him the case might well be different and might well fall within the *ratio decidendi* of *Landes Bros.* v. *Simpson*[2] and *Imperial Tobacco Co.* v. *Kelley*[3]. But that is not the character of the deposits here in question. The intention manifested by the terms of the agreement is that the deposit should be retained by the Company, carrying interest for the benefit of the depositor throughout the terms of the agency. It is to be available during the period of the agency for making good the agent's defaults in the event of any default by him; but otherwise it remains, as I see it, simply as a loan owing by the Company to the agent and repayable on the termination of the agency; and I do not see how the fact that the purpose for which it is given is to provide a security against any possible default by the agent can invest it with the character of a trading receipt.

The Attorney-General relied also upon certain decisions holding that security deposits received from employees were impressed with a fiduciary character so that the depositors were entitled to preferential payments from the assignee in bankruptcy of the depositee. He admitted, however, that there were decisions holding the other way, and we do not think it necessary to discuss that class of cases, as the manner in which such sums have to be dealt with under the Insolvency Acts has no direct bearing on the question now under consideration.

Turning now to the deposits received by the appellants from 5th May, 1944, to 14th February, 1945, we are of opinion that, having regard to the terms of the arrangement then in force, they partake more of the nature of trading receipts than of security deposits. It will be seen that the amounts received were treated as advance payments in relation to each "contract number" and though the agreement provided for the payment of the price in full by the customer and for the deposit being returned to him on the completion of delivery under the contract, the transaction is one providing in substance and effect for the adjustment of the mutual obligations on the completion of the contract. We hold accordingly that the sums received during this period cannot be regarded as borrowed money for the purposes of Rule 2-A.

Lastly, Mr. Pathak suggested that the case having proceeded both before the Excess Profits Tax Authorities and the High Court on the footing that if the

1. (1952) 32 T.C. 133.
2. 19 T.C. 62.
3. 25 T.C. 292.

sums received from the customers during any part of the chargeable accounting period was held to be borrowed money, they must be included in the computation of the average profits for the whole of the chargeable accounting period, no distinction should now be made between one part of the period and another for this purpose. We cannot accept that view. It is true to say that no such distinction was in fact made at any stage so far, but that is because it was held that none of the sums received under any of the arrangements was borrowed money within the meaning of Rule 2-A. But, if it be held that the amounts received under one or more, but not all, of the agreements are borrowed moneys, then, obviously, the computation of average capital in accordance with Rule 2-A must take into account the different character of the sums received under each of the agreements which was in force during a part only of the chargeable accounting period. The form of the question referred to the Court clearly recognises this and admits of a distinction being made, if necessary, between parts of the chargeable accounting period.

In the result we set aside the order of the Court below and answer the question referred in the affirmative with reference to the last part of the chargeable accounting period, namely, 14th February, 1945 to 12th April, 1945, and in the negative with reference to the rest of that period. We make no order as to costs.

Agent for Appellants : *Naunit Lal.*

Agent for Respondent : *G. H. Rajadhyaksha.*

G.R./K.S. ——— *Order set aside.*

[THE SUPREME COURT OF INDIA.]

[Criminal Appellate Jurisdiction.]

PRESENT :—MEHRCHAND MAHAJAN, S., R. DAS AND GHULAM HASAN, JJ.

Mahadev Dhanappa Gunaki }
Nagappa Bhujappa Durdi } .. *Appellants**

v.

The State of Bombay .. *Respondent.*

Penal Code (XLV of 1860), section 116 read with sections 161 and 34—Offer of bribe to public officer after he became functus officio*—Offence.*

Obiter.—The offer of a bribe to a public officer after he was *functus officio* and therefore not a public servant who could, in the exercise of his official function, show any favour or render any service to the appellants will nonetheless be an offence.

Shamsul Huq v. *King-Emperor*, A.I.R. 1921 Cal. 344 ; In re *Pulipati Kenkiah*, (1924) 47 M.L.J. 662 : A.I.R. 1924 Mad. 851; *Venkatarama Naidu* v. *Emperor*, (1929) 57 M.L.J. 239: A.I.R. 1929 Mad. 756, disapproved ; *Emperor* v. *Ajudhia Prasad*, (1928) I.L.R. 51 All. 467 ; *The Crown* v. *Phul Singh*, (1941) I.L.R. 23 Lah. 402 ; *Emperor* v. *Ram Sewak*, I.L.R. (1947) All. 444 : A.I.R. 1948 All. 17 ; *Gopeshwar Mandal* v. *Emperor*, I.L.R. (1947) Nag. 611 : A.I.R. 1948 Nag. 82; In re *Varadadesikachariar*, (1949) 2 M.L.J. 443 ; *Indur Dayaldas Advani* v. *State*, I.L.R. (1952) Bom. 169: A.I.R. 1952 Bom. 58 and *The State* v. *Sadhu Charan Panigrahi*, A.I.R. 1952 Orissa 73, approved.

[On the facts of the case however no final opinion on the point of law was express as on the facts the public officer in the case was found to have had it in his power, in the exercise of his official functions to show favour or render some service to the accused.]

On appeal from the Judgment and Order dated the 17th/18th September, 1951, of the High Court of Judicature at Bombay, in Criminal Revision Application No. 399 of 1951, from the judgment dated the 24th April, 1951, of the Court of the Sessions Judge, Belgaum, in Criminal Appeal No. 95 of 1950, arising out of Judgment dated the 18th September, 1950, of the Court of the Additional Magistrate, First Class, Belgaum, in Case No. 4 of 1950.

B. R. Ambedkar and *H. F. M. Reddy*, Advocates, for Appellants.

M. C. Setalvad, Attorney-General for India and *C. K. Daphtary*, Solicitor-General for India (*G. N. Joshi*, Advocate, with them), for Respondent.

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* Crl. Appeal No. 66 of 1951. 4th February, 1953.

The Judgment of the Court was delivered by

Das, J.—The two appellants before us were charged before the Additional Magistrate, First Class, Belgaum, for having, on or about the 23rd March, 1949, at the Police Club in Belgaum, in furtherance of the common intention of themselves and one Madivalappa Veerappa Pattan who had died during the investigation, offered Rs. 15,000 as an illegal gratification to one Sri P. P. Naik, Police Inspector, Anti-Corruption Branch, Belgaum, in order that he should help them in getting the income-tax inquiry against them dropped and that he should see that the account-books attached by the Anti-Corruption Police were returned to them and having thereby committed an offence punishable under section 116 read with sections 161 and 34 of the Indian Penal Code. The prosecution case was as follows: The appellants and one Madivalappa Veerappa Pattan were residing and carrying on business in partnership in Silk, Yarn, Sarees and other articles in Rabkavi in the district of Belgaum. Having received information that the firm was evading income-tax to a great extent, one Sri Gudi, the Deputy Superintendent of Police, Anti-Corruption Branch, along with Sri Naik, Inspector of Police, went from Belgaum to Rabkavi and searched the residence and business premises of the appellants on the 24th/25th January, 1949, and seized their account-books. At this time the appellant Durdi offered to pay Rs. 15,000 to Rs. 20,000 to Sri Naik to hush up the matter. A similar offer was also made to Sri Gudi. Both the officers characterised the offer as improper and declined to accept it. The two officers returned to Belgaum, on the 26th January, 1949 and on their return they informed their superior officers Sri Malpathak, the Superintendent of Police, and Sri Wagh, the then head of the Anti-Corruption Branch about the offers of bribe made to them by the appellants. They also had a talk about these offers with Sri Jadhav, the District Magistrate of Belgaum, who advised them to arrange for a trap to catch the appellants. On the 21st February, 1949, Sri Gudi issued an order (Ex. 1-A) directing Sri Naik to examine the books of account attached by them and to submit his report. In the first week of March, 1949, at Hubli, which was about 100 miles away from Rabkavi, the appellants contacted one Sri Keshavain who was known to them and was also a friend of Sri Naik and Sri through him offered to pay Sri Naik an amount up to Rs. 30,000 for saving them from the enquiry and for the return of the books of account. Sri Keshavain later on informed them that he had seen Sri Naik but the latter had asked him to inform the appellants that the offer was an improper one. On the 12th March, 1949, Sri Naik submitted his report (Ex. 10-A) stating in substance that a cursory examination revealed that huge profits made by black-marketing had been concealed and the payment of income-tax on such profits had been evaded. The report ended with the following paragraph:

"(9) I have not examined the other account books attached. This examination of mine was very cursory. If a detailed and careful examination is made along with secret papers, balance sheets and other important documents by an expert the profits made by Mr. Durdi for remaining 7 years might come to several lacs. So I submit that the A.A.I.G.P., A.C., Poona, may please be moved in the matter to send the books to the Commissioner of Income-tax for further disposal."

In the second week of March, 1949, the appellants again requested Sri Keshavain to try again and renew the offer to Sri Naik. In the meantime Sri Naik informed Sri Gudi about the offer made through Sri Keshavain and Sri Gudi advised Sri Naik to consent to accept the amount with a view to trap the appellants. Accordingly, when Sri Keshavain renewed the offer to Sri Naik, the latter told him that if the appellants came with the money to Belgaum he (Sri Naik) would see to the rest of things. This reply of Sri Naik was conveyed by Sri Keshavain to the appellants. On the 22nd March, 1949, the appellants and the deceased Pattan saw Sri Keshavain at Hubli and said that they would like to hand over the money personally to Sri Naik and requested Sri Keshavain to accompany them to Belgaum which the latter agreed to do. Accordingly, on the 23rd March, 1949, the appellants and Pattan and Sri Keshavain came to Belgaum. Sri Keshavain then arranged for their meeting with Sri Naik at 7 to 7-30 P.M. near Mitra Samaj. Sri Naik kept Sri Gudi informed as to what had happened. At the appointed time Sri Naik went near-

the Mitra Samaj and met the appellants and Sri Keshavain. The appellants requested Sri Naik to accept the money but Sri Naik said that matters of this kind should not be discussed on the public road and asked them to see him in his room at the Police Club at 10 to 10-30 P.M. Sri Naik informed Sri Gudi about this appointment. Sri Gudi asked Sri Naik to submit a report in writing which the latter did (Ex. 1-B). Sri Naik and Sri Gudi then went to the District Magistrate, Sri Jadhav who, not being able to be present in person at the time of the trapping, wrote a D.O. (Ex. 3-A) to Sri Kamat, the Additional Magistrate, to witness the trapping. Sri Jadhav also authorised Sri Gudi to investigate into the offence by making an endorsement on Sri Naik's report (Ex. 1-B). Then Sri Gudi and Sri Naik returned to the Police Club where Sri Arur, Sub-Inspector, and the Panchas were waiting. Sri Gudi also brought Sri Kamat to the Police Club. A Panchnama (Ex. 2-A) about the search of the room and of the person of Sri Naik was made by Sri Gudi in the presence of the Panchas and Sri Kamat. Then the party left the room and concealed themselves, leaving Sri Naik alone in the room waiting for the arrival of the appellants. At about 10-30 P.M., the appellants and Pattan entered the room of Sri Naik. After receiving them and offering them seats Sri Naik asked the appellants as to what he could do for them. The appellant Gunaki told him that they should be saved from the income-tax inquiry and that their books of account should be returned to them. The appellant Durdi also made similar requests. Thereafter on a signal from the appellant Gunaki, the appellant Durdi handed over a bundle wrapped in cloth to Sri Naik who opened it and found that it contained bundles of currency-notes. Sri Naik kept the notes on the cot where he was sitting and the appellant Gunaki then wanted the return of the unstamped Saree which had been seized. He also enquired as to when the books would be returned. Sri Naik said that the sanction of the Magistrate would be necessary before the books could be returned. The appellant Gunaki then said that the balance amount would be paid on receipt of the books. At this stage, Sri Naik signalled to Gudi through the window and the latter with his party including Sri Kamat rushed into the room. Sri Naik handed over the bundles of notes to them and the formalities of drawing up a Panchnama were gone through.

After some further investigation, in the course of which Madivalappa Veerappa Pattan, the partner of the appellants died, the two appellants were sent up for trial on the charge mentioned above. The prosecution examined, amongst others, Sri Naik, Sri Kamat, Sri Jadhav, Sri Keshavain, Sri Gudi, Sri Arur and the Panch in support of its case. The appellants pleaded not guilty and denied having made any offer of a bribe. They said that they paid Rs. 15,000 to Sri Naik as and by way of composition money in settlement of the State's claim for income-tax and examined five defence witnesses. The trial Magistrate disbelieved the defence witnesses and accepting the evidence of the prosecution witnesses as substantially correct found that the sum of Rs. 15,000 had been offered as illegal gratification for hushing the income-tax inquiry and for the return of the books and convicted and sentenced each of the appellants to undergo rigorous imprisonment for one year and to pay a fine of Rs. 1,000 and in default to undergo rigorous imprisonment for two months. The sum of Rs. 15,000 was confiscated to the Government.

The appellants preferred an appeal but the Additional Sessions Judge, in agreement with the trial Magistrate, came to the conclusion that the sum of Rs. 15,000 had been offered as illegal gratification and not as composition for income-tax and accordingly upheld the conviction and sentences passed by the trial Magistrate and dismissed the appeal. The appellants moved the High Court in revision but that application was also dismissed. The appellants applied for and obtained leave of the High Court to appeal to this Court on a certificate under Article 134 (1) which runs as follows :—

"Leave applied for granted inasmuch as the case is principally decided upon the view that, when the offerer of a bribe is prosecuted, the question to be considered is whether he gave the bribe

with a view to corrupt the Government servant. So far as he is concerned, *mens rea* the gist of the offence consists in the attitude of mind that the officer should favour and not in any possibility of the officer showing favour."

Dr. B. R. Ambedkar appearing in support of this appeal contends on the authority of certain observations to be found in *Lieutenant Hector Thomas Huntley* v. *Emperor*[1] that the prosecution had not excluded every reasonable possibility of innocence of the appellants. The accused in that case was convicted by a Special Tribunal from whose decision there was no appeal. There was only an application for revision to the High Court which dismissed that revision petition but granted a certificate under section 205 (1) of the Government of India Act, 1935. There was, therefore, no question of there being concurrent finding by two courts entitled to go into questions of facts such as there is in the case before us. Further, as it will be presently seen, the facts relied on by the learned counsel only have a bearing on the question of appreciation of the evidence. Thus it said that although there was a definite allegation of the alleged offer of bribe made by the appellants to the two police officers on the 24th/25th January, 1949 and although the two police officers informed their superior officers and the latter advised the trapping of the appellants nothing was done for two months and it is concluded from such inaction that no bribe had in fact been offered and that this story was, therefore, false. We see no force in this argument, because the police authorities had perforce to wait until the appellants made a further move in the matter. It is not reasonable to suggest that the police authorities should go out of their way and actively invite bribes in order to trap the appellants. In the next place it is said that although Sri Naik in his report dated the 12th March, 1949, suggested that there had been evasion of tax on a large scale there was really no substance in such report for the additional tax eventually demanded was a paltry sum of Rs. 71-8-0 for the year 1945-1946 and a sum of Rs. 63-11-0 for the year 1946-1947 and it is suggested that it cannot be believed that the appellants would, in such circumstances, be prepared to pay a bribe up to Rs. 30,000 or even a bribe of Rs. 15,000. The fact that Rs. 15,000 was offered is not disputed. The argument is that it is highly improbable that the appellants would offer a bribe of Rs. 15,000 when they knew that a very small sum was due on account of income-tax. The self-same argument would make it equally improbable that the appellants knowing that the amount of income-tax payable was very small would be prepared to offer Rs. 15,000 as and by way of composition for the income-tax liability. In the third place it is said that the evidence of the prosecution witnesses as to what was actually said when the money was paid is not consistent. Our attention has been drawn to the different statements made by the prosecution witnesses Sri Naik, Sri Arur, Sri Keshavain, the Panch and Sri Kamat but we do not find any substantial discrepancy in their statements. Finally, it is urged that as the appellants were taking steps by means of applications to the higher authorities for the return of their books which fact indicated that they knew that the proper authority to release the books was the District Magistrate, there could, therefore, be no reason for their offering a bribe to Sri Gudi or Sri Naik who had not got it in their power to return the books without the sanction of the District Magistrate. It was reasonably clear that before the District Magistrate would pass any order on the appellants' application for return of the books he would consult the officers at whose instance the books had been attached—as, in fact, the District Magistrate did in this case—and the appellants may, therefore, have thought that a favourable report from Sri Gudi or Sri Naik would facilitate their obtaining an order for return of their books. As already stated, the concurrent findings of fact by the trial Magistrate as well as by the Additional Sessions Judge in appeal are against the appellants and we do not consider that the several points advanced by the learned counsel as hereinbefore mentioned constitute a sufficient ground for departing from the ordinary practice of this Court to accept the concurrent findings of fact as correct.

Dr. Ambedkar then submits that in this case no offence had been committed. He points out that it was Sri Gudi and not Sri Naik who was authorised to seize the

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1. (1944) F.L.J. 167 : (1944) 1 M.L.J. 503 : A.I.R. 1944 F.C. 66 (F.C.).

books. Sri Gudi directed Sri Naik to examine the books and make a report which the latter did on the 12th March, 1949, Exhibit 10-A. After that date Sri Naik was *functus officio,* having fully performed whatever duty he had to perform, and, therefore, he was not the public servant who could, in the exercise of his official function, show any favour or render any service to the appellants. Learned counsel relied on the cases of *Shamsul Huq* v. *King-Emperor*[1], In re *Pulipati Venkiah*[2] and *Venkatarama Naidu* v. *Emperor*[3]. A perusal of the cases relied on by learned counsel will show that the question of law was not fully discussed and the reasons in support of the conclusions arrived at are not clear or convincing. On the other hand, the High Courts of Allahabad, Lahore, Nagpur, Bombay and Orissa have disapproved of the decisions relied on by Dr. Ambedkar. [See *Emperor* v. *Ajudhia Prasad*[4], *The Crown* v. *Phul Singh*[5], *Emperor* v. *Ram Sewak*[6], *Gopeshwar Mandal* v. *Emperor*[7], In re *Varadadesikachariar*[8], *Indur Dayaldas Advani* v. *State*[9] and *The State* v. *Sadhu Charan Panigrahi*[10].] The point of law appears to have been more fully discussed in these cases and the reasonings set out therein appear to us, as at present advised, to be more convincing than those set out in the cases relied on by Dr. Ambedkar. It is, however, not necessary for the purposes of this case to express any final opinion on this question, for, we are satisfied, on the facts of this case, that Sri Gudi and Sri Naik had it in their power, in the exercise of their official functions, to show favour or render some service to the appellants. It will be remembered that the report of Sri Naik was in the nature of a tentative report made on a cursory examination of the books of account. The books of account were still in their custody and the matter was still under their investigation. In fact, the District Magistrate had, on the 20th March, 1949, referred the application of the appellants for the return of the books to Sri Gudi for report. Sri Gudi made his report thereon on the 25th March, 1949, stating that the investigation was in progress and the books were heavy and that he would inform the District Magistrate as soon as the books would not be required any more. The offer of bribe, as already indicated, was last made to Sri Naik on the 23rd March, 1949. On that date there was nothing to prevent Sri Naik from making a further report stating that on closer scrutiny of the books of account he found there was no tax evasion and there was nothing to prevent Sri Gudi from reporting to the District Magistrate that the books were not required and could be returned. In view of these facts the decisions in the three cases relied on by Dr. Ambedkar can have no application even if they were well-founded in principle. The contention of Dr. Ambedkar, therefore, must be rejected.

Finally, Dr. Ambedkar urges that the sentence should be reduced, particularly as regards appellant No. 2. After giving the matter our best consideration we do not find any extenuating circumstance which should weigh with us in interfering with the sentence.

The result, therefore, is that this appeal must be dismissed.

Agent for Appellants : *M. S. K. Sastri.*

Agent for Respondent : *G. H. Rajadhyaksha.*

G.R./K.S. *Appeal dismissed.*

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1. A.I.R. 1921 Cal. 344.
2. (1924) 47 M.L.J. 662 : A.I.R. 1924 Mad. 851.
3. (1929) 57 M.L.J. 239 : A.I.R. 1929 Mad. 756.
4. (1928) I.L.R. 51 All. 467.
5. (1941) I.L.R. 23 Lah. 402.
6. I.L.R. (1947) All. 444 : A.I.R. 1948 All. 17.
7. I.L.R. (1947) Nag. 611 : A.I.R. 1948 Nag. 82.
8. (1949) 2 M.L.J. 443 : A.I.R. 1950 Mad. 93.
9. I.L.R. (1952) Bom. 169 : A.I.R. 1952 Bom. 58.
10. A.I.R. 1952 Orissa 73.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE VENKATARAMA AYYAR.

(Under section 57 of THE INDIAN STAMP ACT II OF 1899).

The Crompton Engineering Co. (Madras), Ltd. .. *Applicants**

v.

The Chief Controlling Revenue Authority, Madras .. .. .. *Respondent.*

Stamp Act (II of 1899), section 2 (17)—Document creating a floating charge over premises and assets—How far a "mortgage" liable to stamp duty—Necessity for compliance with section 59, Transfer of Property Act (IV of 1882).

A borrower company executed in favour of its creditor a document having *inter alia* the following clauses :—

"*Clause* 1.—That the whole of the borrower's floating assets . . . . . and comprising lands, buildings and premises bearing door No. 27, Tiruvottiyur High Road, Madras, together with the electrical installations, plants, and machinery, furniture and fittings, office and transport vehicles, loose tools, book debts, imprest cash with employees' investments, interest accrued on investments, cash on hand and with bankers belonging to the borrowers and all other stocks and goods of the borrower whether raw or in process of manufacture and all articles manufactured therefrom which now or hereafter from time to time during the security shall be brought into, stored or be in or about the borrower's warehouse, godowns, buildings or premises aforesaid or wherever else the same may be including such goods in course of transit or delivery, shall be hypothecated to the company and its assigns by way of first charge as continuing security for the payment by the borrower . . . . . ."

"*Clause* 9.—That this agreement shall operate as a continuing security for all monies, indebtedness and liabilities aforesaid notwithstanding the existence of a credit balance on the said account at any time or any partial payments or fluctuations of accounts." The document was neither attested nor registered.

Held, the reference to the premises and the stock in trade is obviously to "specified property" within the meaning of section 2 (17). Though other items of properties are mentioned the transaction is one and indivisible and the document to evidence it is equally one and indivisible. There was no transfer of rights as the requirements of section 59 of the Transfer of Property Act were not satisfied. Hence the document is not a mortgage deed within the meaning of section 2 (17) of the Indian Stamp Act, and it is not therefore liable to be stamped as a mortgage deed under the provisions of the Indian Stamp Act.

In pursuance of the order, dated 20th September, 1951 and made in Application No. 1170 of 1951, in exercise of the Ordinary Original Civil Jurisdiction of the High Court the Chief Controlling Revenue Authority, Madras, having submitted a statement of the case under section 57 of the Indian Stamp Act (II of 1899) as to the amount of stamp duty payable on the instrument in question and the case having been referred to this Bench under section 57 (2) of the said Act by order, dated 6th October, 1952, and made in the said application for the determination of the question whether the instrument herein executed on 22nd March, 1948, by the Crompton Engineering Co. (Madras), Ltd. (referred to as the borrower) in favour of Best and Co., Ltd. (referred to as the company in the instrument) and marked as Exhibit A and a copy of which is annexed hereto has to be stamped as a mortgage deed as defined in section 2 (17) of the Indian Stamp Act, 1899.

O. T. G. Nambiar for Applicants.

The Government Pleader (*P. Satyanarayana Raju*) for Respondent.

The Judgment of the Court was delivered by

Rajagopalan, J.—Under the orders of Krishnaswami Nayudu, J., on Application No. 1170 of 1951, the Board of Revenue, Madras, as the Chief Controlling Revenue Authority, submitted a statement of the case under section 57 of the Indian Stamp Act (II of 1899). The question for determination is the liability of the document, executed on 22nd March, 1948, by the Crompton Engineering Co. (Madras), Ltd. (referred to as the borrower) to Best & Co., Ltd. (referred to as the company in the document), to be stamped as a mortgage deed under the provisions of the Indian Stamp Act.

* Case Referred No. 61 of 1952. 4th March, 1953.

The clauses of that document, dated 22nd March, 1948, relevant for the determination of this question ran :

"*Clause* 1.—That the whole of the borrower's floating assets . . . and comprising lands, buildings and premises bearing door No. 27, Tiruvottiyur High Road, Madras, together with the electrical installations, plants and machinery, furniture and fittings, office and transport vehicles, loose tools, book debts, imprest cash with employees' investments, interest accrued on investments, cash on hand and with bankers belonging to the Borrowers and all other stocks and goods of the Borrower whether raw or in process of manufacture and all articles manufactured therefrom which now or hereafter from time to time during the security shall be brought into, stored or be in or about the Borrower's warehouse, godowns, buildings or premises aforesaid or wherever else the same may be including any such goods in course of transit or delivery, shall be hypothecated to the company and its assigns by way of first charge as continuing security for the payment by the Borrower . . . .

Clause 9.—That this agreement shall operate as a continuing security for all monies, indebtedness and liabilities aforesaid notwithstanding the existence of a credit balance on the said account at any time or any partial payments or fluctuations of accounts."

The document dated 22nd March, 1948, was not attested. It was not registered.

"Mortgage deed" is defined for the purposes of the Stamp Act, and for the purposes of that Act only, in section 2 (17) of the Act :

"'Mortgage deed' includes every instrument whereby for the purpose of securing money advanced, or to be advanced, by way of loan or an existing or future debt, or the performance of an engagement, one person transfers, or creates, to, or in favour of, another, a right over or in respect of specified property."

Of the arguments advanced by Mr. Nambiar for the borrower in support of his contentions, that the document was not a mortgage deed as defined by section 2 (17) of the Stamp Act only two need be considered : (1) there was no *transfer* of right and (2) there was no transfer of right over or in respect of *specified* property.

The reference to the premises described in the document dated 22nd March, 1948, as bearing door No. 27, Tiruvottiyur High Road is obviously to a "specified" property within the meaning of section 2 (17) of the Indian Stamp Act. Even with reference to the stock-in-trade *the Secretary to the Commissioner of Salt, Abkari and Separate Revenue Board, Madras* v. *Mrs. Orr*[1], should suffice to conclude the question whether it is "specified property" within the meaning of section 2 (17) of the Indian Stamp Act. White, C.J., observed at page 649 :

"It seems to me that so far as the stock-in-trade, etc., which are described in the deed as trust property are concerned, the trust property is specified."

Various other items of properties of the borrower were no doubt enumerated in the document dated 22nd March, 1948. But the transaction was one and indivisible, and, the document to evidence that was equally one and indivisible. It is on that basis we have to determine its liability to be stamped under the provisions of the Indian Stamp Act.

Mr. Nambiar was well-founded in his contention, that there could be no *transfer* of rights over or in respect of the specified premises No. 27, Tiruvottiyur High Road, unless the requirements of section 59 of the Transfer of Property Act were satisfied.

Section 59 of the Transfer of Property Act runs :

"Where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses."

That the specified immoveable property was worth over Rs. 100 was not in dispute. But the document dated 22nd March, 1948, was neither attested nor registered.

That the transfer contemplated by section 2 (17) of the Indian Stamp Act is a transfer valid in law, should be obvious. Such a valid transfer would not have been effected under the document dated 22nd March, 1948, which was neither attested nor registered. Under section 59 of the Transfer of Property Act a valid mortgage can be effected only when the instrument is (1) signed by the mortgagor, (2) attested by at least two witnesses ; and (3) registered. Leaving aside the question of registration of an insufficiently stamped document, no one can claim

1. (1913) 25 M.L.J. 613 : I.L.R. 38 Mad. 646 (F.B.).

that a document not signed by the mortgagor is an instrument of mortgage liable to be stamped. That the attestation need not be contemporaneous with the signature of the mortgagor in no way affects the question at issue in this case, as the document was not attested. The law embodied in section 59 of the Transfer of Property Act necessitates the signature of the mortgagor and the attestation by at least two witnesses in equal degree. To ensure the validity of the instrument as a mortgage, attestation is made as much a part of the execution as the signature of the mortgagor.

The learned Government Pleader pointed out that, on 29th May, 1948, when the document was impounded under section 33 of the Indian Stamp Act, the time for effective registration of that document had not expired. The document was not attested, and it was not registered. The impounding authority could not have enforced registration. In any case, it could not cure the failure to attest, which by itself was enough to invalidate the document as an instrument of mortgage.

The learned Government Pleader urged that it was as an " instrument " that the document of 22nd March, 1948 was impounded under section 33 of the Indian Stamp Act. The definition of " instrument " under section 2 (14) of the Indian Stamp Act runs :—

> " An instrument includes every document by which any right or liability is or purports to be created, transferred, limited, extended, extinguished or recorded."

The document certainly purported to transfer the right in the immoveable property among other things, though in law it could not and did not transfer that right. Even section 33 refers to an instrument chargeable with duty, that is, stamp duty payable under the provisions of the Indian Stamp Act. The document dated 22nd March, 1948, may be an instrument ; but it is not an instrument chargeable with duty, that is, chargeable, as a mortgage deed as defined by section 2 (17) of the Indian Stamp Act.

The very difference between the definition of an instrument in section 2 (14) and a mortgage deed in section 2 (17) should show that the " transfer " provided for in section 2 (17) is a transfer valid in law. To make a document liable to stamp duy as a mortgage deed, it is not enough if the document purports to effect a transfer. It must " transfer ".

We hold that the document dated 22nd March, 1948, is not a mortgage deed within the meaning of section 2 (17) of the Indian Stamp Act, and it is not therefore liable to be stamped as a mortgage deed under the provisions of the Indian Stamp Act.

No order as to costs.

K.S. — *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATARAMA AYYAR.

Minor Balakrishnan and another .. *Appellants**

v.

Balasundara Gramani and another .. *Respondents.*

Hindu Law—Alienee of Hindu joint family property—Right of partition—Allotment of the alienated property to the share of the alienor—Equities—When invoked.

An alienee of property of a Hindu joint family should normally be relegated to filing his own suit for partition and therein ask that in equity the alienated property might be allotted to his alienor's share. But in a suit filed by the coparceners for setting aside the alienation, they should be granted possession of the properties subject to these equities in favour of the alienee being worked out in an independent action.

Appeal against the decree of the Court of the Subordinate Judge, Chingleput, in A.S. No. 168 of 1948, preferred against the decree of the District Munsif Court, Poonamallee, in O.S. No. 51 of 1946.

M. S. Venkatarama Aiyar for Appellants.

Respondent not represented.

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*S. A. No. 1158 of 1949. 28th January, 1953.

The Court delivered the following

JUDGMENT.—The plaintiffs are the appellants. They are the sons of one Vaiyapuri Pillai and all of them constitute members of a joint Hindu family. On 9th March, 1944, Vaiyapuri Pillai settled various properties on the first plaintiff under Exhibit A-1. Thereafter he executed a deed of gift Exhibit B-1 on 11th February, 1945, in favour of his stepsister Sendamarai Ammal, who is the second defendant in the suit. The deed of gift related to one of the properties, comprised in the settlement deed Exhibit A-1. On the same day Vaiyapuri Pillai executed the sale deed, Exhibit B-3, in favour of the first defendant, Balasundara Gramani, who is no other than the husband of Sendamarai Ammal, the second defendant. That sale deed related to properties not covered by Exhibit A-1 and that was for a sum of Rs. 200. The plaintiffs claimed that both the deeds, Exhibits B-1 and B-3 were not binding on them. That contention has been accepted by both the courts below. It has been held that Exhibit B-1, the gift deed in favour of the second defendant, is void and not binding on the plaintiffs. It has also been held that the sale deed Exhibit B-3 in favour of the first defendant could not be supported as one for necessity and that it was not binding on the plaintiffs. On these findings, the learned District Munsif granted a decree for possession in favour of the plaintiffs. The Subordinate Judge on appeal while accepting the findings merely granted a declaration that the two alienations were not binding on the plaintiffs but refused the prayer for possession. The plaintiffs prefer this second appeal in so far as their prayer for possession has been negatived.

I am unable to see how, on the findings, the plaintiffs can be refused the prayer for possession. So far as Exhibit B-1 is concerned, it is a gift deed and being void, the plaintiffs, who are members of a joint family, are entitled to recover possession of the property concerned therein. The learned Subordinate Judge has not given any legal ground for refusing them this relief. As regards the first defendant who claims under the sale deed, Exhibit B-3, the judgment of the lower appellate court is based on the decision in *Ramaswami Aiyar* v. *A. S. Venkatarama Aiyar*[1]. There it was held that an alienee in possession can as a defendant plead that the suit might be regarded as one for partition, and that he might be allotted the alienated properties if that would be less than what his alienor would be entitled to in a suit for partition, and on that basis though the alienation may be set aside the properties alienated may be alotted to the defendant as on account of the share of the father. But it has been frequently pointed out that this is an exceptional procedure to be adopted. In that case there were only two coparceners and all the properties of the joint family were ascertained and it was possible to give effect to that equity in favour of the defendant. But here the father is not a party to the suit. We do not know what the extent of the family properties are. We do not know what debts have been incurred chargeable against the share of the father and we do not know what other alienations he has made. Such an equity as this has not been properly pleaded and the necessary materials have not been placed before the Court. Therefore, there is no ground for adopting the exceptional procedure of granting relief on the basis of equity to the first defendant when the alienation is set aside. The alienee should normally be relegated to filing his own suit for partition and therein ask that in equity the alienated property might be allotted to his alienor's share. But in a suit filed by the coparceners for setting aside the alienation, they should be granted possession of the properties subject to these equities in favour of the alienee, being worked out in an independent action. I am therefore of opinion that there were no grounds for modifying the decree of the first court even as regards the first defendant.

In the result, this appeal will be allowed and the decree of the trial court restored with costs throughout.

No leave.

R.M. ——— *Appeal allowed.*

1. (1923) 45 M.L.J. 203: I.L.R. 46 Mad. 815.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE VENKATARAMA AYYAR.

H. Chandanmull & Co., by Proprietor, C. Laxmichand Mehta .. *Petitioner**

v.

Mohanlal M. Mehta and others .. *Respondents.*

Constitution of India (1950), *Article* 133 *and Civil Procedure Code* (*V of* 1908), *sections* 109 *and* 110 *and Order* 45, *rules* 2 *and* 3—*Leave to appeal—Final Judgment—What is.*

The language of section 109, clause (*a*), Civil Procedure Code, is absent in Article 133 (1) of the Constitution of India. It is only a final judgment that will fall within the category of judgments referred to in Article 133 (1) of the Constitution. An order like the one in question, *viz.*, an order refusing to excuse the delay in filing an application cannot be treated except as a procedural order. Though it may have far-reaching consequences and adversely affect the rights of parties, by itself it cannot be held to have decided the rights of parties. If as a result of the dismissal of such an application a substantive application is dismissed, or otherwise put an end to, it may then be held that there has been a final adjudication of rights and therefore there has been a final order.

Case-law discussed and reviewed.

Petition under Article 133 of the Constitution of India and sections 109 and 110 and Order 45, rules 2 and 3, Civil Procedure Code, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to grant leave to the petitioners herein to prefer an appeal to the Supreme Court of India against the decree of the High Court (Appellate jurisdiction), dated 27th October, 1952 and passed in O.S.A. No. 122 of 1951, preferred against the Order of Krishnaswami Nayudu, J., dated 6th November, 1951 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 2355 of 1951 in O.P. No. 66 of 1951.

K. C. Doraiswami for Petitioner.

A. N. Rangaswami for Respondents.

The Order of the Court was delivered by

Rajamannar, C.J.—This is an application for leave to appeal to the Supreme Court of India against the Judgment and Order passed by us in O.S.A. No. 122 of 1951, dismissing it. This appeal arose out of proceedings under the Indian Arbitration Act. On 2nd November, 1950, an *ex parte* award was passed for a sum of Rs. 21,052-12-8 with interest and costs in favour of the third respondent herein and against the petitioner. The award was filed into this court in O.P. No. 66 of 1951 which prayed for making the award a rule of Court. Notice of filing the award was served on the petitioner on 27th March, 1951. Under Article 158 of the Limitation Act the petitioner had a period of thirty days from the date of service of notice of filing the award to file an application to set aside the award. The petitioner did not file any such application within time but filed an application, No. 2355 of 1951, purporting to be under section 5 of the Limitation Act for excusing the delay in filing the application to set aside the award. That application was dismissed by Krishnaswami Nayudu, J., on the ground that section 5 of the Limitation Act did not apply. There was an appeal under clause 15 of the Letters Patent and we dismissed the appeal agreeing with the learned Judge that section 5 of the Limitation Act has no application to proceedings in Court under the Arbitration Act. It is against this decision of ours that the petitioner seeks leave to appeal to the Supreme Court.

At the very outset we may mention that the question of law involved in this appeal, in our opinion, is of such general importance that we have no hesitation in certifying that the case is a fit one for appeal to the Supreme Court under Article 133 (1) (*c*) of the Constitution.

* C.M.P. No. 10470 of 1952. 25th February, 1953.

The only question on which we have felt considerable difficulty is whether our order can be said to be a judgment, decree or final order in a civil proceeding within the meaning of Article 133 (1) (*c*) of the Constitution. There is no direct decision on the point to help us to decide this question. Our attention has been drawn to several decisions of the Privy Council, the Federal Court and of several High Courts in India but we have felt not a little difficulty in applying the test laid down by the Privy Council and by the Federal Court to the facts of the present case.

In view of the observations in the decision of the Federal Court in *Mohammed Amin Brothers* v. *Dominion of India*[1], it is difficult to maintain the position that the order now under appeal is a judgment or decree. Mukherjea, J., pointed out in that decision that in English Courts the word "judgment" is used in the same sense as a "decree" in the Civil Procedure Code and it means the declaration or final determination of the rights of the parties in the matter brought before the Court. It is clear that calling our order "a judgment" would not really be of much assistance in deciding the question which falls for decision because it would nevertheless remain to be considered whether the judgment is an interlocutory judgment or "a final judgment". It is only a final judgment that will fall within the category of judgment referred to in Article 133 (1) of the Constitution.

The scope of the expression "final order" was fully discussed by the Federal Court in the ruling reported in *S. Kuppuswami Rao* v. *King*[2]. Though that case arose out of criminal proceedings, their Lordships were called upon to construe the expression "final order" in section 205 (1) of the Government of India Act, 1935. The test laid down in that decision was that it is only an order which finally disposes of the rights of the parties and determines the points in dispute and brings the case to an end that can be called a "final order". A preliminary or interlocutory order would not therefore be a "final order". Kania, C.J., referred to several English authorities and two rulings of the Judicial Committee, in *Ramchand Manjimal* v. *Govardhandas Vishindas Ratanchand*[3] and *Abdul Rahman* v. *D. K. Cassim & Sons*[4] and arrived at the test mentioned above. The same test was applied in *Mohammad Amin Brothers* v. *Dominion of India*[1]. Mukherjea, J., in delivering the judgment of the Courts, said :

> "The expression 'final order' has been used in contradistinction to what is known as 'interlocutory order' and the essential test to distinguish the one from the other has been discussed and formulated in several cases decided by the Judicial Committee. All the relevant authorities bearing on the question have been reviewed by this Court in their recent pronouncement in *S. Kuppuswami Rao* v. *King*[2], and the law on the point, so far as this Court is concerned, seems to be well settled. In full agreement with the decisions of the Judicial Committee and the authorities of the English Courts upon which these pronouncements were based, it has been held by this Court that the test for determining the finality of an order is, whether the judgment or order finally disposed of the rights of the parties. To quote the language of Sir George Lowndes in *Abdul Rahman* v. *Cassim & Sons*[4]: 'the finality must be a finality in relation to the suit. If after the order the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it.' The fact that the order decides an important and even a vital issue is by itself not material. If the decision on an issue puts an end to the suit, the order will undoubtedly be a final one, but if the suit is still left alive and has got to be tried in the ordinary way, no finality could attach to the order."

It was not difficult to apply the test so laid down to the two cases which arose before the Federal Court. In both the cases the order sought to be appealed against left the proceeding alive which could continue to a final termination in spite of the order.

In the present case the position is this : O.P. No. 66 of 1951 is the petition in which an award is sought to be made a decree of Court. It is in this petition that the application was filed by the petitioner under section 5 of the Limitation Act.

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1. (1950) S.C.J. 139 : A.I.R. 1950 F.C. 77 (F.C.).
2. (1948) 1 M.L.J. 103 : (1947) F.L.J. 110 ; (1947) F.C.R. 180 (F.C.).
3. (1920) 39 M.L.J. 27 : L.R. 47 I.A. 124 : I.L.R. 47 Cal. 918 (P.C.).
4. (1932) 64 M.L.J. 307 : L.R. 60 I.A. 76 : I.L.R. 11 Rang. 58 (P.C.).

Now that the application has been dismissed, there is nothing to prevent the petition from being proceeded with and resulting in the passing of a decree in terms of the award. In this sense it might be said that the dismissal of the petitioner's application has left the original petition alive.

But it must not be overlooked that after the dismissal of the petitioner's application, he cannot take any proceding to have the award set aside. That right he has undoubtedly lost as a result of the order of Krishnaswami Nayudu, J., and our order confirming it. Though the original petition is alive, the petitioner cannot raise any objection to the award itself as such. In this sense the petitiner's right in this behalf has been finally negatived. This appears to be a plausible way of looking at the case of the petitioner. In this view the order dismissing his application would be tantamount to the dismissal of a substantive application by him to set aside the award. Unfortunately, however, it turns out that the petitioner never filed into Court an application to set aside the award. He thought that he could file such an application after this Court had excused the delay. Strictly speaking an application under section 5 of the Limitation Act should have been filed along with the substantive application; but that was not done. We cannot therefore say that the result of the dismissal of the application under section 5 of the Limitation Act is virtually a dismissal of the application to set aside the award. It might then have been more easy for us to hold that the particular proceeding has come to an end by reason of our order, *viz.*, the proceeding to set aside the award, and in that sense our order must be deemed to be a final order.

In *Promotho Nath Ray* v. *W. A. Lee*[1], what happened was this: An appeal was filed out of time. There was an application under section 5 of the Limitation Act to excuse the dealy in filing the appeal. That application was dismissed and as a result the appeal itself was dismissed. It was held that the order of the High Court dismissing the appeal after refusing the application under section 5 of the Limitation Act was appealable, under clause (*a*) of section 109, Civil Procedure Code. If in the present case an application to set aside the award had been likewise dismissed on the dismissal of an application to excuse the delay in filing it, we would have held following this authority, that the petitioner is entitled to appeal to the Supreme Court. But as we have already pointed out there was no substantive application to set aside the award.

In a later case in the Calcutta High Court in *Purnendu Nath Tagore* v. *Kanialal Goshal*[2], the facts were slightly different. A memorandum of appeal presented to an officer of the High Court was returned as barred by limitation. Thereupon an application was filed under section 5 of the Limitation Act. That application was dismissed. It was held that the order dismissing the application under section 5 of the Limitation Act was neither a decree nor a final order passed on appeal by the High Court within the meaning of section 109, clause (*a*), Civil Procedure Code. The earlier decision in *Promotho Nath Ray* v. *W. A. Lee*,[1], was distinguished on the ground that in that case there was an order made in the appeal itself dismissing it. The learned Judges relied upon a ruling in *Karoondas Dharmsey* v. *Gangabai*[3] in which it was held that an order of the High Court refusing to admit an appeal after the period of limitation had expired was not a decree against which leave to appeal to Privy Council can be granted. But it must be mentioned that these decisions are not of much assistance, because the reasoning in these decisions was based on a consideration of the language of section 109, clause (*a*) of the Civil Procedure Code, which is absent in Article 133 (1) of the Constitution. In section 109, clause (*a*), Civil Procedure Code, which they were construing, the language was "a decree or final order passed on appeal by a High Court." Part of the reasoning was based on the meaning to be attached to the words "passed on appeal" words which are not found in Article 133.

1. (1919) 33 C.L.J. 128.
2. I.L.R. (1948) 2 Cal. 202.
3. (1907) I.L.R. 32 Bom. 108.

The question is not free from doubt but on the whole we think that an order like the one in question, *viz.*, an order refusing to excuse the delay in filing an application, cannot be treated except as a procedural order. Though it may have far-reaching consequences and adversely affect the rights of parties, by itself it cannot be held to have decided the rights of parties. If as a result of the dismissal of such an application, a substantive application is dismissed, or otherwise put an end to, it may then be held that there had been a final adjudication of rights and therefore there has been a final order.

We are therefore compelled to dismiss this application though we are otherwise convinced that the case is a fit one for appeal to the Supreme Court of India. In the circumstances we do not make any order as to costs.

R.M. ——— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

Kalyani Achi .. *Appellant**

v.

K.N.S.P.R.M. Ramanatham Chettiar and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 69—*Sale commencing on a specified date and continuing* de die in diem—*If amounts to adjournment—Leave of Court—When necessary—Selling officer—Whether an agent or a delegate of Court—Powers of.*

If an execution sale commenced on a specified date is continued from day to day, it is not a case of an adjourned sale and the sale might be continued for any length of time if the circumstances of the case warrant it. A continuance of a sale is not tantamount to any adjournment.

But where the sale warrant contains a positive direction that the same should be returned on or before a particular date, the selling officer becomes *functus officio* on the expiry of that date and his power to sell gets terminated by efflux of time. Any sale after the expiry of the time fixed for return of warrant is without jurisdiction and there can be no question of any implied extension of time.

A selling officer is not an agent of the Court and he is at best a delegate of the Court. Any action of a delegated authority in excess of such authority is illegal and *ultra vires* and such acts cannot be ratified subsequently by the Court.

Appeal against the order of the Court of the Subordinate Judge of Sivaganga dated 16th July, 1952, in E. P. No. 100 of 1949 in O. S. No. 53 of 1949, etc.

R. Gopalaswami Aiyangar for Appellant.

A. Sundaram Aiyar for Respondents.

The Judgment of the Court was delivered by

Govinda Menon, J.—These appeals arise out of the order of the Subordinate Judge of Sivaganga in E. P. No. 100 of 1949 in O. S. No. 53 of 1949, dated 16th July, 1952. It is a matter of some doubt whether the order in question is one that comes directly under the provisions of section 47 of the Civil Procedure Code; but in any event there is the Civil Revision Petition filed alternatively and if we are convinced that the learned Judge has not exercised the jurisdiction vested in him by law, then we have to set it aside.

In execution of the decree in O. S. No. 53 of 1949 in the Sub-Court, Sivaganga, three items of properties were attached before judgment and they were proclaimed for sale to be held on 17th June, 1952. The order of the Court to the officer conducting the sale was to the effect that he should sell in auction sufficient portions of the properties attached before judgment on 17th June, 1952, and that he should certify the manner in which the auction was held and if none was held, the reason for the same and return the warrant on or before the 23rd June, 1952. The sale warrant is therefore clear that the sale was to be held on 17th June, 1952, and the warrant has to be returned to the Court on or before the 23rd June, 1952. According to the details contained in the sale list it is found

* A. A. O. No. 369 of 1952 and C.R.P. No. 1170 of 1952. 11th November, 1952.

that the sale commenced on 17th June, 1952. From 16th June, 1952, the Subordinate Judge was on casual leave and he rejoined duty only on 25th June, 1952. During that period of casual leave there were three holidays, *viz.*, the 21st, 22nd and 24th June, 1952. The sale list shows that the sale was commenced on 17th June, 1952, was continued on 18th June, 1952, 19th June, 1952, 20th June, 1952, and 23rd June, 1952, and on 25th June, 1952, there were two bidders for items 1 and 2 and the same were sold to one Unnamalai Achi represented by her Advocate Mr. A. Sreenivasa Iyengar for a sum of Rs. 7,500. For the third item also there were only two bidders and that item was also purchased by Unnamalai Achi, represented by her Advocate for a sum of Rs. 750.

On 25th June, 1952, representation was made before the Judge by the decree-holder that the sale was a nullity as it was being continued while the Subordinate Judge was on casual leave and under the direction of the Court the decree-holder filed a memo of objections on 30th June, 1952. Though in the memo it was stated that actually no sale or bidding took place on any day prior to the 25th of June, the finding of the learned Judge now is that the sale was cried on the days on which it is said to have been continued according to the sale list and that it was only on 25th June, 1952, that the two bidders bid for the property which was finally knocked down for the highest bidder. The decree-holder stated before the learned Judge that he and his counsel were misled by representations made to the effect that because the Judge was on casual leave the sale would not take place and such being the case there was no one to bid on his behalf on those days. His further contention was that actually there was no sale and that the sale list submitted to the Court containing representations to the effect that on the previous days the sale was continued was a faked-up affair. But that need not be gone into now in view of the fact that no evidence has been let in to show that the contents of the bidders list are incorrect. We have therefore to proceed on the basis that the contents of the bidders list cannot be disputed. There is the further fact that the E. P. which had been adjourned to 23rd June, 1952, was further put off to 28th June, 1952, by the Chief Ministerial Officer as the Judge was on casual leave.

The learned Judge in the Court below was of opinion that when a sale is continued from day to day, no fresh proclamation is necessary as there is no question of adjournment of sale and since the selling officer cried the sale every day, the provisions of the Civil Procedure Code and the Civil Rules of Practice have been complied with and such being the case the completion of the sale on 25th June, 1952, cannot be taken objection to at all. Under Order 21, rule 69, Civil Procedure Code, the Court may, in its discretion, adjourn any sale to a specified day and hour and the officer conducting such sale may, in his discretion, adjourn the sale, recording his reasons for such adjournment. Provided that, where the sale is made in, or within the precincts of, the Court-house, no such adjournment shall be made without the leave of the Court. What is therefore contended on behalf of the decree-holder is that since the sale was to have taken place on 17th June, 1952, within the precincts of the Court-house, any adjournment of it from that date would be *ultra vires* and illegal if the Court had not given permission for that purpose ; and when the sale is completed, the person appointed to sell the property shall file in Court his report of the same in form No. 71 contained in the Civil Rules of Practice. As stated already, the learned Judge held that when the sale is cried every day and was continued from day to day, there was no adjournment of the sale as contemplated in the proviso to Order 21, rule 69, Civil Procedure Code and therefore the sale is valid.

Mr. Gopalaswami Aiyangar for the appellant disputed the correctness of the decision of the learned Judge and he re-affirmed the objection taken in the Court below that during the intervening days there was in fact no sale or crying. It is difficult for the learned counsel to substantiate this argument. We have to take it that judicial and official acts are properly done and therefore when the bidders list and the sale list show that on all these days the Judge was on casual

leave and the sale was continued and would continue the next day, these statements should be taken as correct. On the facts as found, what happened is that the sale was cried on 17th, 18th, 19th, 20th and 23rd June, but there were no bidders on those days. 21st, 22nd and 23rd were holidays and the final bidding was only on 25th June, 1952, when only two persons bid. How far the sale held in this manner is correct is the point to be decided.

Mr. A Sundaram Aiyar for the respondent invited our attention to a number of cases to the effect that the practice of continuing the sale is not prohibited if the continuation is *de die in diem.* The sale conducted *de die in diem* for a period longer than seven days is neither illegal nor irregular and to keep open the sale for a long time is a very common practice and having regard to the local conditions, it cannot be said to be not a beneficial one; to this effect is the decision in *Pir Mohamed Rowther* v. *Mayandi Chettiar*[1]. Learned counsel also relied upon *Subbanna* v. *Satyanarayanamurthi*[2], and *Venkataramana Aiyar* v. *Natesa Pillai*[3]. In the former case the learned Judges observed that if the sale is continued from day to day it is not a case of an adjourned sale at all and in such a case the sale might be continued for any length of time if the circumstances of the case warrant it. In the latter case, their Lordships of the Judicial Committee had to consider the case of continuance of the sale, but on the facts of the case the Privy Council came to the conclusion that on account of the agreement between the parties and the order of the Court there was no material irregularity in the proceedings. This is not a case where there was any continuance of the sale with the Court's permission. But the difficulty in the present case arises from the fact that the sale warrant directs the officer conducting the sale to hold it on 17th June, 1952. Therefore ordinarily he would have had no right to adjourn the sale without the leave of the Court under the proviso to Order 21, rule 69, Civil Procedure Code. But in the circumstances of the case, as laid down in the decisions already referred to, there was no adjournment but a continuation of the sale. It might reasonably be said that such a continuation is not tantamount to any adjournment. But the sale warrant contains a positive direction that the same should be returned on or before the 23rd June, 1952. Granting that the continuation of the sale on 18th, 19th and 20th would not amount to adjournment, still it was incumbent upon the selling officer to return the warrant on or before the 23rd June, 1952. On the evening of the 22nd June, 1952, the selling officer becomes *functus officio* so far as the sale proceedings are concerned and if the sale is not complete on the evening of 22nd he has to give his reasons and make a statement that the same has not been finished and return the warrant on the 23rd. A proper interpretation of the sale warrant is that it is not open to the selling officer to hold the sale on any day subsequent to the 22nd June, 1952. His power to sell the same gets terminated by efflux of time on 22nd June, 1952. In such circumstances the sale held on 25th June, 1952, is without jurisdiction.

But it is contended by the respondents' counsel that the Court should be deemed to have impliedly extended the period from the 23rd June, by not objecting to it when the attention of the learned Judge was invited to the fact on 25th June, 1952. Order 21, rule 65, Civil Procedure Code, lays down that the sale shall be held by the person appointed by public auction in the manner prescribed. For finding out what the prescribed manner is we have to refer to the Civil Rules of Practice. Nowhere is it stated that when the sale warrant prescribes a period for the return, the selling officer can continue the sale without the extension being granted by the Court. The manner prescribed in this case is that the sale has to be held on 17th June, and the warrant returned with the necessary particulars on or before the 23rd June. This condition not having been complied with, it is difficult to hold that the sale has been held in the prescribed manner.

How far there had been ratification in this case by the Court has next to be considered. The learned Judge nowhere says that on the 25th June, before the sale was completed any permission was taken from him to conduct the sale. We

1. (1910) M.W.N. 684.
2. (1943) 2 M.L.J. 295.
3. (1944) 2 M.L.J. 352 (P.C.).

have therefore to take it that since the 24th June was a holiday, on the 25th June, as on previous occasions, the sale was cried and when two bidders bid, the sale was completed and it was knocked down to the highest bidder. There is nothing to show that the Judge authorised the selling officer to conduct the sale on the 25th June. Relying upon section 196 of the Indian Contract Act which lays down that where an act is done by one person on behalf of another, but without the knowledge or authority of that person, he may elect to ratify or to disown such acts, and if he ratifies them, the same effects will follow as if they had been performed by his authority, the learned counsel contends that in this case since subsequent to the 25th June, there was no repudiation by the learned Judge about the action of the selling officer, it must be deemed that he has ratified the sale. For one thing section 196 of the Indian Contract Act cannot have any application to a matter like this. A selling officer is not an agent of the Court as is contemplated in the Indian Contract Act. He is at best a delegate of the Court and a delegate can function only within the four corners of the power conferred upon him. Any action of an officer of Court empowered to act under an authority from the Court which is in excess of such authority is illegal and *ultra vries* and if his act is illegal and *ultra vires* it cannot subsequently be ratified. Our attention was drawn to two decisions, *viz.*, *Rajagopalacharyulu* v. *Secretary of State*[1], and *Garapati Narasimudu* v. *Basava Sankaram*[2]. But both these cases have no application to the question now under consideration. Where in the absence of an order by the Court in Insolvency vesting the property of an insolvent in the Official Receiver, the property was sold by the Official Receiver, but subsequently the Court, on being appraised of the fact passed a vesting order, such an order is sufficient ratification of the receiver's act so as to pass good title to the alienee. This is the principle decided in *Garapati Narasimudu* v. *Basava Sankaram*[2]. We find it difficult to apply the observations in that case to the controversy now before us. The Courts there have proceeded on the basis that the Official Receiver is an agent and therefore subsequent ratification of the Official Receiver's act would be sufficient to make the transaction valid. Observations at pages 1024 and 1025 of *Rajagopalacharyulu* v. *Secretary of State*[1], have also been referred to by learned counsel. Even here the question was one of principal and agent. We are not satisfied that the selling officer who is the Deputy Nazir of the Court is an agent of the Court so as to bring his actions within the confines of the principles laid down in the Indian Contract Act. The learned Judge has not stated anywhere that the conduct of the sale on the 25th June, has in any way been ratified by him. In fact the mandatory provisions of the sale warrant to the effect that the same should be returned on or before the 23rd June, has been practically ignored in the discussion by the Court below. As we are of opinion that the act of selling the property, when the selling officer has no power to do so, is one without jurisdiction, the sale is null and void. The order of the lower Court is therefore set aside and the sale will be ordered to be held afresh. The petitioner in the Civil Revision Petition will have her costs in this Court.

R.M. ——— *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AIYAR.

The State of Madras and another .. *Petitioners**

v.

V. Srinivasa Aiyangar .. *Respondent.*

Constitution of India (1950), *Article* 133—*Certificate to appeal to Supreme Court—Matter involved of general importance but not of sufficient importance to proposed respondent to warrant his being put to the expense of the appeal to the highest tribunal—Proper order to make.*

Where the Court thought the case a fit one for consideration by the Supreme Court but that it would not be right to call upon one party whose financial interest in the matter is small to incur

1. (1913) I.L.R. 38 Mad. 997. 2. (1924) 47 M.L.J. 749.

* S.C.C.M.P. No. 10596 of 1952. 28th January, 1953.

the risk of the costs of the appeal on the appellant being willing to a condition that they would be liable for the costs of the respondent in any event the application for grant of certificate to appeal to the Supreme Court was granted.

Petition under Article 133 of the Constitution of India, for grant of a certificate enabling the petitioners herein to appeal to the Supreme Court of India against the order of the High Court dated 14th April, 1952, and made in C.M.P. No. 8302 of 1950, a petition praying that the High Court will be pleased to issue a writ of *certiorari* calling for the records in the proceedings taken by the respondents therein under the Madras Act XXX of 1947 and Act XXVI of 1948 with regard to the village of Karuppur belonging to the petitioner therein and to annul and quash the order therein.

The Government Pleader (*P. Satyanarayana Raju*) for Petitioners.

R. Kesava Aiyangar and *K. Parasaran* for Respondent.

The Order of the Court was made by

Subba Rao, J.—This is an application for leave to appeal to the Supreme Court against our judgment in C. M. P. No. 8302 of 1950. One of the questions raised in the petition was whether section 20 of Act XXVI of 1948 applied to a post-settlement minor inam. We held the section applied. The Government Pleader argued that our decision would affect innumerable post-settlement minor inams which have been recently notified under the Act. On that ground it is pressed that this is a fit case for appeal to the Supreme Court. We have no doubt that the question raised is of public importance and therefore we should grant leave. But learned counsel for the respondent while conceding that the point raised is of sufficient importance, contended that if unconditional leave is graned his client's interests would suffer. He says that the value of the subject-matter of the appeal is only about Rs. 3,000 and that if his client is compelled to go to the Supreme Court he may not be in a position to conduct the litigation and take the risk of the costs of the appeal. In similar circumstances a Full Bench of this Court made some pertinent remarks which we may usefully follow. In *Raja Rajeswara Sethupati* v. *Thiruneelakanta Servai*[1], an application was made for leave to prefer an appeal to His Majesty in Council under section 109 (*c*), Civil Procedure Code, corresponding to Article 133 (1) of the Constitution. There, as in this case, the value of the subject-matter was far below Rs. 10,000. At pages 219-220 the Chief Justice made the following remarks :

"What is the duty of the Court if it thinks that the case is a fit one for consideration by His Majesty in Council but that it would not be right to call upon one party whose financial interest in the matter is small to incur the risk of the costs of the appeal? Assuming the decision in *Clarke* v. *Brajendra Kishore*[2], is right and in my judgment in view of the fact that that case went before the Privy Council and special leave to appeal was granted and it was not then suggested that the Calcutta High Court could have itself imposed any condition, it is not possible for this Court to hold otherwise, the only course open to us is to refuse leave and to leave the appellant, if so advised, to apply to the Privy Council for special leave.

During the hearing of these applications we asked the appellant whether he would be prepared to agree to a condition that he should be liable for the costs of the defendants as between solicitor and client in any event. This by his counsel he definitely refused . . . . I think in such cases the only safe course is to refuse leave stating, if it be the case, that the point in issue appears to be one of general importance but not of sufficient importance to the proposed respondent to warrant this Court in putting him to the expense of an appeal to the highest tribunal."

We asked the Government Pleader whether his client would be willing to a condition that they should be liable for the costs of the respondent in any event. It is represented to us to-day that they are willing to do so. This application is therefore granted, subject to the condition that the respondent will get his taxed costs incurred in the Supreme Court in any event from the petitioners.

K.S. — *Application granted.*

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1. (1922) 44 M.L.J. 217.
2. (1909) 13 C.W.N. 1167.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

P. Moosa Kutty .. *Petitioner.**

Civil Procedure Code (V of 1908), Order 26, rules 9 and 18—Commissioner—Appointment of—Notice to other side if compulsory before appointment.

There is no provision under Order 26, rule 9, Civil Procedure Code, that a commission could be issued only after notice has been issued to the defendant and Order 26, rule 18 cannot mean that notice to the parties is necessary before issuing a commission.

Lachan Naidu v. *Raja Saheb Maherban*, (1933) 40 L.W. 358, dissented from.

The Commissioner's report in such cases though it is undoubtedly part of the records in the case, does not automatically become evidence and the parties are entitled to object to the Commissioner's report and prove their objections by examining the Commissioner or other witnesses.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Parappanangudi, dated the 28th day of October, 1952, and made in I. A. No. 1363 of 1952, in O. S. No. 245 of 1952.

K. P. Ramakrishna Aiyar for Petitioner.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition arises out of an order made by the learned District Munsiff, Parappanangudi, in I. A. No. 1363 of 1952 in O. S. No. 245 of 1952, filed under Order 26, rule 9, Code of Civil Procedure.

The facts are :—P. Amarankutti of Kodinhi Amsom filed the suit for a declaration that he is entitled to a right of easement to pass through a specified portion of Moosakutty's paramba to his house close by and that he has been in possession of the alleged pathway and that this Moosakutty has demolished a bund on the pathway and for an injunction and damages. The plaintiff filed along with his plaint an application on 8th October, 1952, for the issue of a Commission to make a report about the condition of the pathway and the damages alleged by him to the bund. This application for the appointment of a Commissioner for local investigation under Order 26, rule 9, Code of Civil Procedure, was ordered *ex parte* and a Commissioner, an advocate of the Court, was appointed to prepare a plan of the plaintiff's as well as the defendant's property and to make a report of what he saw concerning the alleged demolition of the bund. This order was passed on 9th October, 1952 and the Commission was made returnable on 28th October, 1952 and the Commission warrant was ordered to issue on the plaintiff depositing Rs. 25. On 12th October, 1952, at about 9 A.M. the Commissioner went to the spot and he enquired among others this defendant Moosakutty and then drew up a plan and submitted his report regarding the condition of the bund as called for. On receipt of this report final order was passed on 28th October, 1952 " Commission issued returned executed. Petition closed." The defendant after appearing in Court obtained copies of the application by the plaintiff and the plan and report of the Commissioner. This plan and report are obviously very inconvenient from the point of view of this defendant. Therefore he has come forward with this revision petition stating that if the plan and report filed by the Commissioner are used in evidence in the case, he would be greatly prejudiced as they are one-sided and that the order of the learned District Munsiff appointing the Commissioner without notice to him and hearing him, is illegal and opposed to the provisions of Order 26, rule 18, Code of Civil Procedure. Therefore, he has filed this revision petition against that order which has been executed and what is really more important for him is to get a stay of the trial of the suit on that pretext, obviously to protract the proceedings and wear out the opposite side.

The short point for our consideration is the scope of Order 26, rule 18, Code of Civil Procedure and whether it bears out the interpretation which is sought

* C.R.P. No. 2363 of 1952. 16th December, 1952.

to be placed upon it by the learned Advocate, Mr. K. P. Ramakrishna Ayyar. In the Civil Procedure Code there are two provisions for issuing Commissions for local investigation, *viz.*, when the suit is instituted, and after the suit is instituted. Order 26, rule 9 states:—

"In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute or of ascertaining . . . . damages . . . . the Court may issue a Commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court."

The object of this local investigation is not so much to collect evidence which can be taken in Court but to obtain evidence which from its very peculiar nature can only be had on the spot: *Amulyakumar* v. *Anandacharan*[1]. The Court has a discretion to order local investigation or not; it is not bound to order it in all cases: *Ram Brichh* v. *Mahommed Saheb*[2]. In any event, an application under this rule must be made before the case is closed. The form prescribed for Commission for local investigation is set out in Form No. 9 in Appendix H of the Code of Civil Procedure. The form states:

"Whereas it is deemed requisite for the purpose of this suit, that a commission for . . . . should be issued you are hereby appointed commissioner for the purpose of . . . . .

Process to compel the attendance before you of any witnesses, or for the production of any documents whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application.

A sum of Rs. being your fee in the above, is herewith forwarded."

This issue of Commission can be made *ex parte* and in fact it stands to common sense has often got to be made *ex parte*. It will be borne in mind that this application has been filed along with the plaint and before the issue of suit summons. This application is made on account of urgency. If a Commission is not going to be issued until the defendant appears most often there will be no point in taking out a Commission because the object of the Commission itself would be lost and incriminating circumstances would be obliterated. The appointment of a Commissioner for local investigation in such cases would be an instance of locking the stable door after the horse had been stolen. Rule 9 does not provide for the presence of the parties when a Commission is issued and merely leaves it to the discretion of the Court. But interests of justice require that such acts should not be done without notice to one of the parties: *Jamshed* v. *Kunji Lal*[3]. Then in the instant case the Commissioner has as a matter of fact made the local investigation in the presence of this defendant and has also enquired of him. In fact, this is what is contemplated under Order 26, rule 18, which states:

"Where a Commission is issued under this Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

(2) Where all or any of the parties do not so appear the Commissioner may proceed in their absence."

This provision has been made because in so far as Commissions for local investigations are concerned, the following are the relevant and cogent further provisions. Rule 9 enables the Court to appoint Commissioners for local investigation; rule 10 (1) regulates the procedure of the Commissioner, *viz.*, that after such local inspection as he deems necessary and after reducing to writing the evidence taken by him shall return such evidence, together with his report in writing signed by him to the Court. Rule 10 (2) lays down that the report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record in the same way as pleading, affidavits and other documents of a suit form part of the record of that suit (*Vithaldas Damodar* v. *Lakshmidas Harjiwan*[4] and that the Court or with the permission of the Court any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him, etc. Rule 10 (3) makes provision for the making of further enquiry as the Court thinks fit if it is dissatisfied with the

1. A.I.R. 1933 Cal. 475.
2. A.I.R. 1933 Pat. 542.
3. A.I.R. 1938 Nag. 513.
4. I.L.R. (1942) Bom. 680 : A.I.R. 1942 Bom. 266.

proceedings of the Commissioner. Then we come to the general provision in rule 15 which regulates the expenses of Commission to be paid into Court. Rule 16 defines the powers of Commissioners including examination of parties, documents, inspection, etc. Rule 17 provides for attendance and examination of witnesses before Commissioners and then we come to rule 18 which, to enable the Commissioner to do all these things, enjoins upon the Court at the time the Commission is issued under this Order to direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders. Finally, it is laid down that where all or any of the parties do not so appear, the Commissioner may proceed in their absence. The examination admittedly of this defendant by the Commissioner shows that the order itself contained a direction as required by rule 18 and that is why the petitioner has been scrupulously careful not to file any of the documents for which he has secured copies. The net result of this analysis is that there is no provision under Order 26, rule 9, Civil Procedure Code, that a Commission could be isued only after notice has been issued to the defendant and secondly, that rule 18 cannot bear the interpretation which is sought to be put upon it by the learned Advocate for the petitioner and that as a matter of fact in this case the defendant had notice and participated in the Commissioner's enquiry.

The next grievance of this petitioner is that the plan and report of the Commissioner cannot be admitted in evidence. In regard to it, this objection is obviously made without fully comprehending the scope of the relevant provisions of rule 10 which has been reproduced above. The Commissioner's report does not automatically become evidence and the parties are entitled to object to the Commissioner's report and prove their objections by examining the Commissioner or other witnesses: *Harcharan Das* v. *Danpat Mal Dewar Chand*[1]; *Ajodhya Prasad Singh* v. *Kamal Narain Singh*[2] and *Sitaram* v. *Rama Prosad Ram*[3]. It is within the discretion of a judge to accept the report of a Commissioner: *Sone Kuar* v. *Baidyanath*[4]; *Chowdhury Jadavendra* v. *Gajendra Narain Das*[5]. The Commissioner's report and the opinion he expressed on the evidence is merely a piece of evidence to be considered by the Judge. It does not become *ipso facto* evidence: *Jnanda Sundari Rai* v. *Promoda Sundari Rai*[6]. The person behind whose back the Commissioner has been appointed is entitled to cross-examine him: *Ramanatha Ramakrishna* v. *Wasudev*[7]. Though under Order 26, rule 10 the Commissioner's report forms part of the record and it is incumbent on the Court to consider the contents (*K. S. Venkatarama Ayyar* v. *Ponnuswami Padayachi*[8].) Commissioner's report does not fall under section 35 of the Indian Evidence Act and as it can be proved only by examining writer or witness: *Ibrahim Beg* v. *Aznan*[9]. It is the duty of the judge to consider every objection of fact or of law made by the parties to the report, to show the nature of the objection in his judgment and his grounds for allowing or dismissing it: *Arjandas* v. *Gangaram*[10]. Therefore, it is open to this defendant to show that the report of the Commissioner is incorrect and that it is not entitled to credence. After all it is the facts contained in a Commissioner's report and proved to be correct which count as evidence and not his opinion: *Sarada Prasada* v. *Ram Bharas*[11]. The petitioner cannot seek to short circuit it by alleging that this investigation was made on an emergent order passed *ex parte*. Therefore, I see no substance whatsoever in the Revision Petition.

Before parting with it I shall refer to the decisions relied upon by the learned Advocate for the petitioner. The first decision relied upon is *Lachan Naidu* v. *Rajah Saheb Maherban*[12], wherein Cornish, J., held on the facts in that case that no emergency excused the order of the District Munsiff and did not absolve the District Munsiff from complying with rule 18. It is unfortunate that the head-note of the report has made this observation much wider than what was really meant by stating

1. (1917) 42 I.C. 221.
2. (1917) 38 I.C. 491.
3. (1913) 18 C.W.N. 697.
4. A.I.R. 1926 Pat. 462 (2): 96 I.C. 327.
5. (1918) 47 I.C. 650.
6. A.I.R. 1934 Cal. 116.
7. A.I.R. 1947 Nag. 56.
8. (1936) M.W.N. 935
9. A.I.R. 1936 Oudh 192.
10. A.I.R. 1933 Sind 327.
11. 1944 A.W.R. (Rev.) 18: 1944 R.D. 69.
12. (1933) 40 L.W. 358.

that there is no power in the Court to issue an *ex parte* Commission and even an emergency cannot absolve the Court from complying with rule 18. Then the learned judge held that rule 18 of Order 26, Civil Procedure Code, is mandatory and is intended to ensure that the parties have notice of the appointment of the Commissioner and that they must attend his investigation. I have pointed out that in the instant case the defendant has notice of the appointment of Commissioner and actually attended his investigation by him. Apart from that, in that case when an application was made along with the plaint for the appointment of a Commissioner for local investigation, notice was ordered to the defendants and notice was actually served on the defendants and before they could appear in Court another application was filed for the issue of a Commission emergently alleging that if the Court should pass orders after service of notice on the defendants it would cause delay and that owing to the changes made by the rainfall the defendants would get the opportunity of including a certain channel in their lands. It was therefore held by Cornish, J., that this second application was ordered behind the back of the defendants. This is not the case here. I must not, however, be understood as agreeing with this interpretation of rule 18 of Order 26, Civil Procedure Code, by Cornish, J. But it is unnecessary for the disposal of this Criminal Revision Petition to embark further on this matter. The second decision relied on is an unreported judgment of Raghava Rao, J., in C.R.P. No. 627 of 1950. That judgment has no relevance because the case therein arose under Order 39, rule 7, corresponding to section 499 of the old Civil Procedure Code. Raghava Rao, J., held that an interlocutory order under Order 39, rule 7 can be made only after notice to the other side because rule 8 says that an application by the plaintiff for an order under rule 6, or rule 7 may be made after notice to the defendant at any time after institution of the suit. Rule 8 (2) says that an application by the defendant for a like order may be made after notice to the plaintiff at any time after appearance. There is also a Bench decision of this Court under section 499 of the old Code in *Sengotha* v. *Ramaswami*[1] by Turner, C.J. and Hutchins, J., wherein it was held :

> "An application for an order under section 499 can only be made by a plaintiff after the summons has been served and after reasonable notice of the intention to apply for the order has been given in writing to the defendant. The term 'may' must be read with the words 'at any time' and does not import that it is competent to a plaintiff to apply before service of summons, or to evade the condition of notice."

The advocate for the respondent in that case brought to the notice of Raghava Rao, J., the decision in *Totaram Ichharam* v. *Dattu Mangu*[2], wherein an opposite view was held by Beaumont, C.J. and Wassoodew, J., *viz.*, that in cases in which it is necessary to take action promptly in order to prevent property from being made away with by the defendant, the Court before proceeding under Order 39, rule 7 can always appoint a Receiver or grant an injunction *ex parte* and that the appointment of Commissioners, which was made in that case *ex parte* was really less detrimental to the defendants than would have been the appointment of the same person as Receivers. This decision does not apply to the case on hand wherein we have no provision corresponding to rule 8 of Order 39, Civil Procedure Code. The notice to be given under Order 26, rule 18, is a notice after the issue of Commission that such a Commission has been issued. The third decision is an unreported judgment of Basheer Ahmed Sayeed, J., in C.R.P. No. 997 of 1951. Therein on the facts of that case it was held that the report of the Commissioner should not form part of the record and made evidence in the suit but that there was no objection to that Commissioner being examined as a private individual by the plaintiff as one who had seen the plot of land at that particular time and that it was open to the trial Court to appoint a fresh Commissioner. The fourth case is an unreported decision of T. L. Venkatarama Ayyar, J., in C.R.P. No. 398 of 1952. The facts were : O.S. No. 181 of 1951, District Munsiff Court,

1. (1883) I.L.R. 7 Mad. 241. 2. I.L.R. (1943) Bom. 198.

Vridhachalam, was filed for an injunction restraining the defendants from interfering with their taking water from a well situated in the land of defendants. The plaintiffs filed I.A. No. 708 of 1951 for the appointment of a Commissioner to inspect the well and the channels through which the water flows from the well and to submit a plan and report. This petition was ordered *ex parte*. It was contended before Justice Venkatarama Ayyar, on the foot of the decision in *Lachan Naidu v. Raja Saheb Maherban*[1], that the Commissioner should have been appointed after notice to defendants. It is not clear from the order whether the appointment of the Commissioner was under Order 26 or Order 39. It is also seen that the defendants had themselves filed an application for a duly qualified commissioner being appointed. In these circumstances the order of the lower Court was set aside. The facts of the instant case are quite different and therefore these decisions do not apply here. I need not point out that a decision is only an authority for what it actually decides; it cannot be quoted for a proposition that may seem to follow from it. Every judgment must be read as applicable to the particular facts proved or assumed to be proved; the generality of expressions that may be found cannot be intended to be expositions of whole law but must be regarded as governed or qualified by the particular facts of the case in which such expressions occur: *Deonath Sahay v. Lekha Singh*[2], *Attu Hussain v. Jai Narain Agarwala*[3], *Thirtha Naick v. Lal Sadanand Singh*[4], *Prince Khanderao Gaekwar v. Commissioner of Income-tax, Bombay*[5], *Jivaji Annaji v. Hannant Ramchandra*[6] and *Govindarajulu v. Balu Ammal*[7]. In addition, where the language of an order is clear this exploration into the wilderness of single instances (to quote Tenyson) is a wholly supererogatory task and in the interpretation of these procedural provisions regard must be had to the fundamental principles laid down by Lord Penzance in *Kendall v. Hamilton*[8], cited with approval in the Civil Justice Committee Report, 1924-25, page xxviii. The

"Procedure is but the machinery of the law after all, the channel, and means whereby law is administered and justice reached. It strangely departs from its proper office when in place of facilitating it is permitted to obstruct, and even extinguish the legal rights and is thus made to govern where it ought to subserve."

Therefore, these decisions do not substantiate the contentions of this petitioner.

In the result, the Civil Revision Petition is dismissed.

R.M. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMASWAMI.

The Public Prosecutor .. *Appellant**

v.

G. Sadagopan .. *Respondent (Accused).*

Prevention of Corruption Act (II of 1947), section 5 (2) of Penal Code (XLV of 1860), section 161—Office copy of previous sanction to prosecute—Admissible as secondary evidence under section 65 (c) of the Evidence Act (I of 1872)—Validity of sanction—Conviction for a minor offence—Criminal Procedure Code (V of 1898), section 238.

The accused was tried under section 5 (2) of the Prevention of Corruption Act read with section 161 of the Indian Penal Code with respect to 3 instances of bribe-taking committed within a period of 12 months. The trial Court found him guilty of only one instance and convicted him under section 161, Indian Penal Code. On appeal the Sessions Judge acquitted him on two grounds, *viz.*, (i) that the office copy of the previous sanction to prosecute was not admissible in evidence as secondary evidence, and (ii) the charge being under section 5 (2) of the Prevention of Corruption Act, when two of the counts failed the accused must be acquitted.

Held, on appeal by the State :—(i) the office copy of the previous sanction to prosecute is the best form of secondary evidence and admissible under section 65 (*c*) of the Indian Evidence Act; (ii) the

1. (1933) 40 L.W. 358.
2. A.I.R. 1946 Pat. 419.
3. A.I.R. 1949 Pat. 307.
4. I.L.R. (1949) Cuttack 139.
5. A.I.R 1949 Bom. 17.
6. A.I.R. 1950 Bom. 360 (F.B.).
7. (1951) 2 M.L.J. 209.
8. (1879) 4 A.C. 504 at 526.

* Crl. A. No. 289 of 1952. 15th January, 1953.

sanction is valid in law, all the material and relevant facts having been placed before the sanctioning authority, who applied his mind to those facts before sanctioning prosecution; (iii) the law does not require that the authority should give his reasons; (iv) the conviction under section 161, Indian Penal Code, is good as under section 238, Criminal Procedure Code, even though on two of the three counts, the accused has been acquitted, there could be a conviction for a minor offence.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (accused) by the Additional Sessions Judge of Coimbatore in C.A. No. 69 of 1951 on his file. (S.C. No. 55 of 1951 on the file of the Second Additional Assistant Sessions Judge, Coimbatore).

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) for Appellant.

The Advocate-General (*V. K. Thiruvenkatachari*) for Complainant.

P. Basi Reddi for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal preferred by the State against the acquittal by the learned Sessions Judge, Coimbatore, in C.A. No. 69 of 1951, reversing the conviction and sentence of the Assistant Sessions Judge, Coimbatore, in S.C. No. 55 of 1951.

The facts are :—The respondent G. Sadagopan was the Head Clerk of the District Engineer's Office, Podanur, South Indian Railway. On information received that this Sadagopan was a bribe-taker, investigation was started by the Special Police Establishment, Madras. It is enough for the purpose of this case that this Special Police Establishment, Madras, unearthed three instances against him, *viz.* : that he accepted on 1st May, 1950, at Podanur Rs. 30 from K. Rajagopal for transferring him from Udumalpet ; accepted in January, 1950, Rs. 25 from Swami for giving a permanent vacancy and demanded in or about November 1949 from Sri Narasimhalu at Podanur 20 per cent. of the travelling allowance bills for passing the same. On the foot that each of these accusations which constituted an offence under section 161, Indian Penal Code, amalgamated together made up the offence of criminal misconduct punishable under section 5 (2) of the Prevention of Corruption Act, this accused was tried before the learned Assistant Sessions Judge on these instances of bribe-taking constituting an offence under section 5 (2) of the Prevention of Corruption Act read with section 161, Indian Penal Code. The learned Assistant Sessions Judge who carefully went into the matter found that the prosecution had affirmatively and satisfactorily proved beyond doubt the accusation relating to the acceptance of a bribe of Rs. 30 from Rajagopal (P.W. 1) on 1st May, 1950, for transferring him to Podanur and that in regard to the other two counts, held that he was not inclined to hold that the prosecution had so established the accused's guilt. Therefore, he convicted the accused for the offence proved under section 161, Indian Penal Code and sentenced him to undergo rigorous imprisonment for a period of six months.

There was an appeal therefrom and the learned Sessions Judge, Coimbatore, did not go into the merits of the case but acquitted the accused on two short grounds, *viz.*, that firstly Exhibit P-4 cannot be accepted as a secondary evidence of the previous sanction of the General Manager of the South Indian Railway, and now the General Manager of the Southern Railway, and secondly that when the charge was for criminal misconduct under section 5 (2) of the Prevention of Corruption Act, and the trial Court found that two of the counts had not been satisfactorily proved and the charge of criminal misconduct failed, resultantly the accused could not be convicted on the count proved under section 161, Indian Penal Code, but must have been acquitted in entirety.

The State has preferred this appeal from this incomprehensible acquittal and I shall examine the sufficiency of the two grounds on which this acquittal has been rested by the learned Sessions Judge.

Point 1.—In regard to Exhibit P-4, the following facts should be borne in mind. On 27th July, 1950, the General Manager Mr. K. R. Ramanujam has passed the following order :

"South Indian Railway.

Office of the General Manager,
(Anti-Corruption),
Tiruchirapalli,
27th July, 1950.

Confidential
No. G/CB/PTJ/2.

The Superintendent of Police, Special Police Establishment, Madras.

Case against G. Sadagopan, Establishment Head Clerk, Office of the District Engineer, Podanur-Sanction order for prosecution. Your letter No. B 1861/50 of 12th July, 1950.

By virtue of the authority vested in me by the Government of India under section 6 (*c*) of the Prevention of Corruption Act, 1947 (Act II of 1947), I, Sri K.R. Ramanujam, the General Manager, South Indian Railway, Tiruchirapalli, applied my mind before giving sanction for the initiation of the prosecution against the accused after considering all the facts and circumstances of the case and hereby sanction the initiation of criminal proceedings against G. Sadagopan, Establishment Head Clerk, Office of the District Engineer, Podanur (an employee of the South Indian Railway ——) who is alleged to have been in the habit of receiving bribes and on 1st May, 1950, to have demanded and accepted Rs. 30 from one K.R. Rajagopal, a gangman, to transfer him from Udumalpet to Podanur and thereby committed an offence punishable under section 5 (2) read with section 5 (1) (*a*) of Act II of 1947 and section 161, Indian Penal Code.

(Initialled) K.R.R.,
GENERAL MANAGER.

Copy forwarded to the C.E., TPJ., for information in continuation of this letter No. G/CB/PTJ/2, dated 10th May, 1950.

(Initialled) K.R.R.,
GENERAL MANAGER."

The copy of the order received by the Special Establishment of Police, Madras, got lost and there is no dispute as frankly conceded by the learned counsel for the accused Mr. Basi Reddi, about the truth of this allegation. Therefore, the Special Police Establishment, Madras, secured the original office copy of the order and it is exhibited as P-4. Once again, there is no dispute that this Exhibit P-4 coming from proper official custody and proved through P.W. 4, the confidential clerk attached to the anti-corruption section of the Manager's Officer, South Indian Railway, is the genuine original office copy. P.W. 4 testified that Exhibit P-4 is the order sanctioning prosecution of the accused and he was not cross-examined in the first instance and subsequently in the further cross-examination he has testified:

"The sanction was given after perusing all relevant papers. I know the signature of the General Manager. He has signed (it ought to have been initialled) Exhibit P-4."

Therefore the only point for determination is whether this Exhibit P-4 can be accepted as secondary evidence. Section 65 of the Indian Evidence Act deals with cases in which secondary evidence relating to documents may be given. The instant case falls under sub-clause (*c*), *viz.*, when the original, which is practically a copy here, has been destroyed or lost. The section proceeds to state that in cases falling under clause (*c*) *any* secondary evidence of the contents of the document is admissible. It is only in the cases falling under clause (*e*) or (*f*), with which we have now nothing to do here, a certified copy of the document, but no other kind of secondary evidence is admissible. The best kind of secondary evidence has been produced in this case, *viz.*, paradoxically the original. In *Sevugan* v. *Raghunatha*[1], Varadachariar, J. (as he then was) pointed out that where according to the official practice a book (we may add a file of papers) is maintained containing the copies of the communications sent, the book of copies thus maintained is itself

1. A.I.R. 1940 Mad. 273.

an official register within the meaning of section 35 and a public document within the meaning of section 74 of the Evidence Act. The decisions of this Court in A.S. No. 261 of 1925 and in *Navaneetha Krishna Thevar* v. *Ramaswami Pandia Thalavar*[1]; were relied on. There is no substance therefore in the conclusion of the learned Sessions Judge that Exhibit P-4 cannot be accepted as satisfactory secondary evidence.

Incidentally, it seems to have been argued before the Assistant Sessions Judge and it was mentioned before me that the sanction order is defective in the light of the decision in *Gokulchand Dwarkadas Morarka* v. *King*[2]; in that it does not show that the General Manager had applied his mind to the facts in issue and granted the sanction. I have purposely reproduced the order of the General Manager and also the testimony of P.W. 4 in cross-examination. There is no dispute that for this prior sanction no type-design form or particular form of words has been prescribed. Therefore, in accordance with common-sense and the requirements of justice all that the order of sanction must show is that all relevant materials were placed before the authority sanctioning the prosecution and that the authority considered those materials and the order sanctioning prosecution resulted therefrom. The sanction need not set out the reasons for the sanction because if the Legislature had intended it, it would have added the appropriate form of words. The object of this sanction is nothing more than to ensure the discouragement of frivolous, doubtful and impolitic prosecutions. Therefore, applying these tests we find that the sanction order reproduced above complies with all the requirements of a valid sanction. In other words, the sanction in this case fully complies with the requirements laid down in the decision of Somasundaram, J. in *Subba Rao* v. *The King*[3] and Chandra Reddi, J., in *Shah Vajanji Kasturchand* v. *King*[4]. The sanction order in this case is irreproachable.

Point 2.—The learned Sessions Judge has entirely overlooked that the charge framed in this case is a composite charge. It is an admixture of the various elements constituting by themselves separate minor offences and which by such mixture make out an aggravated offence. In other words, criminal misconduct under section 5 of the Prevention of Corruption Act is an amalgam of bribe-taking *plus* habitually doing so. Therefore, the charge when analysed into component parts is made up of an aggravated offence consisting of several particulars and on a resolving of the same several complete minor offences. In such a case section 238, Criminal Procedure Code, is clearly applicable and it has been so applied in not dissimilar circumstances by Govinda Menon and Basheer Ahmed Sayeed, JJ., in *Raman Ambalam* v. *State*[5]. Of course this is subject to two limitations, *viz.*, the complete minor offences put together should not exceed three and must have been committed within a space of 12 months from the first to the last of such offences; and secondly, that no prejudice should have been caused to the accused by the course taken in the trial Court. In this case the three complete minor offences of the same kind have all been committed within the space of 12 months as laid down in section 234, Criminal Procedure Code and no prejudice is made out or is apparent from the record. Therefore, the learned Sessions Judge was wrong in finding that when the accused got acquitted under section 5 (2) of the Prevention of Corruption Act, he should have been acquitted in entirety and could not have been convicted for a complete minor offence.

In the result, the acquittal by the learned Sessions Judge is set aside and inasmuch as the appeal was not heard on merits, it is remanded to be taken on file and disposed of afresh on merits and according to law by the Sessions Judge, or by the Additional Sessions Judge, other than the Sessions Judge who has so unsatisfactorily disposed of this case.

V.P.S. ——— *Acquittal set aside and case remanded.*

1. (1916) 33 M.L.J. 277: I.L.R. 40 Mad. 871: A.I.R. 1918 Mad. 889.
2. (1948) 1 M.L.J. 243: L.R. 75 I.A. 30 (P.C.).
3. (1949) 1 M.L.J. 600.
4. (1950) 1 M.L.J. 341.
5. (1950) 2 M.L.J. 373.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Govinda Menon, and Mr. Justice Basheer Ahmed Sayeed.

The District Collector of Krishna at Masulipatam .. *Appellant**

v.

Pulavarthi Viswanadam and others .. *Respondents.*

Defence of India Act (*XXXV of* 1939), *section* 19—*Principles of fixing compensation—Interest on compensation when allowed.*

Because section 19 (e) (*i*) of the Defence of India Act lays down specifically that in making an award the arbitrator shall have regard to the provision of sub-section (1) of section 23 of the Land Acquisition Act, 1894, it is impossible to contend that the provisions of sub-section (2) of section 23 have also been attracted. The specific mention of sub-section (1) excludes the application of sub-section (2).

Dinbai v. *Dominion of India,* A.I.R. 1951 Bom. 72 at page 79 followed.

In cases of requisition of property where the compensation paid is only in the nature of damages for temporary requisition no interest on such amount could be awarded. But where the requisitioning is one of permanent acquisition and amounts to conversion of the land into money the party from whom the property is taken away is entitled to interest on the value of the property not paid to him.

Province of Bengal v. *Pawn Kissen Law and Co.,* A.I.R. 1950 Cal. 498, approved.

Associated Oil Mills Ltd. v. *Provincial Government of Madras,* (1947) 2 M.L.J. 429 : I.L.R. (1948) Mad. 567, considered and doubted.

Appeal against the order of the Court of the Arbitrator, the District and Sessions Judge, West Godavari at Eluru, dated 22nd April, 1947, in O.P. No. 109 of 1946.

The Government Pleader (*P. Satyanarayana Raju*) for Appellant.

V. V. Sastri, P. Somasundaram and *P. Suryanarayana for* Respondents.

The Judgment of the Court was delivered by

Govinda Menon, J.—Under section 19 of the Defence of India Act, where there is a compulsory acquisition of property, the question of compensation has, in the first instance, to be fixed by agreement between the officers of Government and the owner of the property. Where no agreement is reached, the Central Government shall appoint an arbitrator who is qualified for appointment as a High Court Judge for deciding the compensation. Such an arbitrator, in making the award, shall have regard to the provisions of sub-section 1 of section 23 of the Land Acquisition Act, 1894, so far as the same can be applicable and clause (*f*) of section 19 of the Defence of India Act lays down that an appeal shall lie to the High Court against the award of an arbitrator except in cases where the amount thereof does not exceed an amount prescribed on that behalf by rules made by the Central Government.

An area of 71 cents of land situated on the main cantonment road by the side of the Andhra Scientific Company in Masulipatam town, belonging to the respondents was acquired by the Government for constructing a fire station. The District Collector of Krishna, fixed the compensation at Rs. 12,101-13-4 being the value of the land, Rs. 129-6-0 being the value of the barbed wire fencing, and Rs. 2-8-0 being the value of the trees, aggregating in all to Rs. 12,233-11-4. He also offered a 15 per cent. solatium in the sum of Rs. 1,835-0-11. The grand total therefore offered by the District Collector was Rs. 14,068-12-3. The owner of the land was not willing to accept this amount and therefore the District Judge of West Godavari was appointed as arbitrator. The learned Judge, after considering the oral and documentary evidence let in before him, came to the conclusion that the value of the site should be fixed at Rs. 6 per square yard whereas the offer was at the rate of Rs. 3-8-0 per square yard. Computing the amount on this basis, the land value will be Rs. 20,746. He also increased the price of the barbed wire fencing and reinforced concrete poles from Rs. 129-6-0 to Rs. 600. The solatium

* A.A.O. No. 102 of 1948. 5th November, 1952.

was proportionately increased to Rs. 3,202-4-5 and the grand total came to Rs. 24,550-12-5. The learned Judge also allowed interest at 6 per cent. per annum on the excess amount allowed by him. The State has preferred an appeal against the excess amount and the interest allowed and the claimant has preferred a memorandum of cross-objections.

The first question for consideration is whether the learned Judge was justified in increasing the site value from Rs. 3-8-0 to Rs. 6 per square yard. In this connection we have also to decide whether the respondent in the memorandum of cross-objection is entitled to claim the rate of Rs. 15 per square yard. Exhibit D-14 is a plan, not drawn to scale, of the proposed site as well as the surrounding areas. We may at once say that it is a very unsatisfactory delineation of the land sought to be acquired and its neighbourhood. Therefore the lower Court made a local inspection of the site, the result of which is stated in paragraph 6 of the judgment. After giving a description of the locality and the various buildings around the site, the learned Judge comes to the conclusion that the locality was both residential and commercial in character. Then the documents filed on behalf of the Government showing the value of the sites in the neighbourhood were considered. Under Exhibit D-2 it was found that the price works out at Rs. 2-1-6 per square yard. The land is situated not far away from the site in question. Under Exhibit D-3 the rate comes to Re. 1-8-0 per square yard. Exhibit D-1, which relates to a site a little far away, shows that the rate is Re. 0-13-6 per square yard. Under Exhibit D-8 the rate works out at Re. 0-5-10 per square yard. Like this the learned Judge has discussed various other documents and pointed out what the price per square yard in that locality is. From these documents it is clear that sites in the locality had been sold at much lower rates. But most of these transaction were prior to the acquisition in question. In the present case the notification for acquiring the property was made on 21st September, 1943 and the acquisition itself was on 9th January, 1944. We have therefore to find out what the value would be at or about the time of the notification.

Exhibits D-2 and D-3 are of September 1937; Exhibit D-5 is of December 1938; D-6 of January 1943; and so on. The transaction which is nearest in point of time to the one in question and also relating to a plot which is part of the same survey number is Exhibit D-4, dated 24th June, 1943. Under that the rate comes to Rs. 2-12-0 per square yard. This was in June 1943. After considering all these documents the learned Judge was of opinion that during the year 1943 there was a progressive rise in the site values and the site had acquired a potential value as a building site. Therefore the learned Judge fixed Rs. 6 per square yard as the proper value. The learned Government Pleader contends that the lower Court was not justified in fixing such a high figure when the documentary evidence showed that lands adjacent and nearby to the site in question were sold at prices below Rs. 3 per square yard. In such circumstances the value of Rs. 3-8-0 per square yard fixed by the Collector, according to the learned counsel, is the proper value. Considering the circumstance that the learned Judge had the benefit of a personal inspection of the locality and was satisfied that the lands were increasing in value during those years, and the fact that the potential value of the site should also be taken into consideration, leaving aside the question of what adjacent lands fetched at sales some time anterior to the notification, we are of opinion that it cannot be said that the learned Judge has exercised his discretion in a wrong manner. One thing is clear and that is that during the years 1943-44 the price of lands in urban areas shot up like a rocket and the increase was phenomenally high. The factor which weighed with the learned Judge was that the price would have been much more than Rs. 3-8-0 per sq. yard in 1944. We do not therefore feel justified in reducing the value of Rs. 5 per square yard fixed by the learned Judge. The respondent's claim of Rs. 15 per sq. yard is, to say the least, highly exaggerated and fanciful. Since the learned Judge has fixed the site value taking into consideration not only the value on the date of the notification but also the potential value of the site during the year 1944, we cannot say that the respondents are

entitled to anything more than Rs. 6 per sq. yard. As we are definitely of opinion that no increase in the site value can be allowed, we confirm the value of Rs. 6 per sq. yard and dismiss the memorandum of cross-objections with costs.

Two legal questions have been raised by the learned Government Pleader. Firstly he contended that since section 19 (*e*) (i) of the Defence of India Act lays down that the arbitrator, in making his award, shall have regard to the provisions of sub-section (1) of section 23 of the Land Acquisition Act, the application of sub-section (2) of section 23 of the Land Acquisition Act, whereby 15 per cent. solatium is allowed, cannot be justified. Under sub-section (2) of section 23 of the Act, in addition to the market value of the land as fixed under sub-section (1) of section 23, the Court shall in every case, award a sum of 15 per cent. of such market value as solatium in consideration of the compulsory nature of the acquisition. We are of opinion that this argument is well founded. When section 19 (*e*) (i) of the Defence of India Act lays down specifically that in making the award, the Arbitrator shall have regard to the provisions of sub-section (1) of section 23 of the Land Acqu isition Act, it is impossible to contend that the provisions of sub-section (2) of sect ion 23 have been attracted. The specific mention of sub-section (1) impliedly excludes the application of sub-section (2). If authority for this position is needed we may cite *Dinbai* v. *Dominion of India*[1], where a Bench of the Bombay High Court holds that the very purpose of the Defence of India Rules was that property which was required for the war should be acquired for a smaller amount than property which is ordinarily acquired under the Land Acquisition Act. But it is contended by Mr. Somasundaram for the respondent that the Collector himself has offered a solatium of 15 per cent. on the site value and therefore we should not interfere with the order of the Arbitrator allowing the solatium. It might be that the Collector was not fully alive to the implications of his action or that he did not comprehend the scope of the compensation offered. But whatever that might be, since the Collector had thought fit to award a solatium of 15 per cent. we do not think that we need interfere with his offer. Under clause (*a*) of section 19 of the Defence of India Act, the amount of the compensation can be fixed by agreement and if the parties did not agree the Arbitrator has to decide only on the disputed points. Here, so far as the solatium is concerned, it is an amount which the Collector was prepared to pay. There is no disagreement on the percentage of solatium. It might therefore be said that the amount of solatium was not the subject-matter of disagreement between the parties, so far as the Collector's offer was concerned. But the same cannot be said with regard to the solatium allowed by the Arbitrator on the increased value of the compensation. As the law does not allow him to go beyond the provisions of sub-section (1) of section 23 of the Land Acquisition Act, it is not open to the Arbitrator to award any solatium on the value of the site fixed according to the principles laid down in sub-section 1 of section 23 of the Land Acquisition Act. We therefore disallow the 15 per cent. solatium allowed by the Arbitrator on the excess amount awarded by him as the value of the site. While retaining the solatium of Rs. 1,835-0-11 offered by the Collector, we disallow the excess solatium granted by the Arbitrator, *viz.*, Rs. 1,367-3-6.

The other question is whether the claimant is entitled to interest on the increased amount. The learned Judge has allowed interest at 6 per cent. on the sum of Rs. 10,482-0-2. The argument of the Government Pleader is that section 34 of the Land Acquisition Act is the statutory provision which allows interest and since that section is not made applicable to the acquisition under the Defence of India Act no interest can be allowed. For this purpose he relies upon the observations in *Associated Oil Mills, Ltd.* v. *Provincial Government, Madras*[2]. That was a case where land was requisitioned under the Defence of India Act and it was not a case of a permanent acquisition. For the damages consequent upon such requisition, the learned Judges have held that interest is not payable. At page 570 the learned Judges observe as follows :

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1. A.I.R. 1951 Bom. 72 at 79.
2. (1947) 2 M.L.J. 429 : I.L.R. 1948 Mad. 567 at 570.

"As to the first point, we do not see how interest can be awarded on an amount which is in the nature of damages."

The distinction between that case and the present one is that here we are concerned with a permanent acquisition of property and the conversion of land into money. It is not a case of damages arising out of temporary requisition. If it had been one in which a party is entitled to damages for requisitioning his property it may be that no interest is allowable. The moment the property is taken away from the party, he is entitled to get its value as *quid pro quo.* The full value has not been offered by the Collector and therefore on the difference between what was offered by the Collector and what is now fixed by the Arbitrator, the owner of the land is entitled to be paid the interest. If authority for this position is needed there is a recent decision of the Calcutta High Court in *Province of Bengal* v. *Pawn Kissen Law & Co.*[1], where the learned Judges say that when land is acquired under the Defence of India Act the arbitrator can award interest to the person whose land has been acquired on the price of the land and the interest will run from the date when the land is taken possession of till the date on which the land acquisition Collector draws up the award and makes an offer to the person. The learned Judges discuss the Privy Council case reported in *Inglewood Pulp and Paper Co., Ltd.* v. *New Brunswick Electric Power Commission*[2] and they quote the observations of their Lordships in that case which are to the following effect :

"It is now well established that on a contract for sale and purchase of land it is the practice to require the purchaser to pay interest on his purchase money from the date when he took possession . . . . . . .It is true that the expropriation under the Act in question is not effected for private gain, but for the good of the public at large, but for all that, the owner is deprived of his property in his case as much as in the other and the rule has long been accepted in the interpretation of statutes that they are not to be held to deprive individuals of property without compensation unless the intention to do so is made quite clear. The statute in the present case contains nothing which indicates such an intention. The right to receive interest takes the place of the right to retain possession and is within the rule."

The learned Judges differed from the observations at page 570 in *Associated Oil Mills, Ltd.* v. *Provincial Government, Madras*[3]. We do not think that it is necessary to hold that the Madras case is incorrectly decided on this point. Where it is damages no interest can be awarded. But where it is the equivalent of the property, then interest can be awarded. We are therefore of opinion that interest can be awarded on the excess amount of the site value. The decree of the lower Court is modified accordingly. The parties will pay and receive proportionate costs in the appeal.

R.M. ——— *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE RAMASWAMI.

Dana Lakshmi Ammal and others .. *Appellants**

v.

Pichayya Naidu and another .. *Respondents.*

Will—Construction—Test to decide whether a document is a will—Power to adopt with words of bequest—Nature of document—Registration—When essential for admissibility in evidence.

A document is a will if it contains specific words of bequest to come into effect after the death of the testator. If there are specific words of devise it is not permissible to ignore them. It may be in some cases that the alleged words of devise are ambiguous and are consistent with a narrative and a declaration of the consequences of adoption. In such cases, having regard to the context, a Court may hold that the document only conferred a power of authority to the widow and the ambiguous words of devise are only a statement of the legal consequences of an adoption. For the purpose of construction of a document the validity of the will or its clauses must be ignored. If the testamentary character of the document is established the document though not registered is admissible in evidence and the power to adopt incorporated therein can be relied upon to sustain an adoption pursuant to such power.

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1. A.I.R. 1950 Cal. 498.
2. (1928) A.C. 492 at 498.
3. (1947) 2 M.L.J. 429 : I.L.R. 1948 Mad. 567 at 570.

* Appeal No. 203 of 1949. 26th November, 1952.

Appeal against the decree of the Court of the Subordinate Judge of Tirunelveli in O.S. No. 57 of 1947.

V. Sundaresan for Appellants.

S. V. Rama Aiyangar for Respondents.

The Judgment of the Court was delivered by

Subba Rao, J.—This is an appeal against the decree and judgment of the Court of the Subordinate Judge, Tirunelveli, in a suit filed by the first respondent for a declaration that the second defendant is not the adopted son of the first defendant and the alleged adoption is neither true in fact nor valid in law. For convenience of reference the following geneology may usefully be read :

Krishnaswami Naidu
- Venkataswami
  - V. Krishnaswami
    - Pichayya
      - P. Krishnaswami
- Alagiriswami
  - Krishnaswami
    - Alagiriswami (D.4).
    - Pichayya (Plaintiff)
    - Muthuswami (D. 5).
  - Rajagopal=Subbalakshmi (D.6)
    - Muthukrishna=Dhanalakshmi (D.1)
      - Ramdas (adopted son of Muthukrishna, D. 2)
      - Rajalakshmi (daughter by first wife, D. 3).
- Rangaswami.

Muthukrishna Naidu died on 22nd June, 1941. The first defendant is his widow Danalakshmi Ammal. He died possessed of the plaint schedule properties. He is alleged to have executed a document styled will dated 21st June, 1941. Pursuant to the power to adopt conferred on her under the said document the first defendant took the second defendant in adoption. The second defendant is the sister's son of the 1st defendant. The plaintiff's case is that the document dated 21st June, 1941, was not executed by Muthukrishna Naidu in a sound disposing state of mind and that even if he did, the said document conferred only a bare power to adopt on the first defendant, and not having been registered, invalid and inadmissible in evidence. He also denied that the adoption, in fact, had taken place. The third defendant is the daughter of Muthukrishna Naidu by his first wife. Defendants 4 and 5 are Muthukrishna Naidu's paternal uncle's sons. Plaintiff is a brother of defendants 4 and 5 but taken in adoption by Muthukrishna's father's father's brother's sons. The 6th defendant is Muthukrishna's mother. Defendants 1, 2, 3 and 6 denied the allegations in the plaint and contended that the document dated 21st June, 1941, was a will and that the adoption was true in fact and valid in law. The fifth defendant was *ex parte* ; the 4th defendant appeared in person and stated that he had no contest. On the pleadings the following issues were framed :

1. Whether the plaint has not been properly valued and proper court-fee paid ?
2. Whether the suit is barred by *res judicata* ?
3. Whether defendants 3 and 4 have colluded with the other defendants ?
4. Whether the suit as brought is maintainable ?
5. Whether the will set up by the defendants is true and valid ?

5-a. Whether the will merely amounts to a power to adopt and so invalid for want of registration ?

6. Whether the adoption is not valid ?
7. Whether the family members consented to the adoption ?
8. Whether the preferential claim of the plaintiff to the village munsiff's office is correct ?
9. To what relief, if any, is the plaintiff entitled ?

The learned Subordinate Judge held that the document dated 21st June, 1941, was executed by Muthukrishna in a sound disposing state of mind and that

the adoption was true. But he held that the document was not a will but one conferring a power to adopt and therefore was invalid for want of registration. He further held that the consent of the next reversioners on the basis of the alleged power would not validate the adoption as the conferment of the power itself was held to be invalid. In the result he decreed the suit. Defendants 1, 2, 3 and 6 prefer the above appeal.

The factum of adoption was not disputed before us. The learned counsel for the appellants argued that the learned Subordinate Judge was wrong in holding that the aforesaid document was not a will. The learned counsel for the respondent, while supporting the construction of the Subordinate Judge put upon the said document, contended that the finding of the learned Subordinate Judge that the document was executed by Muthukrishna in a sound disposing state of mind was wrong. The other findings of the learned Judge were accepted by the parties.

We shall first take the question whether the document dated 21st June, 1941, was executed by Muthukrishna in a sound disposing state of mind. Ex. B-2 is the said document.

* * * * * *

[After discussing the evidence, his Lordship concluded] :—

We therefore accept the finding of the Court below that Muthukrishna executed Ex. B-2 in a sound disposing state of mind.

Learned counsel for the appellants then contended that the construction put upon Ex. B-2 by the learned Judge was not correct. He argued that on a fair reading of the document, it would be clear that it is a document of a testamentary character. Before we consider the contents of this document, it may be convenient at this stage to refer to the cases cited on either side to discover if possible rules of construction which may afford guidance for us to construe this document. In *Mussamat Bhoobun Moyee Debia* v. *Ram Kishore Achari Chowdhri*[1], the question was whether a deed of permission to adopt given by one Gour Kishore Achari Chowdhri to his wife Chandrabullee Debia was valid and whether the adoption made pursuant to that permission was true. That question depended upon a construction of a document dated 9th November, 1819. The relevant portion of the document reads :

> " Subsequently, by the will of God, you have given birth to a male child. Still, having regard to the future, I have again given you permission. If, which God forbid, the male child of your body be non-existent, then you will adopt a son from my race (Gotra) or from a different race (Gotra) for the purpose of performing mine and your *shradh* and other rights, and for the *sheba* (service) of the Gods and for the succession to the Zamindary and other property ; on which, if the adopted son be non-existent, which God forbid, then you shall, according to your pleasure, on the failure of one, adopt other sons, in succession, to avoid the extinction of the *pinda* (funeral cake or offering) ; " that *dattaka* (adopted) son shall be entitled to perform your and my *shradh*, etc., and that of our ancestors, and also to succeed to the property."

In construing the document the Judicial Committee observed at page 309 :

> " The instrument before us is merely what it purports to be, a deed of permission to adopt ; it is not of a testamentary character, it was registered as a deed in the lifetime of the maker ; it contains no words of devise, nor was it the intention of the maker that it should contain any disposition of his estate, except so far as such disposition might result from the adoption of a son under it. He mentions the objects which induced him to make the deed—religious motives, the perpetuation of his family, and the succession to his property ; but it was by the adoption, and only by the adoption, that those objects were to be secured and only to the extent in which the adoption could secure them."

The document construed by their Lordships obviously contained no testamentary disposition. There were no words of devise. A bare power of adoption was conferred on the widow and the object of the adoption was mentioned, namely, to succeed to the property. In *Bireswar Mookerji* v. *Ardha Chander Roy*[2], the question was whether a bequest was to the boy to be adopted as a *persona grata* or whether it depended upon whether the adoption was a condition precedent for the bequest

1. (1865) 10 M.I.A. 279. 452 (P.C.).
2. (1892) L.R. 19 I.A. 101 : I.L.R. 19 Cal.

taking effect. The testator mentioned in the will that the legatee was attached to him and his wife, that he had a mind to give a portion of the property to his daughters and the balance to him, that he had taken the boy in adoption and that therefore he was bequeathing the properties to him. The Judicial Committee thought that he did not select the boy as an adopted son but for reasons independent of adoption, though they were likely to lead to it. On the construction of that will the Judicial Committee held that the boy took the bequest even though the adoption was held to be invalid. This decision, in our view, is not really relevant to the question raised before us. In *Somasundara Mudali* v. *Duraiswami Mudaliar*[1], Benson and Bashyam Ayyangar, JJ., had to construe a document conferring an authority to adopt. The document in question was described as a will executed by Somasundara Mudali. Under the document he gave Vanji Anni, his wife, a power to adopt. The material part of the document reads :

"I have given you authority to adopt Somasundaram second son of Vaiyapuri Mudaliar Avergal . . . . . . I have further hereby given you authority to put into his possession all the properties which I got under the decree in suit No. 50 of 1899 on the file of the Subordinate Judge's Court of Kumbakonam. If you are not willing to adopt the said Somasundaram, you shall adopt anybody you please and put the properties into his possesison."

The learned Judges held that the later clause directing her to put the adopted son in possession of the properties was a statement of the consequences that should follow on the adoption. In that view they held that the authority to adopt being in writing and not contained in a will and not being registered, it was inoperative to confer such authority under sections 17 and 49, Indian Registration Act. It may be noticed that in this case there are no specific words of devise. In *Bheema Deo* v. *Behari Deo*[2], the Judicial Committee had another occasion to construe a document to ascertain whether it contained a testamentary disposition or whether it only conferred a power to adopt. There the document was described as a will. The operative contents of the document were found in the following passage :

"I have consented to your adopting a son at your pleasure and conducting the management of the estate in the best manner. None of my heirs shall have cause to raise disputes touching this matter. This will has been executed with my consent."

Viscount Haldane made the following observations in construing the document at page 735 :

"That standing by itself appears to their Lordships to be no more than a present authority to the wife to make an adoption, and there is nothing else of substance in the document. It may be that the writer was in a position under the law applicable to give her such power, but whether he was or was not, he purports to give her nothing else ; for the references to property that occur in it are no more than consequences of the guardianship of the wife, and the character of being a will is not established independently of these."

The document in this case also does not contain any words of devise. Strong reliance was placed by the learned counsel for the respondent on the judgment of the Privy Council in *Shyam Pratap Singh* v. *Collector of Etawah*[3]. The document in that case was in the following terms :

"Today (Kumar Madho Singh) has given him (Maha Vindeshri Pratap Singh) to me in adoption and I have taken him in adoption. After my death, my adopted son, Lal Maha Vindeshri Pratap Singh, shall be the 'gaddinashin' and the owner of my entire moveable and immoveable property. After my death, he shall like myself, have all the powers. Lal Maha Vindeshri Pratap Singh is yet a minor, therefore during his minority, my mother Rani Besni Madho Kunwar, who was my guardian during my minority, and who managed the entire estate very well, shall remain the guardian of my adopted son Lal Maha Vindeshri Pratap Singh and shall manage the entire estate. I have therefore executed this will while in a sound state of body and mind and after full deliberation."

The question was whether the said document was a will within the meaning of the Indian Succession Act. It was contended that the words "after my death my adopted son Lal Maha Vindeshri Pratap Singh shall be the gaddinashin . . . and the owner of my entire moveable and immoveable property" was a testamentary disposition. In dealing with that contention, Sir John Beaumont, made the following remarks at page 238 :

1. (1903) 13 M.L.J. 283 : I.L.R. 27 Mad. 30.
2. (1921) 41 M.L.J. 648 : L.R. 48 I.A. 482 : I.L.R. 44 Mad. 733 (P.C.).
3. (1946) 2 M.L.J. 235 : I.L.R. 1946 K. (P.C.) 111.

"Their Lordships do not doubt that these words, taken out of their context, would operate as an effective gift of the whole of the testator's property, but taking the document as a whole their Lordships prefer the view of the Subordinate Judge. It will be observed that there are no direct words of gift in the will, and that there was no object in giving to the adopted son property which he would inherit under the law whilst the words imputing that he would take the whole estate are as consistent with mere narrative as with gift."

It is said by making these observations the Judicial Committee held that even though there are definite words of devise in a document, if they are unnecessary and if the adopted son would take the estate even if these words were not found in the document, the Court should hold that such a document is not a will. We do not think that the Judicial Committee intended to lay down any such sweeping proposition. In the case before them, though the words used in the document in a different context could be interpreted as words of devise, they were consistent with mere narrative as with gift. Therefore they held that in the context the words were not words of devise but were only an expression of the consequences that would follow on adoption. The adopted son would be owner of his entire properties. But we do not understand those observations to mean that even if there are specific words of devise, a Court should ignore them and construe them as only a narrative. To illustrate, suppose a testator says in clear terms that he bequeathed his entire properties to the adopted son, we think it is not permissible as a rule of construction to hold that the document is not a will but only a statement of fact. Where the terms of a will are ambiguous and where the alleged words of devise are consistent with a testamentary disposition and also with a narrative, it is open to a Court on a reading of the entire document to hold that in the context the words are not words of disposition but only form part of a narrative. It is not necessary to multiply cases. Nor is it necessary to consider the cases cited by the learned counsel for the appellants laying down general rules of construction of wills.

The document is a will if it contains specific words of bequest to come into effect after the death of the testator. If there are specific words of devise it is not permissible to ignore them. The validity of a will in all its clauses is not a relevant consideration in ascertaining whether a document contains a testamentary disposition or is only a conferment of an authority to adopt. To illustrate a minor may execute a will though the will is invalid. See *Vijayarathnam* v. *Sudarsana Rao*[1]. A testament may dispose of inalienable property or a property in regard to which the testator had no title. The document would be a will but the disposal clause would not operate on the properties conveyed. So too when a member of a joint family makes a bequest of joint family property, the document would be a will but it could not confer any title on the legatee as the testator had no power to dispose of joint family properties. If under a document a power to adopt is conferred on the widow but it does not contain any words of devise, it is obvious it is not a will. It may be in some cases that the alleged words of devise are ambiguous and are consistent with a narrative and a declaration of the consequences of adoption. In such cases, having regard to the context, a Court may hold that the documet only conferred a power of authority to the widow and the ambiguous words of devise are only a statement of the legal consequences of an adoption. But where there are clear words of devise it is not permissible for a Court to ignore them and hold that the document is not a will on the ground that the will was invalid or for the reason that even if the will had not been executed the same legal consequences would flow. For the purpose of construction of a document, the validity of the will or its clauses must be ignored. Bearing the aforesaid principles in view we shall now proceed to construe Ex. B-2. As much of the arguments turned upon the recitals in the document, it would be convenient to read the material part of the document :

"I am aged about 45 years. I am the hereditary village munsiff of this village. While I had married three wives, the first two wives died. The third wife alone namely Dhanalakshmi Ammal is alive. I did not beget any son by any of my three wives. I got only one daughter by my first wife. On account of the sickness wherein I am now suffering from and doubt as to whether I would survive, it is necessary for me to take a suitable boy in adoption

1. (1920) 12 L.W. 596.

in order that my soul may attain spiritual salvation and in order that (he shall) succeed to my properties and also to the office of the hereditary village munsif in my place. I am bringing up Ramdas the son of my brother-in-law the late Tirumal Rao Naidu and Lakshmi Ammal residing at Vasudevanallur, who are my relatives, as an *abimana putra* (foster son) from his childhood. I have a desire to take him in adoption. If in case it is not possible for me to take said boy in adoption during my lifetime, I have, in order that my third wife Dhanalakshmi Ammal shall take Ramdas in adoption for me, given authority under this will to my (third) wife the aforesaid Dhanalakshmi Ammal. The adopted son namely Ramdas who is so taken in adoption to me by my third wife the aforesaid Dhanalakshmi Ammal shall like unto as my *aurasa* son take my properties and the hereditary office of the village munsiff and enjoy them. But as the said boy who is proposed to be adopted is a minor, my third wife Dhanalakshmi Ammal shall be his guardian and be in management till the minor attains majority."

It will be seen from the aforesaid document that Muthukrishna was very anxious to take a suitable boy in adoption for spriitual reasons and also for succeeding to his properties. He was also bringing up Ramdas from his childhood as his foster-son. He intended to take that boy in adoption before his death. If he did not, he gave power to his wife to take him in adoption. Then comes the following crucial recital :

"The adopted son namely Ramdas who is so taken in adoption to me by my third wife the aforesaid Dhanalakshmi Ammal shall like unto as my *aurasa* son take my properties and the hereditary office of the village munsiff and enjoy them."

He appointed his wife to be the guardian and to be in management till he attained majority. He directed that the document should come into force after his lifetime.

The document is styled a will. It contains the posthumous directions of the executant. It is intended as well as expressed to come into effect after his death. The words "take and enjoy" are clear words of devise. It deliberately breaks the line of succession. If the will was not executed, the widow would take a limited interest in the whole property. If he had taken a boy in adoption during his lifetime, or even if the widow had done it after his death, she would inherit her husband's interest in joint family property under the Hindu Women's Right to Property Act. But under the document the executant directs Ramdas the second defendant, to take the entire property to the exclusion of the widow. This is not a narrative of events that would happen in law but a conscious diversion from the natural course of succession. What is more, the bequest is to Ramdas to be taken in adoption by his wife, not to his adopted son. Suppose for one reason or other the adoption has been postponed after the death of the executant, nonetheless the boy to be adopted takes the property under the document for no altnernative bequest during the interregnum is provided for. We need not express our opinion on the question whether the interests so taken would be divested if his adoption had not taken place. The validity of the will for the reason that the properties bequeathed are joint family properties is not of much relevance in this context as we are concerned to ascertain the testamentary character of the document not its validity. If the testamentary character is established—we hold it has been established in this case—the document though not registered is admissible in evidence and the power to adopt incorporated therein can be relied upon to sustain the adoption in this case. We cannot therefore agree with the Court below that Ex. B-2 is invalid for want of registration. We hold that the adoption made pursuant to the power contained in the document is valid.

It follows that the decree of the lower Court is liable to be set aside and we accordingly do so. The appeal is allowed with costs here and in the Court below.

R.M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI NAYUDU.

Sidda Setty .. *Appellant**

v.

Muniamma .. *Respondent.*

* *Hindu Married Women's Right to Separate Residence and Maintenance Act (XIX of 1946), section 2 (4) and (7)—' Marries again '—' Justifiable cause '—Meaning of.*

On a proper construction of the language in clause (4) of section 2 of Act XIX of 1946, the words ' marries again ' could only refer to a future marriage, that is, marriage after the Act. This will be a reasonable and natural construction to be put upon the words without doing violence to the language or even to the spirit of the Statute and the language does not admit of any ambiguity and is plain. To do otherwise would be to lead to inconvenient and unjust results which should always be avoided in judicial interpretation of the words of a Statute. *Laskhmi Ammal v. Narayanaswami Naicker,* (1950) 1 M.L.J. 63, dissented from.

The use of the general words ' justifiable cause ' in section 2 (7) following specific cases in clauses (1) to (6) though need not be confined to matters which arise from those mentioned in the other clauses, could not, however, be extended so as to bring within it any and every cause however trivial and inconsequential. The words ' justifiable cause ' may receive the plain and ordinary meaning and no limitation may be imposed upon them. The contingency of the incompatibility of two wives living together is already provided for under the Act and a further extension of the principle covered under clause (1) could not be sought for under the general words ' justifiable cause.'

' Justifiable cause ' must be some cause which should be considered to be real and serious by reason of which the position of the married woman becomes miserable and cannot be invoked for temporary bickerings that are of a fleeting nature. Sentimental incompatibility of a woman with the husband cannot be treated as ' justifiable cause.'

Appeal against the order of the Court of the Subordinate Judge, Coimbatore, dated 28th February, 1950, in A. S. No. 232 of 1949 (O.S. No. 116 of 1947, District Munsif's Court, Kollegal).

K. K. Gangadhara Aiyar for Appellant.

S. Sankara Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The husband in a suit by the second wife for separate residence and maintenance is the appellant in the Civil Miscellaneous Appeal. He had already married one Pattammal as his first wife. There were disputes between him and his first wife. The first wife obtained a decree for maintenance against the defendant. Subsequently, there was a rapprochement between the first wife and the defendant and the first wife came and joined her husband, while the plaintiff was living with him. The plaintiff's case is that the defendant joined his first wife Pattammal and drove her out of the house after treating her cruelly and removing the jewels from her and this incident happened on the Sivarathri Day in 1944, and that she was threatened that she would be beaten if she came and joined. The defendant denied any cruel treatment or refusal to maintain the plaintiff and stated that the suit was instituted as he had patched up his differences with his first wife and she had come and joined him and that the suit was at the instance of the plaintiff's father, who is stated to be a wealthy man and who was insisting that the defendant should settle some property on his daughter as the defendant had done for his first wife.

One of the issues raised in the suit was whether the alleged ill-treatment of the plaintiff by the defendant was true. The learned District Munsiff held against the plaintiff on this issue and he believed the defendant's version as more probable that on account of the defendant taking back his first wife, the plaintiff's father resented his action and took away his daughter. In appeal, the learned Subordinate Judge of Coimbatore, while agreeing with the finding of the first Court that the allegations of cruelty were not proved, found, however, that there were quarrels in the house between the two wives and consequently the plaintiff was not able to live in her husband's household with peace and honour due to a wedded wife,

* A.A.O. No. 405 of 1950. * 8th January, 1953.

that the plaintiff was the victim of systematic unkind and unsympathetic treatment at the hands of her co-wife resulting in mental cruelty to her and that the defendant had been guilty of not protecting the plaintiff from the cruelty of his senior wife, all of which may be considered sufficient under clause (7) of section 2 of the Hindu Married Women's Right to Separate Residence and Maintenance Act (XIX of 1946) to constitute "justifiable cause" entitling her to separate residence and maintenance.

The evidence in the case does not support the finding of the learned Subordinate Judge that the plaintiff has been the victim of systematic unkind and unsympathetic treatment at the hands of her co-wife and the defendant did not protect the plaintiff from the senior wife's cruelty. The plaintiff, who was examined as P.W. 5, speaks to the incident of her being driven out of the family on a particular occasion after removing the jewels and states that in respect of the jewels there was a panchayat. In cross-examination, she says that she filed a suit because the defendant had settled properties on Pattammal, that if similar property was given to her she would agree to it and that the occasion referred to was the first occasion the defendant had assaulted her, and prior to that they were on good terms. Her charge is against her husband for assaulting her; but there is nothing in her evidence to show that she was treated cruelly by the co-wife. The first wife has borne two children to the defendant and there is nothing in the plaintiff's evidence as to any ill-treatment by the co-wife. It may be that after the first wife came and lived with the defendant his affection to the second wife might have waned, especially as the first wife had given birth to children. On the evidence, therefore, apart from the plaintiff not establishing any cruelty on the part of her husband towards her, she has also not specifically alleged much less proved that she has been subjected to cruelty by the first wife, or that she has been the victim of systematic unkind and unsympathetic treatment at her hands resulting in mental cruelty. Those findings of the learned Subordinate Judge are not supported by the evidence and therefore cannot stand.

The position is that the plaintiff was married as the second wife to the defendant when his first wife was living and it will not be open to her to urge that being the second wife she should be allowed to live alone with her husband and that the first wife should not join the defendant. It is needless to point out that, except in very exceptional circumstances, co-wives do not generally live in good terms. There are bound to be petty quarrels and jealousies between them, which are the natural consequences of marrying one who has already a wife. Not only Hindu law but Hindu society recognise the right of a husband to take more than one wife and the taking of a second wife happens ordinarily in cases where the husband has no issue by the first wife or where by reason of her health or mental condition she is incapable of affording the husband the pleasure and happiness which the husband could expect from his wife. Hindu society however never favoured a plurality of wives and in all cases where there has been such plurality of wives, there would have been some justification for the subsequent marriage for any of the grounds specified above, mostly to satisfy the desire of the husband to have a son to perpetuate his lineage, which is considered to be necessary for the spiritual benefit of the members of the family.

The learned Subordinate Judge relied on a decision of Panchapagesa Sastri, J., reported in *Swarajya Lakshmi Mancharamma* v. *Satyanarayan*[1], for holding that the facts of the present case could be brought under clause (7) of section 2 of Act XIX of 1946 as "justifiable clause" entitling the plaintiff to relief for separate residence and maintenance. In that case, the husband after marrying a third wife sent her away to her father's house and recalled his second wife to live with him. The third wife instituted the suit for separate residence and maintenance. But it was held that clause (4) of section 2, which provides that if the husband marries again, a Hindu married woman would be entitled to separate residence and maintenance, would not apply as the marriage there was not subsequent to the marriage with

1. (1950) 1 M.L.J. 85.

the lady who was asking for separate residence and maintenance. In that case, however, the third wife alleged that at the time of her husband marrying her he had given a solemn undertaking that he would have nothing more to do with the second wife, that contrary to that arrangement he brought her back and that therefore she was entitled to relief under Act XIX of 1946. The learned Judge stated that he was of the opinion that if the facts alleged by the third wife were true, that would be sufficient to enable her to claim separate residence and maintenance, that the husband could not be compelled contrary to his solemn pledges and understanding at the time of the marriage with the third wife to resile from that and compel her to live with him along with his second wife, that it was no longer the law that cruelty or something like that should be proved to justify separate residence and maintenance and that sub-clause (7) was very wide in its language and was designedly intended to take in various circumstances in relation to the particular case before the Court which might make it unjust to compel the lady to live with the husband. The learned Judge however observed

> " that advantage should not be taken of the generality of language to claim a right of separate residence and maintenance merely on the ground of domestic bickerings or incompatibility of temper or minor differences are not unusual in the married lives of parties and nothing more serious is made out."

The suit was remanded for a finding as to whether the alleged understanding pleaded by the third wife was true.

In the instant case the plaintiff cannot rely on section 2, clause (4), that is, she cannot claim separate maintenance on the ground of her husband having married again, since Pattammal was married before the marriage of the plaintiff, she being the first wife. The claim for separate residence and maintenance is not based in the plaint on section 2, clause (4) but is specifically founded on allegations of cruelty, which must be shown to be such cruelty as renders it undesirable for her to live with him, as provided under clause (2) of section 2.

How far and to what extent a subsequent marriage would entitle the first wife to separate maintenance under the Act was dealt with by Viswanatha Sastri, J., in a judgment of his reported in *Lakshmi Ammal* v. *Narayanaswami Naicker*[1], where the words ' marries again in section 2 (4) of the Act were held to be merely descriptive of the position of the husband as a twice-married man at the date when the wife's claim for separate maintenance is made under the Act and do not exclude a husband who had taken a second wife before the Act from its operation. The words " marries again " have been construed as applicable to all subsequent marriages contracted by the husband, whether before or after the Act, and the words are not confined to marriages contracted after the Act. The result is that a husband, who married more than one wife before the Act quite in conformity with the Hindu law, which permitted such marriages without any obligation on the husband's part to provide for separate residence and maintenance except in cases where it is established by evidence that the husband has been habitually cruel so as to endanger her personal safety or is suffering from any loathsome and contagious disease as leprosy, would now, in view of the decision in *Lakshmiammal* v. *Narayanaswami Naicker*[1], be liable to provide for separate maintenance, even though he could not have contemplated any such liability or obligation at the time of his contracting the subsequent marriage. This is only to point out the hardship and the injustice that would result by the interpretation of the words " marries again" as referring to marriages before the Act of Hindu husbands, though they have not contravened any provision of the law applicable to them on the date of the marriages. I had occasion to refer to this decision in A.S. No. 596 of 1949 and expressed my inability to agree with the view taken in this case and I observed that in view of the importance of the question, this matter has to be finally settled by a decision of a Bench. It appears to me that on a proper construction of the language in clause (4) of section 2, the words " marries again " could only refer to a future marriage, that is, marriage after the Act. This, in my view, would be the reasonable and natural construction to be put upon the

1. (1950) 1 M.L.J. 63.

words without doing violence to the language or even to the spirit of the statute, and the language does not admit of any ambiguity and is plain. To do otherwise would be to lead to inconvenient and unjust results which should always be avoided in judicial interpretation of the words of a statute. With respect to Viswanatha Sastri, J., I am unable to agree with his conclusion. But as the question does not directly arise for decision in this suit, I cannot refer it to be decided by a Bench. However, as and when such a question arises for consideration, it will be eminently necessary that this important question as to the scope of the Act with particular reference to the clarification of the cases of marriages which come under clause (4) of section 2 should be considered and finally decided.

The question that remains to be determined in this case is, as to whether, on the facts of this case, the plaintiff could claim separate maintenance relying on clause (7) of section 2. The use of the general words "justifiable cause" following specific cases in clauses (1) to (6), though need not be confined to matters which arise from the cases mentioned in the other clauses, could not however, be extended so as to bring within it any and every cause however trivial and inconsequential. It may be urged that they should be considered as *ejusdem generis*; but in view of the category of cases mentioned in clauses (1) to (6) being different, the words "justifiable cause" may receive the plain and ordinary meaning and no limitation may be imposed upon them. However, in construing them effect must be given to the intention of the legislature as gathered from the object and the circumstances under which the enactment came to be introduced. It cannot be denied that there has been a growing feeling in Hindu society that the rights of Hindu married women to separate residence and maintenance should statutorily be recognised and not dependent on judge-made law and they should be at liberty to free themselves from cruel and undesirable husbands and should not be compelled to live with their husbands when it becomes impossible for them to live without sacrificing their health and happiness. Realising that Judicial decisions did not afford sufficient protection to married women in such cases, the enactment was rightly brought into the statute-book enumerating the cases in which a Hindu married woman can be allowed separate residence and maintenance. The categories mentioned in clauses (1) to (6) are themselves expressive of the justifiable causes, where a married woman could insist on her being provided separately, most of the cases having already been considered to be reasonable and just by judicial decisions, excepting the case in clause (4), where remarriage was added as a ground to entitle the married woman to separate rights. In construing the words "justifiable cause", it must be borne in mind that it should be such a cause as will make it impossible for the woman to live with the husband, as where he is suffering from a loathsome disease or where she is treated cruelly or deserted, or where he brings a concubine in the house or habitually resides with her thus depriving the wife of her husband's company, or where he ceases to be a Hindu. In these cases, a Hindu married woman cannot be expected to live with her husband. But could that be applied to a case, where she has to live with another woman married as she is to her husband such marriage being legal and recognised by the community? The mere fact that her husband who is permitted under law to have more than one wife, desires to live with all the wives together, which he would be entitled to do and which is the object with which he marries more than one wife, would not be sufficient to justify her to live separately or claim separate rights. That is obviously the justification for the enactment in section 2, clause (4) that if the husband "marries again", the woman who was married earlier would be entitled to claim the rights under the Act. The contingency of the incompatibility of two wives living together has already been provided under the Act and a further extension of the principle covered under clause (4) could not be sought for under the general words "justifiable cause." If the Legislature had intended that not only a subsequent marriage would entitle the earlier married woman to separate maintenance but also all cases where there have been more than one marriage and it would be open to every one of the married wives to leave her husband and claim separate residence and maintenance, and if such was the intention the language of clause (4) would have been made more clear and explicit. In

any event, the words "justifiable cause" could not bring in such cases. In construing the provisions of this Act, it must be borne in mind that the law is to be applicable to Hindu married women and one could not get away from principles governing Hindu marriages that marriage among Hindus is not a contract, but is a sacrament and that a Hindu wife has to be with the husband, for marriage is a holy union for the performance of religious duties also and her presence with the husband in the performance of such duties is essential and separation of such a union, though for purposes of separate living cannot be countenanced except for valid reasons. There can be no doubt that on the facts of this case there has been neither cruelty by the husband nor by the senior wife much less there is any proof of systematic unkind and unsympathetic treatment. Even assuming that there was some kind of unsympathetic treatment at the hands of her co-wife, it appears to me that that alone would not be "justifiable cause". But it may be that if there is habitual cruelty from the first wife which the husband is not able to prevent, the second wife would be entitled to allege it as a ground for claiming the rights under the Act, as it is immaterial whether cruelty should proceed from the husband alone; cruelty may proceed from any person in the house which the husband is unable to prevent and may sometimes passively be allowing such cruelty against the second wife. That would more appropriately come within clause (2) of section 2 of the Act. "Justifiable cause" therefore must be some cause which should be considered to be real and serious by reason of which the position of the married woman becomes miserable and cannot be invoked for temporary bickerings, which are common in every Hindu family but are of a fleeting nature. In any event, sentimental incompatibility of the woman with the husband cannot be treated as "justifiable cause" for claiming rights under the Act.

In the result, the appeal is allowed and the decree of the District Munsif of Kollegal dismissing the suit will stand. In the circumstances of this case, there will be no order as to costs. No leave.

R.M. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMASWAMI.

The Public Prosecutor .. *Appellant**

v.

Annadham Annamalai and others .. *Respondents.*

Madras Maintenance of Public Order Act, 1949 *(Act XXIII of* 1949)—*If a special law—Special and local laws—Distinction—Madras Act (XXIII of* 1949)—*Creates fresh offences—Escape from police custody—When an offence—Arrest without authority or under improper or invalid authority—Resistence to arrest—If offence.*

The word 'offence' means a thing punishable under the Penal Code or any special or local law. The special law contemplated are laws such as those that create fresh offences, *i.e.*, laws making punishable certain things which are not already punishable under the Penal Code. But other Acts are those that create no fresh offences but merely provide a supplementary or alternative punishment of offences already primarily punishable under the Penal Code or which can be dealt with under the preventive or reformative provisions of the Code of Criminal Procedure.

The Madras Act I of 1947 (now Act XXIII of 1949) is not a special law. It can be considered a local law applicable to the State of Madras. A local law does not necessarily include all the rules made under the provisions of a local law. Where a local law declares a breach of the rules made under its authority to be punishable, then a breach of such rules might constitute an offence witihin the meaning of section 40 of the Penal Code.

A person cannot be convicted of escape unless the custody in which he was detained was lawful. A person about to be arrested is entitled to know under what power the constable is arresting him and if he specifies certain power which the person knows the constable has not got, he is entitled to object to such arrest and escape from custody, such custody not being a lawful one.

A detention and a rescue by others and the esacpe by the detenu will attract the application of section 225-B, Indian Penal Code, provided the detention was lawful.

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* Crl. Appeals Nos. 92 and 93 of 1951. 21st November, 1952.

Appeal under section 417, Criminal Procedure Code, 1898, against the acquittal of the aforesaid respondents (accused) by the Stationary Sub-Magistrate, Cuddalore, in C.C. No. 2957 of 1949 on his file.

The Assistant Public Prosecutor (*A. C. Muthanna*) for the Appellant.

A. Ramachandran of *Row and Reddy* for Respondents.

The Court delivered the following

JUDGMENT.—These are appeals against acquittal preferred by the Public Prosecutor in C.C. No. 2957 of 1949 and 990 of 1949 on the file of the Stationary Sub-Magistrate, Cuddalore.

Both the appeals relate to the same transactions and the facts are fully set out in C.C. No. 2957 of 1949 and dealt with below :

The facts are : The District Magistrate of South Arcot had promulgated on 17th July, 1948, an order of detention under section 2 (1) (A) of Madras Mainenance of Public Order Act against Chottu *alias* Vasudeva (*see* Exhibit P-1). On the night of 26th November, 1948, at about 8-15 P.M., P.W. 2, Head Constable No. 811, attached to the N. V. Pattu outpost, got information that this Chottu *alias* Vasudeva was in the house of Subramanian (accused 2) in East Chetti Street, in N. V. Pattu and proceeded there accompanied by P.Ws. 3, 4 and 5. This party was also accompanied by some of the villagers including P.W. 6. On reaching the house, P.W. 2 found there accused 2 and 6 and questioned them about the presence of this Vasudeva and not being satisfied with the reply, P.Ws. 2 and 3 got into the house and found the said Vasudeva in the northern room and he was pulled towards the street door assisted by P.Ws. 4 and 5. Accused 2 and 6 protested and obstructed and the womenfolk raised an alarm and a crowd of 20 to 30 people gathered and they sided with the accused persons. In the course of this, this Chottu *alias* Vasudeva is stated to have made good his escape. On seeing this the people who obstructed also ran away. Only accused 2 was caught and taken to the Police station and a special report was given to the Circle Inspector by P.W. 2. Then a charge-sheet was laid against eight persons for obstruction and resistance to a public servant in the discharge of his duties and rescuing a person from lawful detention, offences under sections 353 and 225-B, Indian Penal Code.

In C.C. No. 990 of 1947 the self-same witnesses were examined and the evidence is practically the same as set out above.

The accused one and all denied the offence and pleaded not guilty to the charges framed against them and the main point taken was the legality of the apprehension of this Chottu *alias* Vasudeva.

The substance of this contention was as follows : The detention order relied on is a general order of detention and is not a warrant addressed to any person directing the arrest. P.W. 2 relied on Exhibit P-1 for the apprehension of this Chottu. The power to arrest without warrant a subject named in the detention order arises under section 13 of the Madras Maintenance of Public Order Act only when the person is reasonably suspected of having committed an offence under the said Act. It is not the case for the prosecution that Vasudeva has committed any offence under that Act nor was it a ground relied upon by the prosecution in support of the power to arrest claimed by P.W. 2 and others. The prosecution has proceeded almost entirely on the footing that the detention order amounted to an arrest warrant and was entrusted to Head Constable 811 for execution. Both these assumptions were unfounded because Exhibit P-1 is only a detention order promulgated and did not empower any person to effect the arrest and inasmuch as the Head Constable left the outpost with intention to apprehend Vasudeva only under this detention order and not because this Vasudeva was reasonably suspected of having committed an offence. Section 23 of Police Act V of 1861 could not be invoked and which invocation was both belated and an after-thought and not permissible as pointed out in *Appasami Mudaliar* v. *King Emperor*[1].

1. (1924) 46 M.L.J. 447 : I.L.R. 47 Mad. 442.

The learned Sub-Magistrate accepted this contention and acquitted the accused, though on the facts constituting the gravamen of the charge, *viz.*, obstruction and escape, he found the prosecution case to be true.

The point for consideration is whether the acts complained of fall within section 225-B and section 353, Indian Penal Code. Section 225-B was substituted by the Indian Criminal Law Amendment Act X of 1886, section 24 (1). This section was introduced to provide for cases referred to in *Empress* v. *Shasti Churn Napit*[1] and *Queen Empress* v. *Kandhaia*[2], in which it was held that a person escaping from custody when being taken before a Magistrate for the purpose of being bound over to be of good behaviour not being punishable under section 224 or section 225 could not be punished, and for cases which section 651 of the old Code of Civil Procedure was intended to meet. The requirements of this section are, however, the same as under section 224 or section 225.

The evidence requisite to prove the offence under section 225 is (1) that the person in question was detained in custody ; (ii) that such detention was in respect of an offence ; (iii) that such detention was lawful ; (iv) that the accused rescued or attempted to rescue such person ; and (v) that he did so intentionally. There must be a clear finding as to the intention with which the accused acted : *Alawal*, In re[3] ; *Geevarghese Khathanar* v. *State*[4]. It must be proved further that the case falls under a particular clause of the section.

The word " offence " means a thing punishable under the Penal Code or of any special or local law (section 40). A special law is defined in section 41 as a law applicable to a particular subject and a local law has been defined in section 42 as the law applicable only to a particular part of British India (now Republic of India). Therefore, we have got to see whether Madras Act I of 1947, (hereinafter referred to as the Act) is a local law or a special law. The special laws contemplated in sections 40 and 41 are only laws such as the Excise, Opium and Cattle Trespass Acts, creating fresh offences, *i.e.*, laws making punishable certain things which are not already punishable under the Penal Code. The Whipping Act is not a special law in this sense. It creates no fresh offence but merely provides a supplementary or alternative form of punishment for offences which are already punishable primarily under the Penal Code : *Emperor* v. *Po Han*[5] and *Arunagirinatha*, In re.[6]

The preamble to Madras Act I of 1947 states :—

> " Whereas for the maintenance of public safety and to prevent and put down disorders involving menace to the peace and tranquillity of the Province, it is necessary to provide for preventive detention, imposition of collective fines, control of meetings and processions, control of services essential to the life of the community and certain other purposes ; it is hereby enacted as follows ."

This Act creates no fresh offences but merely provides the supplementary or alternative punishment for offences already primarily punishable under the Penal Code or which can be dealt with under the preventive or reformative provisions of the Code of Criminal Procedure. This is made clear by section 18 of the Act :

> " The provisions of this Act shall be in addition to and not in derogation of any other Act, Ordinance or Regulation for the time being in force."

Therefore, this is not a special law. On the other hand, it can be considered to be a local law applicable to the State of Madras. A local law does not necessarily include all the rules made under the provisions of a local law : *Ganda Shah* v. *Queen Empress*[7] and *Ma Khwet Kyi*, In re[8]. Where a local law declares a breach of the rules made under its authority to be punishable, then a breach of such rules might constitute an offence within the meaning of section 40 of the Code. Therefore, when the act in respect of which apprehension or detention was made was in respect of an offence falling within a local law it will be a detention in respect of

1. (1882) 8 Cal. 331.
2. (1884) I.L.R. 7 All. 67.
3. (1921) 23 P.L.R. 47 : 23 Cr. L.J. 3 : 87. A.I.R. 1922 Lah. 73.
4. 36 Trav. L.J. 694.
5. (1913) 15 Cr. L.J. 3.
6. (1938) 2 M.L.J. 863 : I.L.R. (1939) Mad.
7. 23 P.R. 1894 (Cr.).
8. (1928) I.L.R. 6 Rang. 791.

an offence falling within the meaning of section 40 of the Penal Code, and a rescue by others and the escape by the detainee will attract the application of section 225-B, Indian Penal Code, provided the detention was lawful.

Was the detention in this case lawful is the further point for our consideration? Section 2 of the said Act deals with the powers to make detention orders. The detention order in this case has been marked as Ex. P-1 and it recites that Vasudeva was being detained in exercise of the powers conferred under section 2 (1) (*a*) of the Madras Act I of 1947 read with the order of the Government of Madras G.O. M.S. No. 907 (Public) General (E), dated 21st March, 1947 and that the attention of the said Vasudeva was being drawn to the general order of the Government of Madras under section 2 (5) of the Act, a copy of which was being attached. Section 2 (5) states:

"So long as there is in force in respect of any person such an order as aforesaid directing that he be detained, he shall be liable to be removed to and detained in such place and under such conditions . . . *as the Provincial Government may, from time to time by general or special order, specify.*"

Then section 2 proceeds to make provision for two sets of conditions:

"If the Provincial Government have reason to believe that a person in respect of whom such an order as aforesaid has been made directing that he be detained has absconded or is concealing himself so that the order cannot be executed, they may—

(*a*) make a report in writing of the fact to . . . . . a Magistrate of the first class . . . . . having jurisdiction in the place where the said person ordinarily resides; and thereupon the provisions of sections 87, 88 and 89, Criminal Procedure Code, 1898, shall apply in respect of the said person and his property, as if the order directing that he be detained were a warrant issued by the Magistrate;

(*b*) by order notified in the Fort St. George Gazette, and published in such other manner as they think fit, direct the said person to appear before such officer, at such place and within such period as may be specified in the order . . . . . ."

If the said person fails to comply with such direction provision is made for the punishment. Then, for persons harbouring or concealing these persons ordered to be detained or persons reproducing or publishing statements, etc., made by persons ordered to be detained, offences are enacted and punishments prescribed. Section 13 provides:

"Any police officer may arrest without warrant any person who is reasonably suspected of having committed an offence punishable under this Act."

Section 14 provides for attempts and abetments to contravene the provisions of this Act. In other words, after a detention order is made and the detainee is found to be absconding or concealing himself, provision is made in the Act for a report to a First Class Magistrate and then the detainee becomes a notified or proclaimed offender and all the incidents attached to sections 87 to 89 of the Criminal Procedure Code apply. Section 87 of the Criminal Procedure Code deals with proclamation and attachment, section 88 with the attachment of property and section 89 with restoration of attached property of the proclaimed offender. In other words, by virtue of the report in writing to the First Class Magistrate the detention order becomes as if it were transmuted into a warrant issued by a Magistrate and thereupon and thereafter the provisions of sections 87, 88 and 89 can be applied and if applied thereupon it will be open to any police officer to arrest the detainee wherever he may be found under the third category of section 54, Criminal Procedure Code, *viz.*, a person who has been proclaimed as an offender either under the Criminal Procedure Code or by order of the State Government. If the provisions of sections 87 to 89 have not been applied and the detention order remains at one stage as if it were a warrant issued by a Magistrate even then it would be a case falling within section 54, Criminal Procedure Code, or section 13 of this Act, *viz.*, "any police officer may arrest without warrant any person who is reasonably suspected of having committed an offence punishable under this Act," *viz.*, becoming a detainee absconding or concealing himself after the Gazette notification had been made under sub-section (*b*) of clause (6) of section 2 of the Act and not complying with the terms of the detention order and thereby committing an offence punishable under the Act.

This has not been the case here as it will be seen that beyond passing the detention order there is no evidence that action had been taken under clause (6) of section 2 of the Act. This cannot be got over by invoking section 23 of the Police Act V of 1861, because as pointed out by the learned Sub-Magistrate, that section lays down nothing more than that

" It shall be the duty of every police officer promptly to obey and execute all orders and warrants lawfully issued to him by any competent authority ; to collect and communicate intelligence affecting the public peace ; to prevent the commission of offences and public nuisances ; to detect and bring offenders to justice and to apprehend all persons whom he is legally authorised to apprehend, and for whose apprehension sufficient ground exists ; and it shall be lawful for every police officer, for any of the purposes mentioned in this section, without a warrant, to enter and inspect any drinking shop, gaming house or other place of resort of loose and disorderly characters."

It will be seen that none of the clauses applies to this case. This section does not cover the execution of an invalid warrant or extend a constable's powers of arrest ; *Kartik Chandra* v. *Emperor*[1]. Therefore, the apprehension of the person in question, Vasudeva, was not lawful and once the apprehension or detention is not lawful, it is well settled law that his own escaping as well as the rescuing of such a person by others is no offence. The person from whose custody the rescue is effected or escape made must have authority to lawfully detain the person rescued. Otherwise no offence is committed in effecting the rescue: *Bolai De* v. *Emperor*[2], *Kesar* v. *Emperor*[3] *Shridhar*, In re[4], *Vijoy Narain Singh*, In re[5], *Emperor* v. *Lachu Kamara*[6], and *Bomesh* v. *Emperor*[7]. But if the person rescuing another who is arrested under an illegal warrant uses more force than is necessary and causes unnecessary hurt to the public servant who has custody of that person, he will be punishable under section 353, Indian Penal Code. *Mousi Lal*, In re[8]. In this case it has been found by the Magistrate that no unnecessary force was used and that the force used by these rescuers was just the minimum necessary to obtain the apprehension of Vasudeva.

This will also make the escape of Vasudeva from detention equally innocuous. A person cannot be convicted of escape unless the custody in which he was detained was lawful: *Emperor* v. *Ramarao*[9], *Khanu* v. *Emperor*[10], and *Jograj Mahto* v. *Emperor*[11].

A person about to be arrested is entitled to know under what power the constable is arresting him and if he specifies a certain power which he knows that the constable has not got, he is entitled to object to such arrest and escape from custody, such custody not being a lawful one. This has been well laid down in the decision of the House of Lords in *Christie* v. *Leachinsky*[12]. It was held (affirming the judgment of the Court of Appeal) :

" that an arrest without warrant can be justified only if it is an arrest on a charge made known to the person arrested and it is a condition of lawful arrest that the party arrested should know on what charge or on suspicion of what crime he is arrested ; therefore just as a private person arresting on suspicion must acquaint the party with the cause of his arrest, so must a policeman arresting without warrant on suspicion state at the time (unless the party is already acquainted with it) on what charge the arrest is being made or at least inform him of the facts which are said to constitute a crime on his part. Even if circumstances exist which may excuse this, it is still his duty to give the information at the first reasonable opportunity after the arrest."

This embodies only the sound rule embodied in section 80, Criminal Procedure Code, *viz.*, that the Police officer shall inform the warrantee the substance thereof and if so required has got to show the warrant. This Court has laid down in *Appasami Mudaliar* v. *King Emperor*[13], that a person about to be arrested is entitled to know under what power the constable is arresting him and if he specifies a certain power which the person knows the constable has not got, he is entitled to object to such arrest and escape from custody, such custody not being lawful one. See also

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1. (1930) 38 I.C. 844 : 33 Cr.L.J. 706 : A.I.R. 1932 Pat. 171.
2. (1907) I.L.R. 35 Cal. 361.
3. A.I.R. 1932 Lah. 263.
4. A.I.R. 1945 Rang. 141.
5. 22 P.L.J. 29.
6. A.I.R. 1950 Orissa 62 : 51 Cr.L.J. 679.
7. (1945) 1 M.L.J. 334 : 47 Cr.L.J. 220.
8. A.I.R. 1918 Pat. 252 : 19 Cr.L.J. 1000.
9. (1907) 7 Cr.L.J. 74.
10. A.I.R. 1925 Sind 193.
11. A.I.R. 1940 Pat. 696 : 47 Cr.L.J. 220.
12. (1947) A.C. 573.
13. (1924) 46 M.L.J. 447 : I.L.R. 47 Mad. 442.

Ramjit, In re[1]. Thus where an inspector of police catches hold of the wrist of the accused without informing him for what offence he was being arrested accused wrenching himself free is not guilty of any offence under the Indian Penal Code : *Muneshwar Bux Singh* v. *Emperor*[2].

There is a long line of decisions that resistance to the execution of an unlawful order, or unlawful arrest or defective warrant making it out if it is *ex facie* illegal is no offence. Where the Sub-Inspector asked the constable to bring the accused to thana by force and there was a scuffle. *Held*, as there was no direction for arrest accused not guilty of an offence under sections 224, 225, 353, Indian Penal Code, *Gulabi Mahto* v. *Emperor*[3]. Under the Madras Gaming Act arrest of accused in a shop in the absence of proof that it was a common gaming house led to obstruction to arrest and it was held to be no offence, *Kandaswami Thevan*, In re[4]. Where warrants have not been duly signed or sealed or they are sought to be executed beyond duly authorised and authorisable persons obstruction to execution of such warrants is not unlawful provided the force used is the minimum necessary : *Jagannath* v. *King Emperor*[5], *Fattu* v. *King Emperor*[6], *Subbaramiah* v. *Emperor*[7], In re *Bullikhan* v. *Mansab Khan*[8], and *Bansoroppa Singh* v. *Emperor*[9].

Therefore, the acquittals made by the learned Stationary Sub-Magistrate are correct and these appeals are dismissed.

R.M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Venkataswami Aiya .. *Petitioner*.*

Stamp Act (II of 1899), sections 27 and 64—Offences under—What amounts to—Onus of proof—Persons liable under.

As the law stands two courses are open, when a document is sought to be registered on an under-valuation. First of all, if the Registrar either from his own information or otherwise suspects that the valuation given is an under-valuation with intent to cheat the Government of the legitimate duty, he can ask for particulars from the party and if satisfied with its under-valuation, can refuse to register the document unless proper duty was paid. Secondly, in cases where the document gets registered and the information is subsequently received that the valuation shown is an under-valuation and that the legitimate stamp duty has been intentionally evaded to defraud the State, it will be open to the Registrar to initiate a prosecution under section 27 read with section 64 of the Indian Stamp Act.

The burden of proof is upon the prosecution to show affirmatively and satisfactorily that the terms of section 27 have not been complied with. Mere non-payment of a proper stamp duty does not make a person liable for prosecution under section 64 of the Act unless it is proved that he had an intention of defrauding the Government of its stamp revenue. Section 64 (*b*) is not restricted to the scribe of the instrument but is wide enough to reach and punish the person who is in truth the author of the deed and is responsible for it though he writes the deed through the hand of another. It is not correct to say that a vendee of a sale deed will never be liable under section 64 (*a*) or (*b*) and that the executant of the document alone will be liable.

Case-law discussed.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of Sessions, Coimbatore division, dated 17th March, 1952, in C.A. No. 1 of 1952, preferred against the order of the Court of the Additional First Class Magistrate, Kollegal, dated 8th November, 1951, in C.C. No. 10 of 1951.

K.V. Ramaseshan for Petitioner.

The Public Prosecutor (*V.T. Rangaswami Aiyangar*) for the State.

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1. A.I.R. 1938 All. 120 : 39 Cr.L.J. 360.
2. A.I.R. 1939 Oudh 81 : 40 Cr.L.J. 221.
3. A.I.R. 1940 Pat. 361.
4. 1934 M.W.N. 616.
5. A.I.R. 1932 All. 227 : 33 Cr.L.J. 887.
6. A.I.R. 1932 All. 692: 34 Cr.L.J. 455
7. (1934) 66 M.L.J. 408.
8. A.I.R. 1938 Nag. 35.
9. A.I.R. 1937 Pat. 603 : 39 Cr.L.J. 2.

* Crl. R.C. No. 614 of 1952. (Crl. R. P. No. 510 of 1952). 19th January, 1953.

The Court made the following

ORDER.—This criminal revision case is preferred against the conviction and sentence in C.C. No. 10 of 1951 on the file of the Additional First Class Magistrate, Kollegal, from which C.A.No. 1 of 1952, was filed before the Sessions Judge, Coimbatore, wherein the conviction was confirmed and the sentence was modified.

The facts are : One Chinna Malappa executed a settlement deed Ex. P-10 on 29th July, 1950. It was written by Venkataswami Aiya, karnam of Ikkadahalli village, Kollegal taluk. The document was registered as No. 1937 of 1950 of Book I of the Sub-Registrar of Kollegal. The value of the property as set forth in the document is Rs. 2,000. The District Registrar initiated the prosecution of both these persons under section 27 read with section 64 of the Indian Stamp Act on the foot that the property had been grossly under-valued. The executant died on 2nd August, 1950. The case against him abated. The enquiry proceeded against this scribe only. Both the Courts below found that this accused was guilty as charged and sentenced him to pay a fine. The Additional First Class Magistrate fined him Rs. 100 and the Sessions Judge reduced it to Rs. 50.

This conviction is challenged in this criminal revision case on the following grounds, *viz.*, (*a*) that there has been no valid sanction for the institution of the complaint, and (*b*) that the circumstances alleged against this scribe do not make out the offence contemplated by section 27 and section 64 of the Indian Stamp Act.

Point (*a*) : There is no substance in this point because though it is quite true that originally under the Standing Orders 101 and 102, embodied in the Madras Stamp Manual containing the Indian Stamp Act and the Court-fees Act, with the Notifications issued thereunder and the Board's Standing Orders connected therewith (4th Edn. 1933) only Collectors and Revenue Divisional Officers are found to have been authorised under section 70 of the Indian Stamp Act to sanction prosecutions in respect of offences punishable under the Stamp Act. Subsequently the District Registrars have also been so authorised. Ex. P-12 is the copy of the G.O. Ms. No. 3306, Revenue, dated 28th December, 1949, in which the Local Government accepted the recommendation of the Board of Revenue to authorise the District Magistrate under section 70 of the Indian Stamp Act to sanction prosecution. Ex. P-13 is copy of the proceedings of the Board of Revenue, Ref. No. 3129-50, dated 17th May, 1950, empowering District Magistrate to sanction prosecution. Therefore, there is no substance in the contention about the want of proper sanction for the complaint being launched by the District Registrar.

Point (*b*) : I shall now briefly consider the scope of sections 27 and 64 and Article 58 of the Indian Stamp Act to find out whether the facts of the instant case make out the offence for which the revision petitioner has been convicted.

Section 27 of the Indian Stamp Act requires that the consideration and other facts and circumstances which affect the stamp duty payable must be stated in the instrument. In the case of a settlement deed, the Article applicable is 58. The duty has to be paid on the amount or value of the property settled as set forth in such settlement. It is unnecessary to trace the chequered interpretations of this phrase " as set forth in such settlement " because we have the authoritative Full Bench decision of this Court in *Board of Revenue* v. *Venkatarama Aiyar*[1], wherein the previous decisions in *Reference under Stamp Act, Sec.* 46[2], *Reference under Stamp Act, Sec.* 46[3] *and Reference under Stamp Act, Sec.* 46[4] of this High Court and the decisions of the other High Courts have been referred to. This Full Bench decision affirmed the view that stamp duty should be calculated on the value shown in the document itself. But at the same time it was held in that case that although the Registrar before whom a document is presented for registration cannot embark on the independent enquiry regarding the value of the property, yet he has power under section 35 of the Stamp Act, to refuse registration if the document is not duly stamped ; from which it would seem to follow that he can require the person seeking registration to furnish the particulars required for the calculation of the

1. (1950) 2 M.L.J. 213 : I.L.R. 1951 Mad. 119 (F.B.).
2. (1884) I.L.R. 7 Mad. 350.
3. (1885) I.L.R. 8 Mad. 453 (F.B.).
4. (1896) I.L.R. 20 Mad. 27.

duty payable. For instance, he can refuse to accept the settlor's evasive statement in the document, "value for purposes of stamp and registration Rs. 3,000" when the true value of the property was rupees two lakhs. In this case it was also held that the word "value" in Article 58 means the market value of the property at the time of the execution of the document and not its value to the executant when he acquired it, that is, purchase or a nominal or fictitious value. It was also pointed out that if persons who conveyed property could value it as they pleased, the Act would be purposeless, for little or no revenue would be collected. Notwithstanding the above the stamp duty is only to be calculated on the value as set forth in the settlement. The principles underlying the provisions of the Stamp Act with regard to valuation and estimation of the duty payable are that the value of the property should be taken from the face of the document and that the revenue of the Government is protected by requiring the parties to make a true and full disclosure of all facts and circumstances having any bearing on the duty payable failing which they must suffer the consequences of their false and defective statements. The learned Judges observed:

"No machinery is set up in the Stamp Act for ascertaining the true value of the property or consideration, as the case may be, in every case that comes before the Registrar; and it would clearly be impracticable to cast the burden on the Registrar in each case to ascertain what the true market value is. If the stamp duty were payable only on a market value to be ascertained, then it would have to be definitely stated in the Act who was to ascertain the market value and what rights, if any, an aggrieved party had by way of appeal, revision or the like."

In other words, as the law stands two courses are open when a document is sought to be registered on an under-valuation. First of all if the Registrar either from his own information or otherwise suspects that the valuation given is an under-valuation with intent to cheat the Government of the legitimate duty, he can ask for particulars from the party and if satisfied with its under-valuation, can refuse to register the document unless proper duty was paid. Secondly in case where the document gets registered and the information is subsequently received that the valuation shown is an under-valuation and that the legitimate stamp duty has been intentionally evaded to defraud the State, it will be open to the Registrar to initiate a prosecution under section 27 read with section 64 of the Indian Stamp Act.

In the instant case what happened was this. P.W. 4 and D.Ws. 1 and 2 are brothers, being the sons of the deceased Chinna Mallappa. Chinna Mallappa executed Ex. P-10, the document in question. P.W. 4, felt aggrieved at the execution of Ex. P-10 because under that document his brothers D.Ws. 1 and 2 got the properties mentioned therein. Therefore, he preferred a complaint to the Inspector-General of Registration stating that the properties in Ex. P-10 were deliberately under-valued to avoid stamp duty. P.W. 2 the District Registrar at Erode investigated the complaint and sanctioned the prosecution of the executant Chinna Mallappa and the scribe, the petitioner before us.

But whatever may be the circumstances under which the prosecution is launched the burden of proof is upon the prosecution to show affirmatively and satisfactorily that the terms of section 27 have not been complied with. In all criminal cases the onus of proving everything essential to establish the charge against the accused lies on the prosecution. The difficulty of proving a fact may affect the quantum of evidence demanded in the first instance but does not change the dominant presumption of innocence. It is not necessary in all these cases for the accused to produce independent evidence. He is entitled to rely upon the evidence that has been produced on behalf of the prosecution to urge that such evidence does not establish the guilt: See *Woolamington* v. *Director of Public Prosecutions*[1], (House of Lords) followed in *Manchini* v. *Director of Public Prosecutions*[2], See also *Mahadeo* v. *King*[3].

Section 64 of the Stamp Act requires proof of intention to defraud. Thus, a person selling property ostensibly for Rs. 1,000 while the real consideration was

1. (1935) A.C. 462.
2. 1942 M.W.N. Crl. 140.
3. 1936 M.W.N. Crl. 165 (P.C.).

Rs. 1,000 in cash and Rs. 19,000 as deposit with the vendee to be drawn by the vendor, is guilty under section 64 (c) of the Stamp Act : *Emperor* v. *Rameshar Das*[1]. Mere non-payment of a proper stamp duty does not make a person liable for prosecution under section 64 of the Act unless it is proved that he had an intention of defrauding the Government of its stamp revenue: *Brojendra Nath Bakshi* v. *Emperor*[2]. In order to maintain a conviction under section 64, it is necessary to prove intention to defraud. This intent can only be inferred from the circumstances *Ramchand* v. *Emperor*[3], *Krishnaswami Iyer* v. *Emperor*[4]. The ingredients of the offence under section 64 (*a*) of the Stamp Act are that the consideration quoted in the document is not the real consideration and the intention or effect was to defraud the Government of stamp revenue : *Narasimha Iyer* v. *Tahsildar of Wallajah, North Arcot*[5]. In fact the Board's Standing Order 103, runs as follows :

> "In dealing with cases care is necessary to discriminate between cases in which an intention to defraud is required to be shown and those in which it is not."

Thus, in prosecution under section 64 or section 68 or for device to evade duty on receipt under section 65, the fraudulent intention must be established ; in other cases such an intention is not a necessary element of the offence.

Clause (*b*) of section 64 of the Stamp Act applies to a person who is employed or concerned in or about the preparation of a deed without complying with the requirements of section 27. The clause is not restricted to the scribe of the instrument but is wide enough to reach and punish the person who is in truth the author of the deed and is responsible for it, though he writes the deed through the hand of another person : *Chimandas* v. *Emperor*[6]. A person who is the moving spirit in the matter of sale and who is the real purchaser though the deed is nominally taken in the name of another and who engineers the whole thing and arranges for the wording of the sale deed, is a person concerned in or about the preparation of the instrument : In re *Sengoda Goundan*[7], and In re *Tribak Madho Kshirasagar*[8]. It is not correct to say that a vendee of a sale deed will never be liable under section 64 (*a*) or 64 (*b*) and that the executant of the document alone would be liable. If the vendee was concerned with the preparation of the conveyance and if the consideration was stated therein to be Rs. 300 instead of Rs. 2,000, which was the real value of the properties, and if there was no good faith, the vendee also will be liable under section 64 (*b*). Hence the scribe who scribes the deed without any knowledge of the fraud, does not commit an offence under this clause : *Panchanan Roy* v. *Emperor*[9]. The prosecution must therefore affirmatively and adequately establish that the scribe scribed the deed with intent to defraud or with knowledge of the fraud.

There has always been a general reluctance amongst lawyers to attempt to define fraud, and this is not unnatural when we consider the number of different kinds of conduct to which the word is applied in connection with different branches of law, and especially in connection with the equitable branch of it. " I shall not attempt," said the late Sir J.F. Stephen, " to construct a definition which will meet every case which might be suggested, but there is little danger in saying that whenever the words " fraud," or " intent to defraud," or " fraudulently " occur in the definition of a crime two elements at least are essential to the commission of the crime, namely, first, deceit, or an intention to deceive or in some cases mere secrecy ; and secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy." This intent is very seldom the only or the principal intention entertained by the fraudulent person, whose principal object in nearly every case is his own advantage. The injurious deception is usually intended only as a means to an end, though it does not prevent it from being intentional. Therefore, it is only when there is an intention to deceive and by means of deceit to obtain an advantage, there is fraud.

1. (1910) 32 All. 171.
2. (1918) 45 I.C. 275 (Cal.).
3. A.I.R. 1940 Lah. 274.
4. 1937 M.W.N. 867.
5. 1937 M.W.N. 1071.
6. A.I.R. 1944 Sind 222.
7. 1 Weir 905 (D.B.).
8. A.I.R. 1937 Nag. 57.
9. A.I.R. 1929 Cal. 723.

In the instant case the element of intent to defraud has not been satisfactorily proved. First of all, it has not been shown what is the real market value of the land as contra-distinguished from the under-valuation charged. This must be affirmatively and satisfactorily proved by the prosecution. On the other hand, the burden of it has been thrown upon the scribe, the petitioner before us. The trial Court has stated :

"It is in evidence that the accused who is the karnam of the village knows the value of the land in question. Exs. P-24 and 25 are useful in this respect. (How, no information is vouchsafed). The accused cannot be heard to say that the karnam he is, is ignorant of the value of lands in the village and hence that his intention was not to defraud the Government when he wrote the document in question."

This is merely begging the question. Secondly, the accused as a matter of fact has taken upon himself the burden of showing that there was no under-valuation and examined D.W. 8, a village official and who is his own brother. The trial Court dismissed his evidence in the following unsatisfactory manner :

"For example D.W. 8 Balachandra Iyer is the brother of the accused who also is a village official. His evidence is interested. His records also are not clear."

On the other hand, there is a volume of respectable evidence on the side of the karnam that there was no such gross under-valuation as would by itself be proof of intent to defraud. Thirdly, it has not been shown that the karnam derived any advantage from this under-valuation, even assuming that there was an under-valuation which has not been affirmatively proved. It is quite true that the deriving of this advantage cannot be proved by direct evidence. But sufficient circumstances should be established to enable us to draw that only inference. Threre is no such evidence here.

In these circumstances, the prosecution not having affirmatively and satisfactorily established that the scribe scribed the deed with intent to defaud or with knowledge of the fraud, the conviction and sentence are set aside and the accused is acquitted. The fine amount, if collected, will be refunded.

R.M. — *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Chandrabhogi and another .. *Petitioners**

v.

Gudappa Bhandary .. *Respondent.*

Court-Fees Act (VII of 1870), *Article* 17-B *and section* 7 (iv) (f)—*Scope of—Suit for partition and accounts —Valuation—How made.*

It is settled law that a relief for partition is not capable of valuation and therefore Article 17-B of Schedule II of the Court-Fees Act will apply. It is equally well established that a relief for accounting is governed by section 7 (iv) (*f*). It has also been held that in a suit for rendition of accounts, where the amount is ascertained and a decree granted for a specific amount, the defendant should pay *ad valorem* court-fee in an appeal against that decree. If a relief for partition and a relief for accounting are two distinct subject-matters they should be separately valued even though the reliefs are clubbed together in the same suit. But if the relief for accounting is implied in the relief for partition, it cannot be said that the former relief is in respect of a different subject-matter. In that case, though it is framed as a separate relief, in effect and substance it will be part of the same relief.

Parameshwar Dube v. *Gobind Dube*, (1915) I.L.R. 43 Cal. 459, followed.

Ramaswami v. *Rangachariar*, (1940) 1 M.L.J. 32 : I.L.R. (1940) Mad. 259 (F.B.), relied on.

Kadiyala Peravadhannulu v. *Peravadhannulu*, (1949) 2 M.L.J. 402; *Danukodi Nayakar*, In re, (1938) 1 M.L.J. 628, explained.

Veluchami Pillai v. *Sankaralingam Pillai*, (1949) 2 M.L.J. 782 and *Kamalam* v. *Saradambal*, (1952) 2 M.L.J. 47 (N.R.C.) referred.

Appeals sought to be preferred to the High Court agaisnt the decision of the Court of the Subordinate Judge of South Kanara in O.S. No. 201 of 1949.

* Stamp Register Nos. 1257 and 3174 of 1953. 24th February, 1953.

T. Krishna Rao, G. Kamath and *A.V. Narayana Pai* for *Petitioners.*

The Court made the following

ORDER.—These are References under section 5 of the Court-Fees Act. O.S. No. 201 of 1949 was filed on the file of the Court of the Subordinate Judge of South Kanara for division of the plaint B. Schedule immovable properties and C. Schedule movables into 16536 shares and for allotment to the plaintiff of 851 shares therefrom and to direct the first defendant to account for the income of the family properties realised by him and sale-proceeds of the clay sold by him from items 13 and 14 of the B. Schedule to defendants 99 to 102, and other incidental reliefs. The suit was valued in respect of the relief of partition at a sum of Rs. 100. On 30th July, 1952, the learned Subordinate Judge passed a supplementary preliminary decision whereunder defendants 1, 4 and 8 were directed to render accounts to the family for the sale-proceeds of clay realised by them and they were also made liable to pay the other members of the family their shares of Rs. 21,600 after deducting their own share. Defendants 1, 4 and 8 preferred separate appeals to the High Court. The appeal preferred by the first defendant is S.A. No. 3174 of 1953 and that by defendants 4 and 8 is S.R. No. 1257 of 1953. Both the Memoranda of appeals were stamped on a fixed fee of Rs. 100 under Article 17-B of the II Schedule to the Court-Fees Act. The office took the view that as the appeals were directed against the decree for specific amounts, *ad valorem* court-fee should be paid.

The relevant provisions of the Court-Fees Act read as follows :—

Article 17-B, *Schedule.* II.—

Plaint or memorandum of appeal in every suit where it is not possible to estimate at a money value the subject-matter in dispute and which is not otherwise provided for by this Act.	When the plaint is presented to or the the memorandum of appeal is against the decree of—	
	A Revenue Court ..	Ten Rupees.
	A District Munsiff's Court or the City Civil Court.	Fifteen Rupees.
	A District Court or Sub-Court.	One hundred rupees.
Section 7 (iv) (*f*) for accounts. ..	According to the amount at which the relief sought for is valued in the plaint or memorandum of appeal.	

Article 1, *Schedule I.*—

Plaint or written statement, pleading, a set off or counter-claim or memorandum of appeal (not otherwise provided for in this Act) presented to any Civil or Revenue Court except those mentioned in S. 3.	When such amount or value exceeds one thousand rupees for every one hundred rupees or part thereof, in excess of one thousand rupees up to five thousand rupees.	Seven rupees, eight annas.
	When such amount or value exceeds five thousand rupees, for every two hundred and fifty rupees or part thereof, in excess of five thousand rupees, up to ten thousand rupees.	Fifteen rupees.

It is settled law that a relief for partition is not capable of valuation and therefore Article 17-B of Schedule II will apply. It is equally well-established that a relief for accounting is governed by section 7 (iv) (*f*). It has also been held that in a suit for rendition of accounts, when the amount is ascertained and a decree granted for a specific amount the defendant should pay *ad valorem* court-fee in an appeal against that decree. If a relief for partition and a relief for accounting are two distinct subject-matters they should be separately valued, even though the two reliefs are clubbed together in the same suit. But if the relief for accounting is implied in the relief of partition, it cannot be said that the former relief is in respect of a different subject-matter. In that case, though it is framed as a separate relief, in effect and in substance it will be part of the same relief. It is therefore necessary to ascertain the scope of a relief for accounting in a suit for partition. In

Parameshwar Dube v. *Gobind Dube*[1], Fletcher, J., after considering the case-law on the subject summarised his view as follows at page 465 :

"The result of these authorities I think is that in an ordinary suit for partition in the absence of fraud, or other improper conduct, the only account the *karta* is liable for is as to the existing state of the the property divisible. The parties have no right to look back and claim relief against past inequality of enjoyment of the members or other matters."

Jwala Prasad, J., in *Jyotibati Choudhurain* v. *Lakshmeshwar Prasad Chaudhuri*[2], stated the law thus :

"Now such a *karta* is not responsible to the other members of the family for the management of the joint family property in respect of the income derived therefrom and the expenditure incurred by him. He is the sole master of the situation and is not in any way controlled by the junior members of the family. He has to use his own discretion unfettered in any way, and controlled only by his own sense of right or wrong. He is neither a trustee nor an agent and is not accountable to the members of the family. If any member happens to be dissatisfied with him, his remedy is to separate from the family and to ask for a partition. He is entitled to his share in the family properties, movable and immovable, including cash, that may be in existence at the time of partition. He cannot ask for an account of a preceding period, except for the purpose of determining the properties including cash in the hands of the karta so as to be available for partition."

Later on the learned Judge proceeded to state :

"He can be asked not to render an account as an agent on be half of the other members, but only to disclose the properties including cash in his hands and that might necessitate looking into the accounts. A disclosure of property is not rendition of account, the word "account" in a suit for partition and accounts against a karta being used for convenience sake, and not in the legal sense to bring it within the expression used in section 7 (iv) (*f*) of the Court-Fees Act. Section 7 (iv) (*f*) applies to a suit for account. The test is : 'Can a junior member, without claiming partition, bring a suit for accounts against a Karka?' If he eannot, then the relief" as to accounts becomes subsidiary to the principal relief of partition"

I accept the aforesaid observations as a full statement of the law on the subject. It will be seen from the said two judgments that in a partition suit a relief for accounts may be asked for under two circumstances :

(1) for the purpose of ascertaining the partible assets of the family and

(2) for directing the manager to render accounts on the ground of fraud or improper conduct.

Though the terminology used is similar in both the cases, in substance the reliefs are essentially different in content. In the former, the relief of accounting is incidental and subsidiary to the relief of partition as the accounting is only for the purpose of ascertaining the assets, in the latter case, the relief for the rendition of accounts is a distinct and separate matter and it is an accident that it is clubbed along with the relief for partition in the same suit.

Bearing the aforesaid principles in mind, I shall now proceed to consider the cases cited. In *Ramaswami* v. *Rangachariar*[3], a Full Bench of this Court laid down the mode of valuation of the reliefs in a suit for partition. There a Hindu minor sued through his mother as next friend for partition of the properties of the joint family consisting of himself, his father and his three brothers and for possession of his one-fifth share therein. He also joined as defendants several other persons (strangers to the family) either as alienees of family properties or as creditors of the family.

His prayers were for :

(i) an account of the movable and immovable joint family properties,

(ii) the partition by metes and bounds of his one-fifth share,

(iii) the appointment of a receiver to manage the properties and collect rents and income till the disposal of the suit,

(iv) the costs of the suit, and

(v) such, further and necessary reliefs as in the circumstances might be considered necessary and proper.

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1. (1915) I.L.R. 43 Cal. 459.
2. (1929) I.L.R. 8 Pat. 818.
3. (1940) 1 M.L.J. 32 : I.L.R. 1940 Mad. 259 (F.B.).

The learned Judge held that the relief for partition should be valued under Article 17-B, Schedule II of the Act. In respect of the alienations sought to be set aside and for possession of the properties alienated they directed that those reliefs should be valued under section 7 (v) of the Act. In respect of the setting aside of decrees passed against the plaintiff in suits in which he had been *eo nomine* impleaded as a party, section 7 (iv-A) of the Act was held to be applicable. In regard to the other transactions of his father impugned by the plaintiff it was held that no court-fee was necessary. The reason given was that a relief for declaration or cancellation of those transactions was incidental to the relief of partition. The aforesaid judgment therefore is an authority for the position that in a suit for partition, if a relief relates to a distinct subject-matter it should be separately valued, and in a case where a relief is only incidental to the relief of partition, no separate court-fee need be paid. Mack, J., in *Pervadhannulu* v. *Parvadannulu*[1], appears to lay down a different principle. There a grandson filed a suit against the grand-father for a partition of the joint family property and for rendition of the accounts. The Court directed the defendant to pay a sum of Rs. 20,000 on an account being taken of the outstandings due. In an appeal to the District Court he sought to value it under Article 17-B of the II Schedule of the Court-Fees Act. The learned Judge held, following the Full Bench decision in *Danukodi Nayakar In re*:[2] that the defendant should pay *ad valorem* court-fee on the subject-matter of the appeal. The learned Judge said :

> "I am unable to see how for fiscal purposes the liability of a manager of a Hindu joint family business to account to other members of the joint family can be differentiated from an ordinary suit for account as between partners. The simple principle of valuation is contained in Article I, Schedule I of the Court-fees Act. In a plaint or memorandum of appeal court-fee is payable on the amount or value of the subject-matter in dispute."

The facts are not clear. It is not known on what basis the rendition of accounts was asked for in that suit. If it was a distinct relief on the ground of fraud or improper conduct of the grand-father I respectfully agree with the conclusion arrived at by the learned Judge ; but if the relief claimed was only incidental to the relief of partition, for the purpose of ascertaining the assets of the family, I regret my inability to accept the correctness of the decision. But Krishnaswami Nayudu, J., in *Veluchami Pillai* v. *Sankaralingam Pillai*[3], srtikes a different note. In that case the plaintiff, a member of the joint Hindu family, instituted the suit for partition claiming a one-fourth share in the properties and paid a court-fee of Rs. 100 under Article 17-B of Schedule II of the Court-Fees Act. The final decree provided that the plaintiff should receive a certain amount from the other parties to equalise the shares and he was also granted a decree for a specific amount in respect of his share of the profits. The plaintiff preferred an appeal and paid a court-fee of Rs. 100 provided under Article 17-B of Schedule II. The learned Judge held that the decree for owelty and a share of the profits are incidents in a suit for partition and therefore the court-fee paid on the relief for partition was sufficient. To the same effect is the judgment of Chandra Reddi, J., in *Kamalam* v. *Saradambal*[4]. There the plaintiff brought an administration suit against her mother and her three sisters for partition of the plaint schedule property into four shares for delivery of separate possession of her share and for rendition of accounts of other assets and income from the family property. A court-fee of Rs. 10 was paid under Article 17-B of the Schedule II of the Court-Fees Act. A preliminary decree was made. The Commissioner appointed after looking into the accounts found that the second defendant who was virtually in management of the estate was liable to pay the plaintiff Rs. 3,152-8-9. The second defendant filed an appeal against that judgment. The question was whether *ad valorem* court-fee should be paid on that amount or whether the court-fee of Rs. 100 under Article 17-B of the Schedule II of the Court-Fees Act would be the correct court-fee. The learned Judge held that only the fixed

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1. (1949) 2 M.L.J. 402.
2. (1938) 1 M.L.J. 628 : I.L.R. (1938) Mad. 598 (F.B.).
3. (1949) 2 M.L.J. 782.
4. (1952) 2 M.L.J. 47 (N.R.C.).

fee of Rs. 100 was payable. The learned Judge also accepted the principle that the accounting was only incidental to the relief of partition.

I shall now proceed to consider the cases of the other High Courts. In *Jyoti Prasad Singha Deo* v. *Jogendra Ram Ray*[1], Miller, J., held that in an appeal against a final decree awarding costs, only a fixed fee is payable under Article 17-B of Schedule II of the Court-Fees Act. To support his conclusion the learned Judge put the following illustration at page 191 :

> "Suppose in a partition suit a sum of money has been awarded to one of the parties as owelty money and the party against whom the payment of the owelty money has been directed is aggrieved by such a decree, then he is entitled to prefer an appeal to this Court; and it can hardly be said in such a case although the matter arises in a partition suit the Court-fees leviable would be the amount of the owelty money which forms the subject-matter of the complaint in the appeal."

This decision also is in accordance with the view expressed by the learned judges of this Court. Where the object of the appeal is to attack various items allowed or disallowed in the final decree, Broadway and Martineau, JJ., held in *Majidullah Khan* v. *Hamidullah Khan*[2] that *ad valorem* court-fee should be paid on the amounts entered in the various grounds of appeal. In *Sukha Nand* v. *Shiv Devi*[3] the same High Court held that *ad valorem* court-fee should be paid on the sum claimed in appeal. In *Ram Prasad* v. *Krishnanand Singh*[4] it was held that where the appellants sought to lessen the amount of charge on the properties which they claimed on partition they had to pay *ad valorem* court-fees on the amount for which they sought to secure liability. The aforesaid three judgments certainly support the contrary view. But with great respect to the learned Judge I cannot accept that view as they did not consider the question whether the relief for the recovery of amounts was incidental to the general relief of partition. From the aforesaid discussion of the case-law the following principles emerge :

(1) The court-fee payable for a relief of partition in a suit as well as in the appeal is only the fixed court-fee payable under Article 17-B, Schedule II of the Court-Fees Act.

(2) If the relief of accounting or any other relief is an inherent part of the main relief of partition and implied therein, it is not necessary to value that relief separately. The Court-fee paid on the relief for partition would cover the other relief also. In such a case, if the relief claimed in appeal is only that implied in the main relief for partition, the fixed court-fee under Article 17-B of Schedule II will suffice.

(3) But if the relief for rendition of accounts relates to a different subject-matter such as a relief for accounting against a manager of joint Hindu family on the ground of fraud or improper conduct, a separate court-fee had to be paid both in the suit as well as in the appeal. In such cases the principle of the Full Bench decision in *Danukodi Nayakar, In re* :[5] will apply and *ad valorem* court-fee is payable in appeal on the amount decreed.

In the instant case the appeals relate only to the sum of Rs. 21,600 representing the share of the other members in the sale-proceeds of the clay realised by the appellants. That amount, therefore, only represents the value of the respondent's share in one of the assets of the family. Looking into the accounts by the Commissioner or the Court for ascertaining the value of that asset is incidental to the relief of partition and is implied therein. I therefore hold that the appellants have correctly valued their relief in the appeals by paying the fixed fee of Rs. 100 under Article 17-B, Schedule II of the Court-Fees Act.

R.M. —————— *References answered.*

1. (1928) I.L.R. 56 Cal. 188.
2. A.I.R. 1924 Lah. 325.
3. A.I.R. 1935 Lah. 14.
4. A.I.R. 1936 All. 221.
5. (1938) 1 M.L.J. 628 : I.L.R. (1938) Mad. 598 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATA-RAMA AYYAR.

Rechuri Suryaprakasa Rao and others ... *Appellants**

v.

Gottumukkala Venkataraju and others .. *Respondents.*

Transfer of Property Act (IV of 1882), section 58 (c), Proviso—Applicability—Sale with an agreement to reconvey—Agreement not embodied in the document of sale—Sale or mortgage by conditional sale—Construction.

If a Court comes to the conclusion that an ostensible sale taken along with an agreement is not in reality a sale but only a mortgage then it follows that the mortgage is a mortgage by conditional sale. It could not be any other kind of mortgage or even an anomalous mortgage.

Kasturi Venkatasubba Rao v. *Bikkina Veeraswami*, (1946) 1 M.L.J. 342, followed.

Ram Narayan v. *Ramratan*, A.I.R. 1934 Nag. 18, dissented from.

Kuppa Krishna Hedge v. *Mhasti Goli Naik*, A.I.R. 1931 Bom. 371, considered.

The word ' deemed ' in the proviso has evidently been used because ostensibly the transaction is only a sale. When the condition of reconveyance is embodied in the same document it is open to the Court to hold that what purports to be a sale is really a mortgage. Then it can be said that the sale is ' deemed ' to be a mortgage. What the proviso says is that when the condition is not embodied in the same document in no case shall a sale be deemed to be a mortgage.

Appeal against the decree of the Court of the Subordinate Judge of Narasapur in O.S. No. 47 of 1947.

P. M. Srinivasa Aiyangar for Appellants.

Kasturi Seshagiri Rao and *Kasturi Sivaprasada Rao* for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—The plaintiffs in O.S. No. 47 of 1947 on the file of the Court of the Subordinate Judge of Narasapur appeal against the dismissal of their suit for redemption of properties which they along with the fourth defendant conveyed to one Venkataramaraju under a deed of sale dated 20th January, 1932. On the same day as the sale deed there was an agreement to reconvey executed by the vendee under the sale deed. The contention on behalf of the appellants was that both these documents embody a single transaction which was either a mortgage by conditional sale or an anomalous mortgage. In this view they claimed redemption of the same. There were also other allegations challenging the validity of the transaction, but the learned Subordinate Judge found against them and we are not concerned with them in this appeal.

The defence to the claim for redemption was twofold. The contesting respondent, namely, first respondent, who is the son of Venkataramaraju, pleaded that it was not open, in view of the Proviso to section 58 (*c*) of the Transfer of Property Act to contend that the transaction should be held to be a mortgage as the agreement to reconvey was not embodied in the document of sale. He also pleaded that even assuming that it was permissible to hold so, it was not the intention of the parties that the transaction should be considered to be a mortgage. The learned Subordinate Judge held in favour of the first respondent on both the points.

In the appeal learned counsel for the appellants tried to get over the hurdle in the way of his success, namely, the Proviso to section 58 (*c*) in two ways. He first contended that as the Proviso was only a Proviso to clause (*c*) of section 58, it will be open to him to plead that the transaction is another kind of mortgage, that is, a mortgage other than a mortgage by conditional sale. This point is covered by a direct decision of a Bench of this court in *Kasturi Venkatasubba Rao* v. *Bikkina Veeraswami*[1]. The learned Judge there repelled an exactly similar argument thus :

"This argument cannot be accepted. The construction suggested would involve reading into the proviso words which are not there, and it would moreover stultify the new enactment as it would

* Appeal No. 607 of 1949. 18th December, 1952.

1. (1946) 1 M.L.J. 342.

leave the previous state of the law practically unchanged. For it would not make much difference in the legal effect of a sale accompanied by a separate agreement for repurchase to provide that it shall not be deemed to be a mortgage by conditional sale but may be regarded as an anomalous mortgage. We do not think that the proviso was intended to have that effect. Its object evidently was to shut out an enquiry whether a sale with a stipulation for re-transfer is a mortgage where the stipulation is not embodied in the same document."

The learned Judges followed the ruling of the Rangoon High Court in *Ma Sein Nyo* v. *Maung San*[1]. With great respect to the learned Judges we entirely agree with this decision. No authority has been cited to us which takes a different view on this point. The argument of the learned counsel to the contrary proceeded on a misapprehension of the effect of holding a transaction which consisted of an ostensible sale and an agreement to reconvey to be a mortgage. It was evidently an implication underlying his argument that such a transaction could be held to be any of the known kinds of mortgages. In this he erred because if a court came to the conclusion that an ostensible sale taken along with an agreement was not in reality a sale but only a mortgage then it followed that the mortgage was a mortgage by conditional sale. It could not be any other kind of mortgage. This is evidently why the Proviso was inserted as a Proviso to clause (*c*). The Proviso does not say that such a transaction shall not be deemed to be a mortgage because if it can be deemed to be a mortgage it could be only a mortgage by conditional sale.

The next way in which counsel for the appellants sought to get over the proviso was to contend that "shall be deemed to be" is an expression which does not necessarily prohibit a court from coming to the conclusion that even if the transaction is contained in more than one document it nevertheless is a mortgage. The argument was that if the condition to reconvey was not embodied in the document of sale the court will not presume that it was a mortgage, but in a proper case nothing prevented the Court from coming to that conclusion and giving effect to it. In support of this contention he relied not upon any decided cases, but on observations in cases decided by other High Courts. He first relied upon a passage in *Kuppa Krishna Hedge* v. *Mhasti Goli Naik*[2] where Patkar, J., made the following observations:

"In case a mortgagor passes in favour of a mortgagee an ostensible sale-deed and the intention of the parties is to be arrived at by the construction of the document, the proviso says that the right of repurchase must be embodied in the same document, and that if it is embodied in more than one document the inference of a mortgage would not necessarily arise, and that no transaction should be deemed to be a mortgage by conditional sale unless the condition is embodied in the document of the ostensible sale."

These observations were not necessary to dispose of the case before the learned Judges which arose out of a document executed long before the Proviso was inserted in the Act. Indeed there was only one document of sale in which the condition to reconvey was embodied. We do not think that the learned Judges were construing seriously the effect of the Proviso. But we must say that so far as it goes we are unable to accept this construction as sound. Reliance was placed on these observations in *Jaggarnath* v. *B. K. Ray*[3]. But the learned Judges with respect dissented from them (see page 669). In that decision the learned Judges held that the Proviso shows clearly that if the condition is not embodied in the document which purports to effect the sale, then it is not open to the court to treat the transaction as a mortgage. They also followed the ruling in *Ma Sein Nyo* v. *Maung San*[1], which was followed by the Bench of this Court in *Kasturi Venkatasubba Rao* v. *Bikkina Veeraswami*[4].

Learned counsel for the appellants then relied upon certain observations in *Ram Narayan* v. *Ramratan*[5]. Niyogi, A.J.C., said in that case:

"That proviso cannot be interpreted as laying down any rigid rule that if the agreement to sell and the covenant of re-purchase are embodied in more than one document the inference of a mortgage would not necessarily arise, or that when the condition of repurchase is embodied in the document of sale the transaction should necessarily be regarded as one of mortgage."

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1. A.I.R. 1935 Rang. 212.
2. A.I.R. 1931 Bom. 371 (372).
3. (1946) I.L.R. 25 Pat. 666.
4. (1946) 1 M.L.J. 342.
5. A.I.R. 1934 Nag. 18 at p. 19.

So far as the latter portion of the sentence is concerned we need not say any thing because in this case the conditions of repurchase is embodied in a separate document. But we must respectfully dissent from the learned Judge's observation contained in the first part of the sentence which implies that in spite of the proviso even if the agreement to sell and the covenant to repurchase are embodied in more than one document, a Court could hold that the transaction amounted to a mortgage.

In a later decision of the Nagpur High Court reported in *Samshar Khan* v. *Vithaldas*[1], these very observations of Niyogi, A.J.C., were not approved. The learned Judges said :

"In *Ram Narayan* v. *Ramratan*[2], which was one of these cases, Nigyogi, J., suggested that the proviso to section 58 (*c*) could not be interpreted as laying down any rigid rule that if the agreement to sell and the covenant of repurchase were emobided in more than one document the inference of a mortgage would not necesarily arise. That point was not one that arose for consideration in that case and with the greatest respect we think that the only meaning that can be put upon the proviso is that where the condition for retransfer is not embodied in the document that effects or purports to effect a sale, the transaction shall not be treated as a mortgage."

It was held in that the rule laid down in the proviso is rigid and where the condition for retransfer was not embodied in the document of sale the transaction shall not be treated as a mortgage.

The decision of a single Judge in *Saheba Deochand Kunbi* v. *Jagannath Gundharilal Kalar*[3] was also cited to us and a passage in the judgment dealing with the proviso was relied upon. But it has no bearing whatever on the question which falls for decision in this case as the learned Judge was dealing with a case in which the agreement to reconvey was embodied in the same document.

Learned counsel for the appellants relied upon the meaning of the word " deemed " as given in law lexicons. " Deemed " is a word with which we are sufficiently familiar. It has been evidently used because ostensibly the transaction is only a sale. When the condition of reconveyance is embodied in the same document it is open to the Court to hold that what purports to be a sale is really a mortgage. Then it can be said that the sale is " deemed " to be a mortgage. What the proviso says is that when the condition is not embodied in the same document in no case shall a sale be deemed to be a mortgage. We see no substance in any of the contentions raised on behalf of the appellants.

We may mention that even on the merits the learned Subordinate Judge has held that the transaction was not a mortgage. The appeal fails and is dismissed with costs of the first respondent. As the apppeal was filed in *forma pauperis* the appellants shall pay to the Government the court-fee payable on the memorandum of appeal.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Lakshmi Ammal and others .. *Appellants**

v.

Thangavel Asari .. *Respondent.*

Hindu Widows' Re-marriage Act (*XV of* 1856), *sections* 2 *and* 5—*Hindu widow—Re-marriage—Forfeiture of husband's property—Scope of.*

A combined reading of sections 2 and 5 of the Hindu Widows' Re-marriage Act indicates that the forfeiture of the property by a widow on re-marriage is only confined to the category of cases detailed in section 2. Under section 2 she forfeits her rights only in her husband's property which she is entitled to by way of maintenance or by inheritance or by virtue of any will. The interest contemplated by the section is confined or limited to her lifetime. The section will not apply to the absolute interest legally acquired by the widow.

Bangaru Reddi v. *Mangammal*, (1946) 2 M.L.J. 377, relied on.

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1. I.L.R. 1946 Nag. 278.
2. A.I.R. 1934 Nag. 18.
3. A.I.R. 1940 Nag. 84.

* S. A. No. 531 of 1949. 5th January, 1953.

Appeal against the decree of the Court of the Subordinate Judge of Tirunelveli in Appeal Suit No. 81 of 1948 (A.S. No. 82 of 1948, District Court, Tirunelveli) preferred against the decree of the Court of the District Munsif of Ambasamudram in Original Suit No. 323 of 1946.

K. S. Sankara Aiyar and *V. Sundaresan* for Appellants.

R. Ramamurthi Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The Second Appeal raises a question of the interpretation of section 2 of the Hindu Widows' Re-marriage Act (XV of 1856), hereafter called the Act, and its application to the facts of the case. The facts are simple and are not in dispute. They may be briefly stated. One Mookan Asari, the elder brother of the plaintiff and the first husband of the defendant died. After his death, the plaintiff instituted O.S. No. 239 of 1944 on the file of the Court of the District Munsif of Ambasamudram claiming that the properties were joint family properties and that he was entitled to the same by survivorship. The defendant contended that the properties were the separate properties of Mookan Asari and that she succeeded to the same as his widow. The suit was ultimately compromised and Exhibit A-6, dated 11th June, 1945, was the compromise decree made therein. Under the compromise decree, the properties described in the first schedule annexed to that decree were given absolutely to the plaintiff and the properties particularised in the second schedule annexed thereto were given absolutely to the defendant. The plaintiff and the defendant were put in possession of the properties allotted to their shares. After Mookan Asari's death on 28th October, 1943, the defendant married one Somasundaram Asari on 24th September, 1946. The plaintiff filed O.S. No. 323 of 1946 on the file of the District Munsif, Ambasamudram, for recovery of possession of the items of property given to the defendant under the compromise decree on the ground that she forfeited all her rights in the said properties under the Act by reason of her second marriage. The learned District Munsif held that the defendant did not forfeit her rights to the properties given to her under the compromise decree by reason of her second marriage, whereas on appeal the District Judge held contra. The result was that the suit was decreed with costs throughout. The defendant preferred the above appeal.

At the outset it may be convenient to consider what would have been the legal position apart from the Act if the widow had died and the succession opened. The plaintiff having been a party to the compromise decree and taken a benefit thereunder would have been estopped from questioning the binding nature of the decree. As the terms of the decree were clear and unambiguous and the parties thereto got absolute interest in the properties allotted to their respective shares, the plaintiff could not have questioned the defendant's absolute interest in the plaint schedule properties. The plaintiff and defendant would have been bound by the terms of the decree. It is not necessary to speculate what would have been the position if a person other than the plaintiff was the next reversioner.

Would the provisions of the Act make any difference? The governing provisions are sections 2 and 5 which read :

Section 2 : All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to re-marry, only a limited interest in such property, with no power of alienating the same, shall upon her re-marriage cease and determine as if she had then died ; and the next heirs of her deceased husband or other persons entitled to the property on her death, shall thereupon succeed to the same.

Section 5 : Except as in the three preceding sections is provided, a widow shall not, by reason of her remarriage forfeit any property or any right to which she would otherwise be entitled ; and every widow who has re-married shall have the same rights of inheritance as she would have had, had such marriage been her first marriage."

Learned counsel for the respondent relying upon the provisions of the aforesaid sections contended that the defendant forfeited rights in the properties given to her by reason of her re-marriage. His argument involved four steps :

(1) Under the compromise decree the properties allotted to the defendant were in virtue of her pre-existing title.

(2) She therefore came into possession of her husband's property by inheritance.

(3) If she secured the properties by inheritance from her husband, the quantum of interest she possessed therein is immaterial for the application of the provisions of section 2 of the Act.

(4) Even if she had got an absolute interest under the compromise decree, the compromise in so far it gave her an interest beyond her lifetime would not bind the plaintiff and the property as there could not be an estoppel against the statute.

It may be useful at this stage to construe the relevant provisions of the Act unhampered by the facts of the case. A combined reading of sections 2 and 5 indicates that the forfeiture of the property by a widow on re-marriage is only confined to the category of cases detailed in section 2. Under section 2 she forfeits her rights only in her husband's property which she is entitled to by way of maintenance or by inheritance or by virtue of any will. In the case of a will she does not forfeit if under the will she is authorised to re-marry or an absolute interest is conferred on her. The words

"shall upon her re-marriage cease and determine as if she had then died; and the next heirs of her deceased husband or other persons entitled to the property on her death, shall thereupon succeed to the same,"

afford the clue to the scope of the section. They indicate that the interest contemplated by the section is confined or limited to her lifetime. The section will not apply to an absolute interest legally acquired by the widow. This interpretation was accepted by Rajamannar, J., as he then was in *Bangaru Reddi* v. *Mangammal*[1]. After reading the provisions of section 2 of the Act, the learned Judge said as follows :—

"It is clear that this section has no effect on property belonging to the widow absolutely on the date of the re-marriage. The rights and interests which she may have in her deceased husband's property by way of maintenance obviously refer to recurring rights as for example to payment of maintenance by the enforcement of a charge on her deceased husband's property. In the case of wills and other testamentary dispositions it is only the limited interest that ceases and determines. The words "as if she had then died" supply the criterion for adjudicating on the rights and disabilities of the widow on re-marriage. All the results which would follow the re-marriage are results which would ensue if she had died on the date of the re-marriage. In other words, if she had only a limited and life interest then that would cease; but if she had an absolute estate that would not cease."

I respectfully agree with the aforesaid observations.

But this would not conclude the point against the respondent, for his contentions, as stated above, namely, that under the compromise decree the defendant secured her rights which she acquired by inheritance to her husband and that the decree in so far it gave her absolute interest would not bind him, require to be countered. In support of his contention that a title conferred under a compromise decree is only an affirmation of a pre-existing title, the learned counsel appearing for the respondent cited before me a long catena of cases. I shall briefly deal with some of them. The leading case on the point is *Rani Mewa Kuwar* v. *Rani Hulás Kuwar*[2]. The facts there were : Immoveable property partly situated in Rohilcund and partly in Oudh belonged to the common ancestor of the appellant and the respondent. By a deed of compromise they agreed to divide it in certain proportions, and the agreement was carried out in Rohilcund but not in Oudh, where the respondent was, and continued in possession. At the end of the nine years from the date of the deed of compromise, the appellant sued for possession of her share of the property in Oudh. The Judicial Committee held that the claim rested on a title to the land acknowledged and defined by the contract and therefore the suit for possession was within time. The passage relied upon is found on page 166 of the report, and it reads :

1. (1946) 2 M.L.J. 377.

2. (1874) L.R. 1 I.A. 157 (P.C.).

"The compromise is based on the assumption that there was an antecedent title of some kind in the parties and the agreement acknowledges and defines what that title is."

I cannot understand the said statement as laying down a proposition of law that under all circumstances a title acknowledged under a compromise must necessarily refer to the title asserted. There may be cases where the conflict of claims may be resolved by a compromise creating a new root of title. Indeed the decision of the Judicial Committee in *Musammat Hiran Bibi* v. *Musammat Sohan Bibi*[1]; is an illustration of the other class of cases. There, the widow of a Hindu, adopted a son but remained in possession of the property of her husband. The adopted son died before her. On the death of the widow, the widow of the adopted son succeeded to her, whereupon one of the daughters of the original owner brought a suit for her share, of the property belonging to her father, questioning the adoption. The suit was compromised. In a subsequent suit a daughter of the adopted son challenged the compromise decree on the ground that her mother had no power to come to a compromise as it amounted to an alienation. The Judicial Committee held that the compromise was in no sense of the word an alienation but a family settlement in which each party took a share of the family property by virtue of the independent title which was to that extent and by way of compromise admitted by the other parties and therefore binding on them. The same principle was applied by the Judicial Committee in *Nathu Lal* v. *Babu Ram*[2].

In that case there was a dispute between a widow and her husband's alleged coparcener. The dispute was referred to arbitrators who gave an award. Under the award a share was given to the widow. Their Lordships held that though the properties were originally claimed by the widow through her husband and though the gift was in settlement of a dispute arising therefrom, she got an absolute estate under the award. This case was explained by Wadsworth, J., in *Kadiyala Nagabhushanam* v. *Moyya Anandayya*[3], on the ground that the compromise was based upon an admission made by the widow that her husband and brother-in-law were undivided. Even so, this affords another illustration of an independent title acquired by a widow under a compromise decree. In *Khunni Lal* v. *Gobind Krishna Narain*[4], their Lordships of the Judicial Committee followed their observations in *Rani Mewa Kuwar* v. *Rani Hulas Kuwar*[5]. The facts in that case may be briefly noticed: A father and son constituted members of a jont Hindu family. The father was converted to Muhammadanism in 1945. The father survived the son. After the death of the father and the widows of the father and son, compromise was effected between the two daughters of the son on the one side and the grandson of the father on the other, under which a $8\frac{1}{2}$ annas share was allotted to the daughters and a $7\frac{1}{2}$ annas share to the grandson. The daughter's share eventually devolved upon the respondents. In a suit by them for possession of the share allotted to the grandson of the father against the appellant who was his successor in title, the aforesaid compromise was relied upon to non-suit the plaintiffs. The plaintiffs contended that the said compromise was in effect and in substance an alienation, and therefore it was not binding on them. In overruling the said contention, their Lordships made the following observations at page 367:

"The true test to apply to a transaction which is challenged by the reversioners as an alienation not binding on them is, whether the alienee derives title from the holder of the limited interest or life-tenant. In the present case Khairati Lal acquired no right from the daughters of Daulat, for "the compromise," to use their Lordships language in *Rani Mewa Kuwar* v. *Rani Hulas Kuwar*[5], is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is."

These observations were made to counter the argument that the grandson of the father derived title under the widow of the son. A compromise of conflicting claims may be based upon a recognition of a pre-existing title, but the compromise in resolving the conflict may create a title in a party either more or less than the interest claimed. Wadsworth, J., considered the aforesaid cases in *Kadivala Naga-*

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1. (1914) 27 M.L.J. 149 (P.C.).
2. (1935) L.R. 63 I.A. 155 (P.C.).
3. (1939) 1 M.L.J. 170.
4. (1911) 21 M.L.J. 645: L.R. 38 I.A. 87: I.L.R. 33 All. 356 (P.C.).
5. (1874) L.R. 1 I.A. 157 (P.C.).

bhushanam v. *Movva Anandayya*[1]. The headnote gives a summary of the facts as follows :

"*A* (brother of *B*) claimed properties which were alleged to belong to the joint family, by survivorship and *C* and *D* claimed those properties as daughters of *B* who was alleged to have died as divided member. As a result of a compromise between them, the claims of *C* and *D* were in part recognised and they were given some properties to be enjoyed by them as of right (the terms used being *Kakkn* and *Bhuktham*."

The learned Judge on a construction of the document and having regard to the observations of the Judicial Committee in some of the aforesaid decisions, held that the daughters got an estate similar to the one which they claimed, that is, the limited estate of a female. I do not think the learned Judge meant to lay down that even in a case where under the terms of a compromise decree an absolute interest is clearly created, a court should hold that the daughter got only an estate similar to the one she claimed. That was made clear by the learned Judge in explaining the decision of the Privy Council in *Nathu Lal* v. *Babu Ram*[2]. The learned Judge observed :

"I do not think that this case is authority for holding that when a female puts forward a claim consistent only with the claim to a limited estate and that claim is in part recognised by a compromise, the estate which would be conveyed by the compromise would in the absence of anything to the contrary be presumed to be anything else than an estate similar to that which was claimed."

After noticing the cases cited by the learned counsel the learned Judge summarised the law on the subject as follows :

"The general result of decisions such as these is, that when a person puts forward a claim based on a pre-existing estate and that claim is to some extent recognised by a compromise that compromise will be interpreted in the light of the claim which was put forward and the estate which will pass will be an estate similar to that which was claimed."

I understand these observations to mean that where the terms of a compromise or compromise decree are ambiguous it is open for a court to interpret the terms of the said document, having regard to the circumstances such as the claim put forward and the nature of the estate that would pass on the basis of that claim. The same learned Judge reiterated his view in *Akkamma* v. *Pichamma*[3]. There the last male-holder, Venkayya, died leaving a widow and two daughters. The widow made two gift deeds, comprising the whole of the properties which she got from her husband, in favour of her two daughters, the first defendant and the plaintiff. Thereafter, Venkamma filed a suit against the nephews of Pichamma, the deceased widow of her brother-in-law, claiming possession of 3·80 acres alleged to have been given by the late Venkayya to Pichamma with a stipulation that she should enjoy the land during her lifetime and that thereafter it should pass to the plaintiff's family. The nephews of Pichamma contended that Pichamma was absolutely entitled to the land and had conveyed it to one of them by a deed of gift. The suit was compromised. Under the compromise the nephews of Pichamma were directed to deliver to Venkamma 1·56 acres out of the land in dispute and that they (the nephews) should be absolute owners of the remaining land. After the death of Venkamma the appellant filed the suit for recovery of possession of the land got under the compromise decree. The learned Judge having regard to the aforesaid circumstances held that Venkamma got only a widow's estate. The learned Judge observed at page 268 :

"There is no such indication in the compromise with which we are now concerned. There was apparently no finding that *Venkamma's case* was a bad one, nor was there any admission by her from which it could be inferred that she took what she got as a gift from persons who were absolutely entitled. The very fact that under the compromise she is merely given possession of 1.56 acres, while the defendants are to be absolute owners of the balance, seems a positive indication that the compromise merely acknowledged the title which she claimed to the extent of 1.56 acres. It purports to confer no new title upon her."

The observations make it clear that the learned Judge came to the conclusion on a construction of the compromise decree having regard to the surrounding circumstances.

From the aforesaid discussion of the cases the law on the subject may be stated thus :

1. (1939) 1 M.L.J. 170.
2. (1935) L.R. 63 I.A. 155 (P.C.).
3. (1945) 2 M.L.J. 266.

The well-settled rules of construction will apply to a compromise decree just like to any other document. If the terms of the compromise decree are clear and unambiguous it is not open to courts to read into them words which are not there. The entire document must be read together and the expressed intention of the parties is the guiding factor. A compromise decree in resolving the conflicting claims may itself be a foundation of a new root of title. It may allot properties to the parties in affirmation of their respective claims. It may create an absolute interest or only a life-estate. Where the document is ambiguous it is open to a court to construe the document having regard to the surrounding circumstances to ascertain the intention of the parties. A court, therefore, to clear an ambiguity, may consider the claims of the parties, the quantum of interest they would derive on the basis of those claims and similar other circumstances. In construing the document the binding nature of the document or the validity of the clauses contained therein are not relevant. Bearing the aforesaid principles in view, if the terms of the document are looked into, there is no scope for any argument. Under the compromise decree Exhibit A-6, the conflicting claims of the plaintiff and the defendant were resolved. Each of them was given the properties particularised in the schedules annexed to the decree absolutely. The quantum of interest was defined by the same terms in the case of the plaintiff and the defendant. It is not suggested that the plaintiff did not get an absolute interest in the property allotted to him. I would, therefore, hold that under Exhibit A-6 the first defendant got an absolute interest in the plaint schedule properties.

Under Exhibit A-6 the claims set up were not confirmed but a new title was created in diciding the conflicting claims. It is not possible to predicate that the compromise was based upon the assumption that the properties were the self-acquired properties of the defendant's husband.

There is no scope in this case for the application of the doctrine that there could not be an estoppel against the statute. The plaintiff, being the next heir of Mookan Asari, it was contended that under section 2 of the Act he would be entitled to the property on the remarriage of the defendant and, therefore, the compromise decree would not preclude him from asserting his right to the same. But the plaintiff has not established that the properties were the self-acquisitions of Mookan Asari.

In the result the decree of the lower Court is set aside and that of the District Munsif is restored with costs throughout. Leave granted.

R.M. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AYYAR.

Messrs. K. A. Meera Sahib Tharaganar and Brothers .. *Appellants.**

Income-tax Act (*XI of* 1922), *section* 5 (8)—*Validity—Constitution of India* (1950), *Article* 14.

There is nothing in section 5 (8) of the Income-tax Act which is inconsistent with the right guaranteed under Article 14 of the Constitution. It cannot be said that the issue of directions by the Central Board of Revenue which is the chief income-tax authority under the Act is in the nature of outside or executive pressure or interference and that it affects the independence and impartiality of the assessing officer.

Appeal under Clause 15 of the Letters Patent, against the order of the Honourable Mr. Justice Chandra Reddy, dated 30th January, 1953, in W.P. No. 33 of 1953, presented to the High Court to issue an order in the nature of a writ of *certiorari* or any other appropriate writ calling for the records relating to the compulsory revenue recovery proceedings taken by the fourth respondent the Tahsildar, Nanguneri, Tirunelveli district, in pursuance of his order A-4, 1335 of 1951, dated 28th November, 1952 and A-4, 1528 of 1951, dated 28th November, 1952 and to quash the order therein, etc.

* Writ Appeals Nos. 8 to 15 of 1953. 6th February, 1953.

M. R. M. Abdul Kareem for Appellants.

The Judgment of the Court was delivered by

Rajamannar, C.J.: These are appeals under the Letters Patent against the judgment of Chandra Reddi, J., dismissing a batch of applications under Article 226 of the Constitution. The points raised in all these petitions were the same and the petitions were all disposed of by a common judgment. The relief sought by the petitioner was the same in all the petitions and was in respect of proceedings taken for the enforcement of orders of assessment of excess profits tax and income-tax. The petitioners were assessed to income-tax and excess profits tax for several years and against the orders of assessment they have preferred appeals to the Appellate Assistant Commissioner of Income-tax and it is represented to us that the appeals are pending. Meanwhile, the petitioners have filed these applications to get rid of the same orders evidently provoked by the proceedings taken by the Income-tax authorities to collect the tax imposed on them.

The only ground on which our jurisdiction under Article 226 is sought to be invoked is that the procedure contemplated by the Income-tax and Excess Profits Tax Acts offends against the constitutional guarantees contained in Part III of the Constitution, and in particular, the procedure violates the right guaranteed by Article 14 of the Constitution. We have heard learned counsel at great length but must confess that we are unable to see how Article 14 has any application whatever to the contentions raised on behalf of the petitioners.

Broadly, the attack on the procedural provisions of the Income-tax Act falls into three heads: Firstly, it was said that section 5 (8) of the Income-tax Act violates the principle enunciated in Article 14 of the Constitution inasmuch as it affects the independence and impartiality of the assessing officer. Section 5 (8) runs thus :

"All officers and persons employed in the execution of this Act shall observe and follow the orders, instructions and directions of the Central Board of Revenue :

Provided that no such orders, instructions or directions shall be given so as to interfere with the discretion of the Appellate Assistant Commissioner in the exercise of his Appellate functions."

At the outset, we may observe that it is not alleged by the appellants that in the cases before us there have been any orders, instructions or directions of the Central Board of Revenue which were followed by the assessing officer in making the assessments on the appellants. The contention was that section 5 (8) of the Act contemplates the issue of orders, instructions and directions by the Central Board of Revenue and the very possibility of this happening would render the entire proceedings of the assessing officers void as being a violation of the principle of equality of law embodied in Article 14 of the Constitution. In the first place, in our opinion, this provision, namely, section 5 (8) does not contemplate orders, instructions and directions from the Central Board of Revenue to the assessing officer in any particular case. What is contemplated, we think, is the issue of general orders, instructions and directions to guide the subordinate officers in the execution of the duties laid on them by the several provisions of the Act. In the absence of any allegation that in the cases before us, any officer had followed any order, instruction or direction of the Central Board of Revenue in making any order adverse to the appellants, we do not think it necessary to embark on a general discussion of the validity of this provision. Moreover, we are also convinced that even if such orders, instructions and directions are issued in any particular case by the Central Board to the assessing officer, the principle of equality before law is not infringed in any manner. It was said that the assessing officer was performing judicial functions and therefore should not be subject to executive pressure or any extraneous influence. Assuming this is the correct position, we do not think the issue of directions by the Central Board of Revenue which is the chief income-tax authority under the Act is in the nature of outside or executive pressure or interference. Passages were cited to us from Wade and Phillips on Constitutional law and Robson's Justice and Administrative law. We are not concerned with any question of policy as to the desirability of having administrative tribunals to deal with the rights of citizens. Varying views have been held by eminent jurists and public men on this matter, and it is

not the province of this Court to embark on a discussion of the merits or demerits of the system of administrative law. It suffices to say that there is nothing in section 5 (8) of the Income-tax Act which is inconsistent with the right guaranteed under Article 14 of the Constitution. Learned counsel was unable to cite any decided authority in support of his contention.

The second head of argument was based upon the fact that the Income-tax Officer is not bound to disclose the material on which he finally makes the assessment and this circumstance also is inconsistent with the right guaranteed under Article 14. Here again we are unable to follow learned counsel. It is true that the Income-tax Officer is given wide powers to ascertain the income of the assessee, and the powers include the gathering of material without the knowledge of the assessee. This is a well-known provision in taxing statutes. If the assessee is aggrieved by the order of assessment eventually passed by the officer, he is not without remedy. He can appeal to the several tribunals prescribed under the Act ending with this Court and he can prefer an appeal from this Court to the Supreme Court. The appellants have resorted to the remedy provided by the Act, and have filed appeals. In our opinion, they have no further right to attack the entire proceedings on this ground.

Lastly, it was contended that the appellants have been denied the right to be heard. What counsel meant was that the appellants were not given an opportunity to test the worth of the evidence upon which evidently the Income-tax Officer made the assessment. It is not for us to say whether there should be provision enabling the assessee to lead evidence controverting the evidence which might have been gathered by the Income-tax Officer. All that we are called upon to decide is whether the procedure prescribed by the provisions of the Act as they stand is in any way in violation of any of the rights guaranteed by the Constitution. Learned counsel wanted to rely upon decisions of the Supreme Court of the United States on the due process clause of the Fourteenth Amendment of the Constitution and the system of assessment and the procedure relating to it followed in England and in the United States. We refused to hear him on these points because we consider that these have no bearing on the question to be decided in this case.

As already mentioned, the appellants in this case are content with urging these general grounds attacking the validity of the provisions of the Income-tax Act and the procedure prescribed by them and have nothing whatever to say about the orders actually passed against them. Indeed, these orders are the subject-matter of appeals before the tribunal under the Act.

We find no substance in any of the contentions raised on behalf of the appellants and the appeals are therefore dismissed.

R.M. — *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE VENKATARAMA AYYAR.

D. Rajamannar and others .. *Appellants**.

Court-Fees Act (VII of 1870), section 7 (iv-A) and Article 17-A (1) of schedule II (as amended in Madras)—Rule 2 of the rules framed by the Madras High Court under section 9 of the Suits Valuation Act—Effect of—Rule if applicable to cases where fixed court-fee is leviable—Construction of rule.

Prima facie a suit for a mere declaration that a compromise decree is not binding on a plaintiff and where no consequential relief is prayed for would fall under Article 17-A (1) of Schedule II of the Court-Fees Act.

It is not correct to so construe section 9 of the Suits Valuation Act as to confer a power on the High Court to provide for a separate class of suits not falling within any of the classes mentioned in the body of the Court-Fees Act or in the schedules. Nor can a rule framed under section 9 of that Act

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*S. R. No. 9182 of 1952. 12th March, 1953.

provide whether court-fee should be calculated on an *ad valorem* basis or on a fixed basis. Section 9 of that Act deals with that class of suits which does not admit of being satisfactorily valued and provides that the High Court may provide for the valuation of such suits. It does not interfere in any manner with the scheme relating to classification of suits provided in the body of the Court-Fees Act and its schedules. If the rule were to be construed to have this effect, it would be in excess of the powers conferred by section 9 of the Suits Valuation Act.

In a suit filed to obtain a declaratory decree where no consequential relief is prayed, which does not fall within the category of suits provided for by section 7 (iv-A) of the Court-fees Act, court-fee is not leviable on an *ad valorem* basis on the value of the subject-matter of the suit computed in accordance with Rule 2 of the rules framed by the High Court under section 9 of the Suits Valuation Act in 1943.

S.R. No. 9132 of 1952, Appeal No. of 1952, sought to be preferred to the High Court against the decree of the Court of the Subordinate Judge of Chittoor, dated 5th October, 1951, and passed in O. S. No. 45 of 1949.

Order of Reference made by *Subba Rao* and *Ramaswami, JJ.*—(15th October, 1952).

ORDER.—This was referred by one of us to a Bench of two Judges in view of the importance of the question raised. The facts are fully stated in the order of reference and it is not necessary to restate them in detail.

O.S. No. 45 of 1949 on the file of the Subordinate Judge's Court of Chittoor was instituted by two of the daughter's sons of one Chenchiah as presumptive reversioners to his estate for a declaration that the compromise decree in O.S. No. 10 of 1944 is not binding on the reversioners and for the appointment of a Receiver to the estate of late Chenchiah to manage his properties and to prevent waste. The suit was dismissed and the plaintiffs preferred an appeal. The master held that Rule 2 of the Rules framed under the Suits Valuation Act and Article 1 of schedule I of the Court-Fees Act applied to the first relief and that Court-fee should be paid *ad valorem* on the value of the property, *i.e.*, the subject-matter of the decree. A Bench of this Court consisting of Rajamannar, C.J., and Viswanatha Sastri, J., held in *Narasamma* v. *Satyanarayana*[1], that rule 2 of the rules framed under the Suits Valuation Act would apply to such a case. The learned Judges observed at page 761:

"Even if the plaintiff in the subsequent suit be considered not to have been a party to the prior suit, still if he sues to set aside the decree in that suit, rule 2 of the Court-fees rules would govern the case and *ad valorem* Court-fee would be payable."

The learned counsel for the appellants contended that the said rule 2 is invalid on the ground that the High Court has no legal competence in making the rule so as to substitute the fixed Court-fee payable under Article 17-A of schedule II for one payable on *ad valorem* basis. The relevant provisions of the Court-Fees Act, the Suits Valuation Act and the rules framed under the Suits Valuation Act by the High Court may now be read:

Article 17-A of Schedule II of the Court-Fees Act:—

Plaint or memorandum of appeal in a suit:— (i) to obtain a declaratory decree where no consequential relief is prayed.	When the suit is presented to, or the memorandum of appeal is against the decree of— (*a*) District Munsiff's Court or the City Civil Court.	Fifteen rupees.
	(*b*) District Court or a Sub-Court.	Hundred rupees if the value for the purposes of jurisdiction, is less than ten thousand rupees; five hundred rupees if such value is ten thousand rupees or upwards.

Section 9 of the Suits Valuation Act.—

"When the subject-matter of suits of any class, other than suits mentioned in the Court-Fees Act, 1870, section 7, paragraphs v and vi, and paragraph x, clause (*d*) is such that in the opinion of the High Court it does not admit of being satisfactorily valued, the High Court may, with the previous sanction of the State Government, direct that suits of that class shall, for the purposes of the

1. (1951) 1 M.L.J. 436: I.L.R. (1951) Mad. 751.

Court-Fees Act, 1870, and of this Act and any other enactment for the time being in force, be treated as if their subject-matter were of such value as the High Court thinks fit to specify in this behalf".

Rules for valuation of certain classes of suits :—

The preamble reads :

"Whereas the subject-matter of suits of the class hereinafter mentioned is such, that in the opinion of the High Court, it does not admit of being satisfactorily valued, the High Court under and by virtue of the authority conferred on it by section 9 of the Suits Valuation Act (VII of 1887), and with the previous sanction of the provinvial Government, issues the following directions with regard to the valuation of such suits for purposes of the Court-Fees Act (VII of 1870) and of the Suits Valuation Act".

"(ii) In suits for a declaration or for an injunction consequent on a declaration that a decree for money or any other property having a money value is not binding on the plaintiff who was not a party to the decree, the subject-matter of the suit shall for purposes of jurisdiction and court-fee be valued at the amount or value of the property for which the decree was passed".

Under section 9 of the Suits Valuation Act, the High Court has power to specify the value of the subject-matter of suits of any class under the Act, except those specifically exempted, if in its opinion the subject-matter does not admit of being satisfactorily valued. Such valuation is for the purposes of the Suits Valuation Act, the Court-Fees Act and any other enactment for the time being in force. The Court-Fees Act and the schedules provide for two classes of suits.

(i) suits in regard to which court-fee is payable on the *ad valorem* basis and (ii) suits in respect whereof fixed court-fee is payable.

In regard to the former suits under the Court-Fees Act, the subject-matter is valued on different principles-market, notional and arbitrary values (*see* section 7). In the case of suits covered by Article 17-A, schedule II, the court-fee depends upon the forum as well as the value for purposes of jurisdiction. But, in either case, the court-fee is not on *ad valorem* but on a fixed basis, though varying with the value of the subject-matter for purposes of jurisdiction. Though under section 9, the High Court is given power to fix the valuation of the subject-matter of a suit for the purposes of the Suits Valuation Act and the Court-Fees Act, it does not either expressly or by necessary implication confer on it a power to change the principle adopted by the Court-Fees Act for fixing the court-fee. It cannot convert the *ad valorem* basis into fixed basis or *vice versa* ; nor does rule 2 framed by the High Court attempt to alter the basis. The rule only says that in cases of suits for a declaration that a decree for any property, having a money value, is not binding on the plaintiff, who is not a party to the decree, the subject-matter of the suit shall for purposes of jurisdiction and court-fee be valued at the value of the property for which the decree was passed. But it does not say that the court-fee should be calculated *ad valorem* on the value of the subject-matter of the suit. The rule framed by the High Court is consistent with the scheme of the Court-Fees Act. To illustrate, the fixed court-fee payable under Article 17-A of schedule II will depend upon the value fixed by the High Court for purposes of jurisdiction under rule 2, *i.e.*, if such a suit is filed in the District Court or a Subordinate Court, court-fee of Rs. 100 has to be paid if value fixed by the High Court for purposes of jurisdiction is less than Rs. 10,000 and Rs. 500 if such value is Rs. 10,000 or upwards. The rule therefore is valid but it does not compel a party to pay under Article 1 of schedule 1 of the Court-Fees Act *ad valorem* Court-fee on the value so fixed. We cannot there with great respect agree with the observations made by the learned Judges in *Narasamma* v. *Satyanarayana*[1], but as the question relates to one of Court-fee it is not advisable to have two conflicting Bench decision on the same question. It is necessary to have an authoritative decision of a Full Bench. We, therefore, refer the following question to the Full Bench :

"Whether, in a suit filed to obtain a declaratory decree, where no consequential relief is prayed or in an appeal filed against a decree in that suit, the plaintiff or the appellant, as the case may be, is liable to pay court-fee on the *ad valorem* basis on the value of the subject-matter of the suit fixed under rules 2 of the rules for the valuation of certain classes of suits framed by the High Court."

1. (1951) 1 M.L.J 436 : I.L.R. (1951) Mad. 751.

The papers will be placed before the learned Chief Justice for constituting a Full Bench.

W. Kothandaramayya for Appellants.

The Government Pleader (*P. Satyanarayana Raju*) for the State.

The Court answered the reference as follows :—

Rajamannar C. J.—The question referred to the Full Bench is as follows :

"Whether, in a suit filed to obtain a declaratory decree, where no consequential relief is prayed or in an appeal filed against a decree in that suit, the plaintiff or the appellant, as the case may be, is liable to pay court-fee on the *ad valorem* basis on the value of the subject-matter of the suit fixed under Rule 2 of the Rules for the valuation of certain classes of suits framed by the High Court."

The question has been amply discussed first by the Master, then by Subba Rao, J., on a reference to him under section 5 of the Court-fees Act and again by a Division Bench consisting Subba Rao and Ramaswami, JJ. It is not therefore necessary to state at great length the various arguments which could be put forward for either point of view.

The proposed appeal arises out of a suit filed in the Court of the Subordinate Judge of Chittoor by two of the daughter's sons of one Chenchiah Chetti for a declaration that the compromise decree passed in O.S. No. 10 of 1944 on the file of the same Court was not binding on them and for the appointment of a receiver to manage the properties of the late Chenchiah Chetti. The plaintiffs were not parties to the prior suit. That suit was brought by one of the daughters of Chenchiah Chetti against the other daughters and Vediah Chetty, the husband of the first daughter, for partition of the properties. In that suit the plaintiff therein claimed that certain properties belonged to the estate of Chenchiah Chetti and did not belong to Vediah Chetti who was claiming them as his own. It ended in a compromise decree under which Vediah Chetti and his children were given a large number of items. It is in respect of this compromise decree that the plaintiffs now seek for a declaration that it is not binding on them as reversioners to the estate of Chenchiah Chetti.

Before us it is common ground that the relief of appointment of a receiver was not consequential on the declaration that the compromise decree was not binding on the plaintiffs. It was also practically admitted by the learned Government Pleader that the suit did not fall within section 7, clause (iv-A) of the Court-Fees Act as amended by the Madras Legislature. We must therefore take it that the suit was rightly framed as a suit for a mere declaration that the compromise was not binding on the plaintiffs. *Prima facie* such a suit would fall under Article 17-A (1) of Schedule II to the Court-Fees Act which runs thus :

"Plaint or Memorandum of Appeal in a suit to obtain a declaratory decree where no consequential relief is prayed."

The proper fee leviable for such a suit under that Article depends upon firstly, the Court to which the plaint is presented and secondly, when the plaint is presented to a District Court or a Sub-Court according to the value for purposes of jurisdiction. If such value is less than Rs. 10,000 the fee is Rs. 100. If such value is Rs. 10,000 or upwards the fee is Rs. 500.

The question for consideration is, what is the effect of Rule 2 of the Rules framed by the High Court of Madras in exercise of the power conferred on it by section 9 of the Suits Valuation Act. The rule runs as follows :

"In suits for a declaration or for an injunction consequent on a declaration that a decree for money or any other property having a money value is not binding on the plaintiff who was not a party to the decree, the subject-matter of the suit shall for purposes of jurisdiction and court-fee be valued at the amount or value of the property for which the decree was passed ;

"Provided that if the value of the property or the interest which the plaintiff seeks to be declared not liable for the decree is less than the value of the decree the plaint shall be valued as if it were one for the possession of such property or interest."

This rule came into operation on and from 1st November, 1943. There can be no doubt that the present suit does fall within the scope of this Rule. This is a suit

for a declaration that a decree in respect of property having a money value is not binding on the plaintiffs who were not parties to the decree.

The value of the subject-matter must therefore be computed at the value of the property for which the decree was passed. Undoubtedly, this value will determine the Court which will be competent to entertain the suit. The rule provides that the value so computed will also be the value for purposes of court-fee payable. The answer to this question depends entirely on the provisions of the Court-fees Act.

The actual amount or rate of court-fee leviable on a plaint is found in the Court Fees Act only in two schedules. Under Schedule I, the fee is calculated on an *ad valorem* basis. Schedule II provides for cases in which a fixed fee is leviable. In the body of the Act section 7 embodies the rules as to the computation of the amount of fee in certain classes of suits according to the value of the claim or relief sought. When the value of the claim or relief is ascertained according to these rules, for a calculation of the proper fee one has to turn to Article I of Schedule I. That Article provides *inter alia* for a plaint presented to any Civil Court not otherwise provided for in the Act. The words " not otherwsie provided for in this Act " should not be understood to refer to anything except a provision for the actual fee leviable. It does not refer to the provision for computation of values. If there is any other Article in either Schedule I or Schedule II which provides for a fee on any particular class of plaints, then that provision will govern and Article I of Schedule I will have no application. Otherwise, it will apply. To give an example, there is no provision otherwise in Schedule I or Schedule II for a plaint in a suit for possession of land. Therefore, for such suits Article I of Schedule I will apply so far as the rate of court-fee is concerned. The fee will have to be calculated at the proper rate on the amount as computed under section 7 (v) of the Act. Likewise, a suit for relief under section 92 of the Code of Civil Procedure is specifically provided for in Article 17 (iii) of Schedule II. The proper fee is a fixed fee of Rs. 50. To such a plaint Article I of Schedule I will not apply. Now as I have already mentioned above there is a specific provision for a suit to obtain a declaratory decree where no consequential relief is prayed in Article 17-A (1) of Schedule II. To a suit of that class Article I of Schedule I will have no application. It must follow on a plain reading of the material provisions of the Court-Fees Act including the Schedules that the fee cannot be calculated on an *ad valorem* basis.

In my opinion it is not correct to so construe section 9 of the Suits Valuation Act as to confer a power on the High Court to provide for a separate class of suits not falling within any of the classes mentioned in the body of the Court Fees Act or in the Schedules. Nor can a rule framed under section 9 of that Act decide whether court-fee should be calculated on an *ad valorem* basis or on a fixed fee basis. The object of the Suits Valuation Act is to prescribe the method of valuing certain suits for the purposes of determining the jurisdiction of Courts with respect thereto. The Act contemplates suits in which the court-fee value may be different from the value for purposes of jurisdiction. A suit for possession of land must be valued for purposes of court-fee according to the rule laid down in section 7, paragraph (v) of the Court-fees Act. But the value of such a suit for purposes of jurisdiction may be different if the Provincial Government makes rules for determing the value of the land for purposes of jurisdiction on a different basis (section 3 (1)). Under section 8, as regards certain classes of suits the value as determinable for the computation of Court-fees and the value for purposes of jurisdiction are the same. Section 9 deals with that class of suits which does not admit of being satisfactorily valued and provides that the High Court may provide for the valuation of such suits. The section then declares that the valuation so computed shall be the valuation both for the purposes of the Court-fees Act and for the purposes of the Suits Valuation Act.

I do not therefore read rule 2 framed under section 9 of the Suits Valuation Act as interfering in any manner with the scheme relating to the classification of suits provided in the body of the Court-Fees Act and its schedules. Take, for instance, a suit to obtain a declaration that an alleged adoption is invalid. Such a suit in

terms falls within paragraph (iii) of Article 17-A of Schedule II and a fixed fee is leviable thereon. It will not be open, by a rule made under section 9 of the Suits Valuation Act, to take such a suit out of Article 17-A (iii) of Schedule II and make it a suit for which court-fee is leviable *ad valorem*. If the rule were to be construed to have this effect, it would be in excess of the powers conferred by section 9 of the Suits Valuation Act.

This reference to a Full Bench really became necessary because of the observations contained in the decision of a Division Bench of this Court to which I was a party in *Narasamma* v. *Satyanarayana*[1]. That was a suit in which the plaintiff prayed for the cancellation of the decree in a suit to which she was *eo nomine* a party. What she alleged was that she was impleaded in that suit as a major while she was still a minor. Actually she had engaged a pleader for her, and she gave evidence in the suit. It was contended that the suit fell within Article 17-A (1) of Schedule II because the decree must be deemed to be void ; but it was held that the suit fell within section 7 (iv-A) of the Act. Viswanatha Sastri, J., who delivered the judgment of the Bench, observed thus :

"The distinction between a decree to which the plaintiff was a party and a decree to which he was not a party and the distinction between void and voidable decrees, may be relevant in connection with other branches of the law, as for instance, in determining the period of limitation applicable to a suit to set aside the decree and the rights of innocent third parties who have acquired for value an interest in the subject-matter of the suit. But so far as the Court-Fees Act is concerned, a suit by a party to the decree, which is *ex facie* regular and within the jurisdiction of the Court, to have it declared void as against him is taken out of Article 17-A of Schedule II and section 7 (iv) (*c*) and brought within section 7 (iv-A) of the Act."

I may point out that on behalf of the Government the only provision relied upon was section 7 (iv-A) of the Court-Fees Act and the arguments were confined to a discussion of that provision and Article 17-A (1) of Schedule II of the Act. But the learned Judge apparently thought that *ad valorem* court-fee would be payable on the value of the subject-matter of the suit under rule 2 of the rules framed under section 9 of the Suits Valuation Act above mentioned. The learned Judge expressly mentioned the fact that the rule was not brought to the notice of the Bench by the learned counsel in the case. Strictly speaking, in view of the decision of the Bench that the suit would be governed by section 7 (iv-A) of the Act, it was not necessary to deal with rule 2 framed under the Suits Valuation Act. As the learned Judge said :

"Whether the suit is governed by section 7 (iv-A) of the Act or Rule 2 of the Court-Fees Rules *ad valorem* court-fees must be paid on the market value of the lands in Schedules A and B of the plaint which formed the subject-matter of the previous decree."

In my opinion the decision in *Narasamma* v. *Satyanarayana*[1], cannot be considered as an authority on the applicability of the rule now under consideration to a suit for a declaration that a decree in a suit to which the plaintiff was not a party is not binding on him. Having been a party to that decision I am free to say that the contentions now put forward before us as regards the scope of that rule were never before us in that case.

I would answer the question referred to us as follows :—

"In a suit filed to obtain a declaratory decree where no consequential relief is prayed, which does not fall within the category of suits provided for by section 7 (iv-A) of the Court-Fees Act court-fee is not leviable on an *ad valorem* basis on the value of the subject-matter of the suit computed in accordance with Rule 2 of the rules framed by this Court under section 9 of the Suits Valuation Act in 1943."

Rajagopalan, J.—I agree.

Venkatarama Ayyar, J.—I agree.

R.M. — *Reference answered accordingly.*

1. (1951) 1 M.L.J. 436 : I.L.R. 1951 Mad. 751.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

Tirukoilur Sri Viratteswarar Devasthanam by its trustees K. M. Velayudham Pillai and others .. *Petitioners**

v.

R.M.M.S.T.C.T. Ramanathan Chettiar and others .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), *Sections* 57 *and* 93—*Scope—Disputes under—Jurisdiction of Civil Court—If ousted—Whether operates retrospectively.*

Neither section 57 nor section 93 of the Madras Hindu Religious and Charitable Endowments Act, 1951, would, on a reasonable construction of the language employed therein, amount to an ouster of the jurisdiction of the Civil Court. Merely because a provision is made giving power to the Deputy Commissioner to enquire into disputes of the nature described in section 57 it is too much to say that the Civil Court has lost its jurisdiction to try suits in which such disputes arise.

Section 93 does not appear to have any retrospective effect and refers only to suits to be filed after the new Act came into force and probably such suits cannot be filed under this Act without exhausting the remedies provided in the special Act.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court, South Artcot, dated 20th March, 1952, in O. S. No. 15 of 1951.

T. V. Balakrishnan for Petitioner.

K. Parasurama Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—Defendants are the petitioners and being aggrieved by the order of the learned District Judge of South Arcot on the preliminary issues tried by him, they have preferred this civil revision petition.

The preliminary issues on which the order in question has been passed are to the following effect : (1) Whether under section 57 of the Madras Hindu Religious and Charitable Endowments Act (Act XIX of 1951), the District Court had jurisdiction to try a suit without the matter being first enquired into by the Deputy Commissioner. The second issue was whether section 57 of the Act was itself *ultra vires* of the powers of the legislature. On both the issues the learned District Judge found that the District Court had jurisdiction to try the suit that it was maintainable in his Court and also held that there was no need for referring to the High Court the question as to the validity of section 57 of the Hindu Religious and Charitable Endowments Act (Act XIX of 1951). After giving this finding he has posted the case for trial.

The learned counsel for the petitioners, Mr. T.V. Balakrishnan, contends that section 57 is a bar to the maintainability of the suit in the District Court. Section 57 of the Act provides for a procedure to be followed by the Deputy Commissioner in the case of certain disputes and matters. The section says that :

> " Subject to the rights of suit or appeal hereinafter provided the Deputy Commissioner shall have power to enquire into and decide the following disputes and matters : (*a*) whether an institution is a religious institution ; (*b*) whether a trustee holds or held office as a hereditary trustee ; (*c*) whether any property or money is a religious endowment ; (*d*) whether any property or money is a specific endowment ; and (*f*) whether any institution or endowment is wholly or partly of a religious or secular character, and whether any property or money has been given wholly or partly for religious or secular uses."

The contention of the learned counsel is that since this section lays down that the Deputy Commissioner shall have power to enquire into and decide the kind of disputes that have arisen in the present suit before the District Court, a suit is not maintainable in the District Court before any such enquiry had been conducted and concluded by the Deputy Commissioner. Relying on this section he would urge that the jurisdiction of the Court is ousted in so far as the suit related to the question as to whether the property in dispute is a specific endowment or whether

*C.R.P. No. 627 of 1952. 4th February, 1953.

the institution is wholly or partly of a religious nature. It must be observed that the enquiry by the Deputy Commissioner is nothing more than a preliminary enquiry which does not become final. In support of his contention reliance is placed by him upon section 93 of the same Act. It runs :

> "No suit or other legal proceeding in respect of the administration or management of a religious institution or any other matter or dispute shall for determining or deciding which provision is made in this Act be instituted in any court of law, except under, and in conformity with, the provisions of this Act."

This section 93 provides that after the Act has come into existence, no suit shall be instituted in any Court of law except under and in conformity with the provisions of this Act. Neither section 57 nor section 93, would, on a reasonable construction of the language employed therein, amount to an ouster of the jurisdiction of the Court in so far as the present suit is concerned. Merely because a provision is made giving power to the Deputy Commissioner to enquire into the disputes of the nature described in section 57, it is too much to say that the Civil Court has lost its jurisdiction to try suits in which such disputes arise. Similarly even section 93 does not appear to have any retrospective effect so as to prevent the trial of a suit already filed and pending at the time the Act came into force. It has reference only to suits to be filed under the new Act and possibly such suits cannot be filed under this Act after the Act has actually come into effect without exhausting the remedies provided in the special Act. But before the Act came into force, it cannot be said that suits could not have been filed for determining the relevant merits in regard to the disputes as to whether any property is specific endowment or whether any religious institution is wholly or partly religious or secular. There is no section in the new Act which makes section 93 retrospective in effect. The other section that has been relied upon by the learned counsel for the petitioners in this connection is section 103 and sub-section (*j*) and the *explanation* thereto. A reading of the language of sub-section (*j*) and *explanation* thereto in section 103 does not lend any support to the contention of the learned counsel for the petitioners that the present suit cannot be maintained in the District Court. All that section 103, in my view, aims at is to safeguard the existing rights, reliefs and remedies between the parties to these pending suits. It does not establish the contention of the learned counsel that before proceedings in the civil courts are further proceeded with the matter should be sent back to the Deputy Commissioner for enquiry and then the parties should be given a right to proceed on appeal to the Commissioner and thereafter to proceed with a suit in a civil Court. I do not think that such a construction is at all reasonable to be placed upon the language in sub-section (*j*) to section 103 and *explanation* thereto, which is in the nature of a saving clause. It could never have been the intention of the legislature, that pending suits should be taken out of the jurisdiction of the civil Courts and that the new machinery, namely, the Deputy Commissioner, who is practically an executive officer intended to facilitate the enquiry in regard to the matter in disputes enumerated in section 57, should have authority, which would in effect be much greater than the authority of the civil Court, to adjudicate upon disputes between the parties.

On a consideration of the sections referred to by the learned counsel for the petitioners and after a careful consideration of the order passed by the learned District Judge, I am inclined to agree with the learned District Judge that the District Court has jurisdiction to try the suit and I do not think that this petition calls for any interference on my part. The petition is, therefore, dismissed with costs.

R.M. *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Ponnuswami Gounder .. *Appellant**

v.

Rengaswamy and others .. *Respondents.*

Workmen's Compensation Act (VIII of 1923), section 2 (1) (d)—"Dependant wholly or in part"—What constitutes—Earnings insufficient for maintaining even the deceased—If makes the parent not dependent on such earnings.

Whether a person is partially dependent on the earnings of a deceased workman is a matter essentially of fact to be decided in the circumstances of each case. No general principle of law could be laid down to cover cases, even of a similar nature.

It is extremely difficult to lay down any hard and fast rule about what is sufficient for the maintenance of an individual person, and to work out an excess out of his earnings available for the father and mother and the other members of the family to enjoy. In cases of poor working families, particularly those living jointly all the earnings come into a common pool and it may often happen that the common pool is actually quite insufficient to maintain the members at a bare standard of existence. Merely because of it, the parent cannot be said to be not dependent on the son's earnings.

Observation of Chandra Reddy, J., in *St. Joseph's A. and M. Works* v. *Maria Soosai,* (1952) 2 M.L.J. 436 *doubted and distinguished.*

Appeal against the order of the Court of the Additional Commissioner for Workmen's Compensation, Chepauk, Madras, dated the 20th December, 1949, in Case No. 389 of 1948.

T. S. Krishnamurthi Aiyar for Appellant.

R. Krishnaswami Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The appellant is a P.W.D. contractor who appeals against an order by the Commissioner for Workmen's Compensation directing him to pay a sum of Rs. 550 as compensation to the father of a road employee who was killed by a stone-roller while working on road laying. The accident was reported by the Superintending Engineer of the P.W.D. to the Commissioner and an enquiry was held by the Revenue Divisional Officer, Tindivanam, under rule 23 (1) of the Workmen's Compensation Rules. The enquiry disclosed that the deceased had a father, mother and a minor brother aged 11 and a minor sister aged 2 alive. There is on record a statement by the father recorded by the village magistrate and statements recorded from the contractor and one of his witnesses by the Revenue Divisional Officer. According to the father's statement, the son was 25 years old, but according to the contractor he was 16. According to one of the contractor's witnesses, the deceased was an emaciated boy who was prior to his employment by him as a road cooly earning six annas daily as wages. The report of the Revenue Divisional Officer, accepted by the Commissioner, was to the effect that the deceased was earning at least eight annas a day and as he was living with his parents his father was partially dependent on him.

No appearance has been made on this appeal by the respondent-father, who engaged an advocate, Mr. R. Krishnaswami, who, however, reported no instructions when this appeal was taken up for hearing two weeks ago. I allowed some time for appearance by any other advocate as Mr. Krishnaswami said that the papers were taken from him, but no appearance has yet been made.

Mr. Krishnamurthi Aiyar for the appellant has contended that, in the circumstances, the father cannot be deemed to be even partially dependent on his son's earnings. He has relied on a decision reported in *St. Joseph's A. and M. Works* v. *Maria Soosai*[1], by Chandra Reddi, J., in which some English decisions were considered. The facts there were rather different, the deceased workman being a child of tender years, working as a cleaner on a daily wage of four annas. In that

*A.A.O. No. 21 of 1950. 6th February, 1953.

1. (1952) 2 M.L.J. 436.

case the finding of the Commissioner that the father of the child was partially dependent on his earnings was reversed on the ground that the earnings of the child far from being an asset to the family were not sufficient to maintain him and, in fact, that the father had to spend a portion of his own earnings on the maintenance of his son. Whether a person is partially dependent on the earnings of a deceased workman is a matter essentially of fact to be decided in the circumstances of each case.

In *Main Colliery Co.* v. *Davies*[1], the son killed was 16 years old and was earning on an average 8sh. a week but lived at home with his father and mother and gave them all his wages. They fed him, clothed him and housed him and gave him a little pocket money. The father was a collier earning about 25sh. a week. The County Court Judge, held that he was a partial dependent and awarded him compensation. This finding was reversed in the Court of Appeal but the House of Lords restored the finding of the County Court Judge. The Earl of Halsbury, L.C., made the following observations which appears to be particularly appropriate to a Hindu joint family :

> "Therefore, the burden being upon the father of the family, the father of the family in his turn obtains from the wages of those who are being maintained by him a partial contribution to the general family fund. Why is not the father in the discharge of that burden partly dependent upon the earnings which he receives from his children? I am not able to answer that question. It appears to me that he must be relying or dependent—call it what you please—for the means by which he discharges his legal obligation upon the funds supplied to him, or partly supplied to him, by the children who earn those funds."

Lord Shand, who concurred in the decision said he agreed with the County Court Judge in thinking that there was mutual dependency between the parties—that each depended to some extent upon the other—and that the father was to some extent dependent upon his son's wages. It was emphasised in that decision that each case must depend on its own facts.

In *Peart* v. *Bolckow Vaughan & Co.*[2], two cases were considered by the Court of Appeal, both, it would appear, somewhat similar. In the one case the deceased was 14 years old earning 15sh. 3d. a week and the father earning £3 11sh. a week. In the second case a boy aged 11 was contributing 11sh. 10d. a week and the father £1 a week. The County Court Judge found in the former case that the father was entitled to compensation but not in the latter case. The Court of Appeal confirmed his findings of fact decided after taking into consideration all the circumstances of the case and not merely by striking a balance between the earnings and cost of living per head. The Court of Appeal also held that the County Court Judge was entitled to apply his judicial experience and knowledge of the standard of living among the industrial population of the district over which he has jurisdiction, and is also entitled to and should take into consideration not only the present earnings of the deceased, but any prospective increase of earnings in the near future.

Coming to the facts of the present case we have a poor family eking out its livelihood by doing cooly work, the father claiming he earns only eight annas a day, though he probably in fact earns a little more than this on days he can get work and the son also earning eight annas a day. It is extremely difficult to lay down any hard and fast rule about what is sufficient for the maintenance of an individual person, and to work out an excess out of his earnings available for the father and mother and the other members of the family to enjoy. I find it not easy with great respect to express complete concurrence with the following observation of Chandra Reddy, J., who considered the two decisions I have cited and also some others :

> "The principle deducible from the various decisions is that when the earnings of the deceased workmen were hardly sufficient for his maintenance and no balance left which would contribute to the family fund the parent cannot be said to be a dependent within the meaning of section 2, clause (1) (*d*)."

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1. (1900) A.C. 358.   2. (1924) 94 L.J. K.B. 497.

In cases of poor working families, particularly those living jointly all the earnings come into a common pool and it may often happen that the common pool is actually quite insufficient to maintain the members at a bare standard of existence.

I have given careful consideration to the case of the respondent although he has not been represented by an Advocate. It is unreasonable to expect a cooly working in the mofussil several miles away to engage an advocate on any substantial fee to make an appearance in this Court and fight out the matter of compensation. Nor can I fairly make any inference that from the fact that the advocate he engaged reported no instructions, he had not a good case to present in this Court. I can see no legal grounds for any interference with the finding of fact by the learned Commissioner. Section 30 specifically lays down that no appeal lies against any order unless a substantial question of law is involved in the appeal. It cannot be said that in view of the undisputed material in the case, there was insufficient evidence to justify the learned Commissioner's finding.

The appeal is dismissed but without any order as to costs.

R.M. *Appeal dismissed.*

[THE SUPREME COURT OF INDIA.]

[Criminal Appellate Jurisdiction.]

PRESENT :—MEHRCHAND MAHAJAN AND S. R. DAS, JJ.

Magga and Bhagga .. *Appellants**

v.

The State of Rajasthan .. *Respondent.*

Criminal Procedure Code (V of 1898), section 284 and 285—Person not summoned chosen as assessor—Effect—Trial commenced with three assessors—Subsequent absence of one for some time and substitution of another for him—Completion of trial with all the four assessors—Validity—Irregularities if cured by section 537.

The trial for an offence under section 302, Penal Code, began on 22nd March, 1952. Three assessors had been summoned for that date. Of these two were present while the third did not come. Thereupon one person who was present in the Court premises and whose name was in the list of assessors but who had not been summoned in the manner prescribed by the Code of Criminal Procedure was chosen as an assessor. The trial then began with the three assessors so chosen (*A*, *B* and *C*). On the 6th June, 1952, *A*, one of the assessors absented himself and one *D* was asked to sit in the place of *A* as an assessor with the result that on the 6th June, 1952, there were three assessors, *viz.*, *B* and *C* who had been sitting from the beginning of the trial and *D* who was introduced for the first time that day. On the 23rd June also *B*, *C* and *D* sat as assessors. On 27th June, however, *A* re-appeared and was allowed to sit and since that date four assessors sat throughout. Eventually all the four assessors gave their opinion on the 1st July, 1952, when the trial came to an end and the accused was convicted. It was contended that the trial was bad as it took place in defiance of the provisions of sections 284 and 285 of the Code of Criminal Procedure and that such an illegality could not be cured by the provisions of section 537 of the Code.

Held, (i) the circumstance that the formality of issuing a summons was not gone through in respect of one of the assessors chosen was a mere irregularity which was curable under section 537 of the Code of Criminal Procedure as there was no failure of justice caused on account of that irregularity and the trial on that account cannot be held to be bad.

King-Emperor v. *Ramsidh Rai*, (1938) 39 Cr.L.J. 725, approved. *Balak Singh* v. *Emperor*, A.I.R. 1918 Pat. 420, explained and distinguished.

(ii) It is no doubt true that section 285 enjoins on the Judge a duty to find whether there is sufficient cause for the non-attendance of an assessor and whether it is not practicable to enforce his attendance and ordinarily the proceedings must represent on their face whether this duty has been performed but such an omission on his part does not necessarily vitiate the trial. When a Judge proceeds with the trial in the absence of one or two of the assessors with the aid of the remaining assessor or assessors, it may be presumed that he has done so because he was satisfied that it was not practicable to enforce the attendance of the absent assessor or assessors and that there was sufficient cause for his or their non-attendance. If, however, there is evidence to the contrary effect, the matter may be different. Failure to record an order indicating the reasons for proceeding with the trial with the remaining assessors can at best be an irregularity or an omission which must be held to be such as to come within the reach of section 537, unless in fact it has occasioned a failure of justice.

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* Crl. Appeal No. 103 of 1952. 16th February, 1953.

(iii) The Criminal Procedure Code does not authorize a trial commenced with the aid of three named assessors to be conducted and completed with the aid of four assessors. The substitution of one assessor by another and an addition to the number of assessors appointed at the commencement of the trial is not sanctioned by section 285, Criminal Procedure Code, nor is it authorised by section 284. On the other hand the language of section 285 (1) read with the provisions of section 285 (2) implicitly bans the holding of such a trial.

On Appeal under Article 134 (1) (*c*) of the Constitution of India from the Judgment and Order dated the 27th October, 1952, of the High Court of Judicature for the State of Rajasthan at Jodhpur (Wanchoo, C.J. and Bapna, J.), in D.B. Criminal Murder Reference No. 2 of 1952, arising out of the Judgment and Order dated the 1st July, 1952, of the Court of the Sessions Judge, Pali, in Criminal Original Case No. 2 of 1951.

H. J. Umrigar, Advocate, appointed by the Court, under rule 8 of Order 21, Supreme Court Rules, 1950, for Appellants.

Porus A. Mehta, Advocate, for Respondent.

The Judgment of the Court was delivered by

Mahajan, J.—This is an appeal under Article 134 (1) (*c*) of the Constitution of India, by Magga and Bhagga, who have been convicted under section 302, Indian Penal Code, for the triple murders of Ganesh, Gheesa and Hardas.

The case relates to an incident which took place on the night between the 3rd and 4th April, 1951. Gheesa and Ganesh, deceased, Ratna, Govind, another Ganesh who is a witness in the case, and Hardas had gone to " Imaratia " a well in village Gadwara on that night to keep watch over the crops there. Gheesa slept in one shed near the well, while Hardas slept in another shed some distance away, and Ratna slept in a third shed near the entrance gate. Ganesh, deceased, Ganesh (P.W.), and Govind slept on the threshing floor further away from the well. Some time after midnight Ratna woke up on hearing the cries of Gheesa. It is alleged that he then saw the two accused beating Gheesa, accused Magga having in his hand a farsi and accused Bhagga having a katari and an axe. Hardas, who woke up on hearing the cries, rushed to the aid of Gheesa and thereupon the two accused, Magga and Bhagga, fell upon him and attacked him with farsi and axe. Ratna ran away and hid himself near the well. On an alarm being raised, one Krishna who was working on a nearby well came and witnessed the attack on Hardas. The accused after finishing Gheesa and Hardas went to the threshing floor where Ganesh, deceased, was sleeping. There Magga asked Bhagga to hit Ganesh with the axe and Bhagga immediately hit Ganesh with the axe and he fell down. Thereafter Magga hit Ganesh two or three times with the farsi on the legs and Bhagga cut the neck of Ganesh with the katari. Govind (P.W.) entreated on behalf of Ganesh but he was threatened and was told that if he did not keep quiet he would also be killed. Without injuring Govind and Ganesh, P.Ws., the accused then left the place.

Information of the incident was carried to the village by Ratna and a report of it was made to the police at 11-30 A.M. on 4th April, 1951. In the report it was stated that " Bhagga and Magga are standing at their house with swords and are saying that they would kill more persons. Village people are surrounding them outside the house." The Sub-Inspector of Police, when he arrived at the village, found the house of the accused surrounded by the village people. The door of the house was closed from inside and the accused were standing on the chabutra inside. Magga had a farsi in his hand and Bhagga had an unsheathed sword. The Sub-Inspector got the door opened, arrested the accused, and took possession of the farsi and the sword. He also recovered the axe and a katari which were bloodstained. The clothes of the accused were also taken possession of after the arrest and they appeared to have bloodstains on them.

The accused pleaded not guilty. They admitted their partnership in cultivation at " Imaratia " well with the deceased but denied that any quarrel took place between them and the other partners about the cutting of the crop. They

also denied that they had gone to the well armed with various weapons and had committed the murder of Gheesa, Hardas and Ganesh.

The Sessions Judge on the evidence led by the prosecution felt satisfied that the prosecution case was proved beyond all reasonable doubt. It was held that the murder was brutal and advantage had been taken of the persons who were sleeping to kill them. In the result the appellants were convicted under section 302, Indian Penal Code, and sentenced to death. The sentence of death passed on them by the Sessions Judge was confirmed by the High Court after examining the evidence afresh. In the High Court a contention was raised that the whole trial was vitiated inasmuch as it had not been conducted in accordance with procedure prescribed by law. This contention was negatived on the ground that the irregularities committed in the course of the trial were such as were cured by the provisions of section 537, Criminal Procedure Code. As the objection raised concerned the validity of the trial the case was certified as a fit one for appeal to this Court.

The facts which concern the validity of the trial, shortly stated, are these: The trial began on 22nd March, 1952. Three assessors had been summoned for that date. Of these two were present while the third did not come. Thereupon one person who was present in the Court premises and whose name was in the list of assessors but who had not been summoned in the manner prescribed by the Code of Criminal Procedure was chosen as an assessor. The trial then began with the three assessors so chosen, *viz.*, Jethmal, Balkrishna and Asharam. On the 6th June, 1952, Jethmal, one of the assessors, absented himself and for some reason which is not clear from the record, one Chimniram was asked to sit in place of Jethmal as an assessor with the result that on the 6th June, 1952, there were three assessors, *viz.*, Balkrishna and Asharam, who had been sitting from the beginning of the trial and Chimniram who was introduced for the first time that day. On the 23rd June also Chimniram, Balkrishna and Asharam sat as assessors. On 27th June, however, Jethmal re-appeared and was allowed to sit and since that date four assessors sat throughout, *viz.*, Jethmal, Chimniram, Balkrishna and Asharam. Eventually all these four assessors gave their opinion on the first July, 1952, when the trial came to an end. It was contended that the trial was bad as it took place in defiance of the provisions of sections 284 and 285 of the Code of Criminal Procedure and that such an illegality could not be cured by the provisions of section 537 of the Code.

In order to judge of the validity of this objection it is necessary to set out the provisions of the Code relevant to this matter. Section 284 provides that, "When the trial is to be held with the aid of assessors, not less than three and, if possible, four shall be chosen from the persons *summoned* to act as such." The section as it originally stood required that "two or more shall be chosen as the Judge thinks fit," so that there had to be a minimum of two assessors. In the year 1923, that provision was amended so as to make a minimum of three assessors an essential requisite for a trial to be held with the aid of assessors. A trial commenced with less than three assessors is not authorised by the provisions of this section as it now stands. Therefore, unless a case comes within the provisions of the next following section 285, a trial held in defiance of the provisions of section 284 would not be legal. Section 285, however, has no application to cases where a trial is commenced with less than three assessors. (Vide *Balak Singh* v. *Emperor*[1]; *Sipattar Singh* v. *King-Emperor*[2].) Section 285 provides:

"(1) If in the *course* of a trial with the aid of assessors, at any time before the finding, any assessor is from any sufficient cause, prevented from attending throughout the trial, or absents himself, and it is not practicable to enforce his attendance, the trial shall proceed with the aid of the other assessor or assessors.

(2) If all the assessors are prevented from attending or absent themselves, the proceedings shall be stayed and a new trial shall be held with the aid of fresh assessors.".

In cases contemplated by this section a trial commenced with the aid of three assessors can be continued and finished with the aid of less than three assessors.

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1. A.I.R. 1918 Pat. 420. 2. A.I.R. 1942 All. 140.

This section, however, does neither authorise the substitution of an assessor for an absent assessor, nor does it authorise an addition of an assessor to the number of assessors during the course of the trial. The effect of the provisions of sections 284 and 285 is that a trial cannot be validly commenced with less than three assessors chosen in the manner prescribed by the Code, but once validly commenced it can be continued in certain cases to a finish if some though not all, of the persons originally appointed, attend throughout the trial. If all of them do not attend, then a fresh trial has to be held. An addition in the number of the assessors or a change or substitution in their personnel during the course of the trial is not warranted by the Code; on the other hand, it is implicitly prohibited. The procedure prescribed by section 285 (1) is not of a permissive nature. It has to be followed if the conditions prescribed are fulfilled, and like section 285 (2) it is of a mandatory character. No scope is left in these provisions for the exercise of the discretion of the Judge for supplementing these provisions and for holding a trial in a manner different from the one prescribed and for conducting it with the aid of some assessors originally appointed, and also with the aid of some others recruited during the trial. Section 309 provides that when a trial is concluded, the Court may sum up the evidence for the prosecution and defence and shall then require each of the assessors to state his opinion orally and shall record such opinions. Sub-clause (2) of this section enacts that the Judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors. Sections 326 and 327 enact the method and manner of summoning assessors and jurors. Section 537 provides as follows:

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account—

(*a*) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or . . .

(*c*) of the omission to revise any list of jurors or assessors in accordance with section 324, or

(*d*) of any misdirection in any charge to a jury, unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice."

The first objection that was taken in the High Court to the validity of the trial was that Asharam who had not been *summoned* as an assessor could not be appointed as such and hence it should be held that the trial commenced with a minimum of two assessors in defiance of the provisions of section 284. What happened was this: On the date fixed for the trial there was a deficiency in the number of persons who had been summoned and who appeared to act as assessors, the Court then sent for Asharam whose name was in the list of assessors and ordered him to sit as an assessor. The High Court took the view, and we think rightly, that the circumstance that the formality of issuing a summons was not gone through was a mere irregularity which was curable under section 537 of the Code, as there was no failure of justice caused on account of that irregularity and that the trial on that account could not be held to be bad. This view is in accord with the decision of the Calcutta High Court in *King-Emperor* v. *Ramsidh Rai*[1], with which we agree. We are constrained, however, to observe that the High Court did not fully appreciate the decision of the Patna High Court in *Balak Singh* v. *Emperor*[2], when it said that that decision held a trial bad where a person was chosen as an assessor who had not been summoned. In that case during the examination of the first witness only one qualified assessor was present in Court, and capable of acting as such, the judge ordered another person who happened to be present in Court *but was not in the official list of assessors to act as an assessor*, and it was held that as the trial commenced with only one assessor and not with two duly qualified assessors the trial was abortive and contrary to law. No exception could therefore be taken to the rule stated in this decision.

The second objection against the validity of the trial taken before the High Court was founded on section 285. It was contended that when one of the assessors

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1. (1938) 39 Cr.L.J. 725. 2. A.I.R. 1918 Pat. 420.

appointed absented himself the Court was bound, under section 285, to ascertain before proceeding further with the trial whether the absence of the assessor was due to sufficient cause and whether it was practicable to enforce his attendance and that the judge in this case failed to observe this condition which alone entitled him to continue the trial with the remaining assessors and that the defect was fatal to the validity of the trial. The High Court held that though there was non-compliance with the provisions of section 285 in the case, this irregularity was cured by section 537 as it had not in fact caused failure of justice. We agree with the High Court in this conclusion. It is no doubt true that the section enjoins on the Judge a duty to find whether there is a sufficient cause for the non-attendance of an assessor and whether it is not practicable to enforce his attendance and ordinarily the proceedings must represent on their face whether this duty has been performed but we think that such an omission on his part does not necessarily vitiate the trial. We are further of the opinion that when a judge proceeds with a trial in the absence of one or two of the assessors with the aid of the remaining assessor or assessors, it may be presumed that he has done so because he was satisfied that it was not practicable to enforce the attendance of the absent assessor or assessors and that there was sufficient cause for his or their non-attendance. If, however, there is evidence to a contrary effect, the matter may be different. Failure to record an order indicating the reasons for proceeding with the trial with the aid of the remaining assessors can at best be an irregularity or an omission which must be held to be such as to come within the reach of section 537 unless it has in fact occasioned a failure of justice. It could not be seriously argued that such an omission can lead to such a result.

Finally the learned counsel contended, also relying on section 285, that the Sessions Judge had no jurisdiction or power to substitute an assessor or to reinstate the absent assessor, or to add to the number of assessors. When the point was raised before the High Court, it fully realized that there was no provision in law which permitted such substitution of an absent assessor by another assessor or the subsequent reinstatement of an absent assessor as had been done in this case. It, however, felt that the irregularity was of the same nature as non-compliance with the provisions of section 285, and as such was cured by section 537 of the Code. In regard to the addition of an assessor during the trial it said :

"We have not been able to find any reported case where an assessor had been added in the middle of the trial as has been done by the learned Judge. That is perhaps due to the fact that no Judge ever did such an obviously silly thing, but considering that the trial, in any case, continued with the aid of two assessors who were there throughout, there was, in our opinion, substantial compliance with the mode of trial provided in the Code and the irregularity committed by the addition of Chimniram in June, 1952 is curable under section 537 as it did not occasion any failure of justice. The Sessions Judge was still the Court of competent jurisdiction to try the case and all that he did was to add unnecessarily one more assessor to advise him when he had no business to do so. *We can ignore his presence altogether* and as the irregularity has not caused failure of justice, the trial will not be vitiated."

In our judgment, the High Court was in error in this view. The Sessions Judge during the progress of the trial not only made a change in the personnel of the assessors originally appointed and also added to their number, but he actually took the opinions of all the four assessors as required by the provisions of section 309 of the Code, and acted in accordance with those opinions in convicting the two appellants. It is plain that a unanimous verdict of four assessors is bound to weigh much more with a judge than the opinion of two persons. We have not been able to understand how the High Court could ignore the presence of assessors altogether who had given their opinions and which opinions had been accepted by the Judge. The opinion of an assessor is exercised in the judicial function imposed upon him by law, and the Judge is bound to take it into consideration and he cannot dispense with it. The Judge considered this trial as if he had commenced it with the aid of four assessors, and taking into consideration their opinion, he convicted the appellants. It is difficult to assess the value which the Judge gave to the opinions of the assessors at the time of arriving at his finding and the High Court was in error in thinking that it did no harm and caused

no prejudice. We cannot subscribe to the view of the High Court that the trial should be taken as having been conducted with the aid of the two assessors as sanctioned by section 285, Criminal Procedure Code. That is not what actually happened. It is difficult to convert a trial held partly with the aid of three assessors and partly with the aid of four assessors into one held with the aid of two assessors only. At no stage was the trial held with the aid of two assessors only. The third substituted assessor attended a part of the trial and the added fourth assessor also attended a part of it. None of these two were present throughout. Thus the trial when it concluded was a different trial from the one which was commenced under the provisions of section 284, Criminal Procedure Code. To a situation like this we think section 537 cannot be called in aid. Such a trial is not known to the Code and it seems implicitly prohibited by the provisions of sections 284 and 285. What happened in this case cannot be described as a mere error, omission or irregularity in the course of the trial. It is much more serious. It amounts to holding a trial in violation of the provisions of the Code and goes to the root of the matter and the illegality is of a character that it vitiates the whole proceedings. As observed by their Lordships of the Privy Council in *Subramania Iyer* v. *King-Emperor*[1], disobedience to an express provision as to a mode of trial cannot be regarded as a mere irregularity. In *Abdul Rahman* v. *King-Emperor*[2], the distinction between cases which fall within the rule of section 537 and those which are outside it was pointed out by Lord Phillimore. There it was said that the distinction between *Subramania Iyer's case*[1] and that case in which there was an irregularity in complying with the provisions of section 360 of the Code, was fairly obvious. In *Subramania Iyer's case*[1] the procedure adopted was one which the Code positively prohibits and it was possible that it might have worked actual injustice to the accused but that the error in not reading the statements of witnesses to them was of a different character, and such an omission was not fatal. In *Pulukurti Kotayya* v. *King-Emperor*[3] their Lordships again examined this question. That was a case where there had been a breach of the provisions of section 162, Criminal Procedure Code, and it was held that in the peculiar circumstances of that case it had not prejudiced the accused and the case therefore fell under section 537 and that the trial was valid notwithstanding the breach of section 162. Sir John Beaumont in delivering the decision of the Board made the following observations which bring out the distinction between the two sets of cases :—

"There are, no doubt, authorities in India which lend some support to Mr. Pritt's contention and reference may be made to *Tirkha* v. *Nanak*[4], in which the Court expressed the view that section 537, Criminal Procedure Code, applied only to errors of procedure arising out of mere inadvertence, and not to cases of disregard of, or disobedience to, mandatory provisions of the Code, and to In re *Madura Muthu Vannian*[5], in which the view was expressed that any failure to examine the accused under section 342, Criminal Procedure Code was fatal to the validity of the trial, and could not be cured under section 537. In their Lordships' opinion this argument is based on too narrow a view of the operation of section 537. *When a trial is conducted in a manner different from that prescribed by the Code* (as in *Subramania Iyer's case*[1]), *the trial is bad, and no question of curing an irregularity arises* ; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under section 537 and nonetheless so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind. This view finds support in the decision of their Lordships' Board in *Abdul Rahman* v. *King Emperor*[2], where failure to comply with section 360, Criminal Procedure Code, was held to be cured by sections 535 and 537. The present case falls under section 537, and their Lordships hold the trial valid notwithstanding the breach of section 162."

In our judgment, the trial conducted in the present case was conducted in a manner different from that prescribed by the Code and is bad and no question here arises of curing any irregularity. The Code does not authorize a trial commenced with the aid of three named assessors to be conducted and completed with the aid of four assessors. The substitution of one assessor by another and an addition

1. (1901) 11 M.L.J. 233 : L.R. 28 I.A. 257 : I.L.R. 25 Mad. 61 (P.C.).
2. (1926) 52 M.L.J. 585 : L.R. 54 I.A. 96 (P.C.).
3. (1947) 1 M.L.J. 219 : L.R. 54 I.A. 65 (P.C.).
4. (1927) I.L.R. 49 All. 475.
5. (1922) 43 M.L.J. 402 : I.L.R. 45 Mad. 820.

to the number of assessors appointed at the commencement of the trial is not sanctioned by section 285, Criminal Procedure Code, nor is it authorized by section 284. On the other hand, the language of section 285 (1) read with the provisions of section 285 (2) implicitly bans the holding of such a trial. It is not possible to say with any degree of certainty to what extent the opinion of the outgoing and the incoming assessors who did not attend the whole of the trial influenced the decision in the case; but as such a trial is unknown to law, it has to be presumed that it was illegal.

Mr. Mehta for the State Government contended that under section 309 (2) the opinion of assessors is not binding on the sessions judge and their presence or absence does not affect the constitution of the Court and that as at this trial at least two of the assessors originally appointed sat throughout the trial it should be held that the trial was substantially a trial conducted in accordance with the provisions of the Code. The learned counsel did not go to the length of urging that a trial without the aid of any assessors whatever was a good trial under the Code. Such a contention, if raised, would have to be negatived in view of the clear provisions of section 284 and of sub-section (2) of section 285. The appointment of at least three assessors is essential for the validity of a trial of this character at its commencement, and once validly commenced, in certain events, it can be validly concluded if at least one of them remains present throughout, while others drop out; but a trial conducted in the manner in which it was done in this case is wholly outside the contemplation of the Code and it is not possible to hold that it was concluded according to the provisions of the Code. The provision in the Code that the opinion of the assessor is not binding on the sessions judge cannot lend support to the contention that the sessions judge is entitled to ignore their very existence. As already pointed out, though he may not be bound to accept their opinions, he is certainly bound to take them into consideration. The weight to be attached to such opinions may well vary with the number of assessors.

Mr. Mehta to support his contention placed reliance on the majority decision of the Madras High Court in *King-Emperor* v. *Tirumal Reddi*[1]. In that case the trial continued for about seven weeks. During that period one of the assessors was permitted to absent himself during two whole days, and five half days respectively, at first, so that he might visit his mother on her death-bed, and subsequently, to perform the daily obsequies rendered necessary by her decease. He then resumed his seat as an assessor and continued so to act until the termination of the trial, all the depositions recorded in his absence having been read by him on his return. At the conclusion of the trial the sessions judge invited the opinion of each assessor, and recorded it. The opinion of each was that all the accused were guilty and the judge concurring in that opinion, convicted the accused. On appeal it was contended that the judge had acted contrary to law in allowing the assessor who had been absent to resume his seat as an assessor and in inviting and taking into consideration his opinion in deciding the case. It was held by the majority of the Court that the finding and the sentence appealed against had been passed by a court of competent jurisdiction within the meaning of section 537 of the Code and that the defect in the trial did not affect its validity and was cured by that section as the irregularity had not in fact occasioned a failure of justice. Mr. Justice Davies took a different view. This decision was clearly given on the peculiar facts and circumstances of that case and is no authority in support of the view contended for by Mr. Mehta.

For the reasons given above we are constrained to hold that the trial of the appellants conducted in the manner above stated was bad and the appellants have to be retried in accordance with the procedure prescribed by the Code.

In the result we allow this appeal, quash the conviction and sentence passed on the appellants, and direct their retrial by the sessions Judge in accordance with the procedure prescribed by the Code.

Agent for Respondent: *G.H. Rajadhyaksha.*

G.R./K.S. ——— *Appeal allowed.*

1. (1901) 11 M.L.J. 241 : I.L.R. 24 Mad. 523.

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT :—MEHRCHAND MAHAJAN AND S. R. DAS, JJ.

Buddu Satyanarayana and others .. *Appellants**

v.

Konduru Venkatapayya and others .. *Respondents.*

Inam—Grant to temple—Archakas and their predecessors-in-title in long possession of properties and rendering services—Presumption of lost grant in favour of archakas—If permissible.

Madras Hindu Religious Endowments Act (II of 1927), Chapter VI-A—Proceedings for ejectment—Archakas asserting adverse rights—If entitled to equitable relief and be allowed to remain in possession and appropriate income for reasonable remuneration and expenses of services.

A presumption of an origin in some lawful title may in certain circumstances be made to support possessory rights long and quietly enjoyed where no actual proof of title is forthcoming but that presumption cannot be made where there is sufficient evidence and convincing proof of the nature of the grant and the person to whom it was made. In the face of the entries in the Inam Register and the statement filed in the inam inquiry by the Archakas' predecessors-in-title clearly indicating that the inam grant was made in favour of the temple by the grantor no presumption of lost grant can be made in favour of the Archakas.

In a proceeding for the framing of a scheme relating to a temple it may be permissible to take into account the claims moral if not legal, of the Archakas to reasonable remuneration for their services and expenses and to make some provision for protecting their rights (for instance by allowing them to remain in possession of the land and appropriate the income). But in proceedings for ejectment under Chapter VI-A of the Madras Hindu Religious Endowments Act, 1927, where the Archakas actually asserted an adverse right in the face of the honest admission of their predecessors-in-title, such conduct cannot but be regarded as disentitling them from any claim founded on equity, even if it were permissible for the Court in a suit of that description to give such relief as can be given in proceedings for framing a scheme.

On appeal from the Judgment and Decree dated the 15th December, 1948, of the High Court of Judicature at Madras (Subba Rao and Panchapakesa Ayyar, JJ.) in Appeal No. 474 of 1945, arising out of Judgment and Decree dated the 31st July, 1945, of the Court of the Subordinate Judge of Tenali, in Original Suit No. 24 of 1944.

M. C. Setalvad, Attorney-General for India (*N. Subrahmanyam* and *K. R. Choudhury*, Advocates, with him) for Appellants.

K. S. Krishnaswamy Aiyangar, Senior Advocate (*M. Seshachellapathi*, Advocate, with him) for Respondent No. 1.

The Judgment of the Court was delivered by

Das, J.—This appeal arises out of a suit for recovery of possession of certain immoveable properties measuring about 93 acres and 33 cents which are more fully and particularly set out and described in Schedule A to the plaint. That suit was instituted by Konduru Venkatapayya, respondent No. 1, in his capacity as the Executive Officer appointed by the Government on the 15th July, 1942, in respect of Sri Somasekharaswami Temple at Kotipalle, hamlet of Donepudi, a temple notified on the 26th October, 1939, under the provisions of Chapter VI-A of the Madras Hindu Religious Endowments Act (Act II of 1927). The suit was instituted in *forma pauperis*. The claim for ejectment of the defendants was founded on the allegation that the properties belonged to the temple, having been given to it by an Inam grant made in 1770 A.D. by Janganna Rao, the then Zamindar of Rachur, that the defendants 1 to 16 and their predecessors were Archakas rendering Nitya Naivedya Deeparadhana services and as such were in possession of the properties for and on behalf of the temple and that defendants 17 to 43 were the lessees under the Archakas and that the defendants 1 to 16 were wrongfully claiming the properties as their own and the other defendants claimed to be in possession of portions of the properties as their lessees. The plaintiff instituted this suit after having given registered notice to the defendants to make over possession of the suit properties to the plaintiff as the Executive Officer of the temple

* Civil Appeal No. 121 of 1951. 26th February, 1953.

but the defendants were still continuing in such possession in spite of such notice. The defendants filed written statements raising various contentions and issues to which it is not necessary now to refer. The learned Subordinate Judge by his judgment dated the 31st July, 1945, decreed the plaintiff's suit. Some of the defendants preferred an appeal to the High Court but the High Court dismissed the same. Those defendants obtained leave of the High Court to appeal to the Federal Court and that appeal has now come up for hearing before us.

The only two points which were raised before us, as before the High Court, are (1) whether the Inam grant was made in favour of the temple or whether the grant was made in favour of the Archakas burdened with the duties of service, and (2) what right did the grant confer on the grantee—whether it was a grant of the land itself or only of the *melvaram* interest in the properties.

Re. 1—It is urged by the learned Attorney-General that as the defendants and their predecessors have been in possession of the properties from ancient times it should be presumed that their possession originated in some lawful title conferred on them. In short, the contention, founded on several judicial decisions, is that the principle of a lost grant should be applied in this case in favour of the Archakas who have been in quiet possession for over a century and a half. There is no doubt, on the authorities, that a presumption of an origin in some lawful title may in certain circumstances be made to support possessory rights long and quietly enjoyed where no actual proof of title is forthcoming but it is equally well established that that presumption cannot be made where there is sufficient evidence and convincing proof of the nature of the grant and the persons to whom it was made. It is true that the original grant is not forthcoming but turning to the evidence we find two documents which appear to us to be decisive on the question of title. The first one is Exhibit P-3, a copy of the relevant entries in the Inam Register of 1860. This Inam Register was prepared after enquiries made by the Inam Deputy Collector and the statements furnished at that time by the then Archakas were taken into consideration for preparing the register. The copy of the statement filed by the then Archakas before the Inam Deputy Collector was exhibited in this case as Exhibit D-3. In the Inam Register (Exhibit P-3) under the several columns grouped under the general heading " Class, extent and value of Inam " this Inam is classified in column 2 as Devadayam. In column 3 are set out the survey numbers together with the word ' Dry ' indicating the nature of the land comprised within the survey numbers. The areas are set out in column 5. The heading of column 7 is " where no survey has been made and no assessment fixed by Government, the cess paid by the *ryot* to the Inamdar, or the average assessment of similar Government land should be entered in column (7)." Under this heading are set out the amounts of respective assessments against the three survey numbers totalling Rs. 198-13-9. We then pass on to the next group of columns under the general heading " Description, tenure and documents in support of the Inam." Under column 8 ' description of Inam ' is entered the remark " For the support of a Pagoda. Now kept up." The entry in column 9 shows that the Inam was free of tax, *i.e.*, *sarvadumbala*. Under column 10 headed " Hereditary, unconditional for life only or for two or more lives " is mentioned ' Permanent.' The name of the grantor as stated in column 11 is Janganna Rao and the year of grant is *fasli* 1179 A.D. 1770. In column 13 the name of the temple is set out as the original grantee. The name of the temple and the location of the temple are also set out under columns 16 and 17. Turning now to the statement Exhibit D-3 caused to be written and filed by the then Archakas during the Inam Inquiry held in 1859-60 Sree Somasekharaswami Varu is given as the name of the Inamdar and the present enjoyer. The name of the temple is also set out under columns 3, 5, 6 and 12. Under the heading " Income derived from the Inam whether it is *sarvadumbala* or *jodi*. If *jodi* the amount " in column 13 is stated " Sarvadumbala Inam. Cist according to the rate prevailing in the neighbouring fields—Rs. 266-3-1." This statement (Exhibit D-3) bears the signature of the Karnams and the witnesses. It will be noticed that neither in the Inam Register Exhibit P-3 nor in the statement

Exhibit D-3 is there any mention of the Archakas as the grantee or for the matter of that having any the least interest, personal or otherwise, in the subject-matter of the Inam grant. The two exhibits quite clearly indicate that the Inam grant was made in favour of the temple by the grantor and that in the face of this definite evidence and proof of the nature of the grant no presumption of a lost grant can be made in favour of the Archakas. We, therefore, in agreement with the High Court, hold that the deity was the grantee and the first question raised before us must be answered against the appellants.

Re. 2—The learned Attorney-General next contends that assuming that the Inam grant was made in favour of the temple it was only a grant of *melvaram* interest and that the Archakas who have the *kudivaram* rights cannot be ejected. He relies strongly on an unreported judgment of the Madras High Court in Appeal No. 213 of 1942, *The Board of Commissioners for the Hindu Religious Endowments, Madras* v. *Parasuram Veeraraghavacharyulu and others*, where it was held :

"The records of the Inam settlement really contain only one clear indication as to the precise extent of this grant. The statement at the Inam Inquiry Exhibit V upon which the decision of the Inam Commissioner was presumably based contains a column headed "Income realised from the Inam *Sarvadumbala*" and in that column we find the entry 'Rs. 14 *sarvadumbala*'. On its face this entry seems to show that the income of the Inam was Rs. 14 free from all charges. We find, however, from the Inam Register, Exhibit IV, that the assessment of the Inam on the basis of the enjoyment of 16·97 acres is also Rs. 14. This seems to indicate that the extent of the Inam was the amount of the assessment.

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It seems, therefore, that the decision must rest on the recital in Exhibit V that the income of the Inam consists of Rs. 14, read along with the recital in Exhibit IV that the assessment on the land also comes to Rs. 14. On these materials we confirm the findings of the learned District Judge, although we do not accept his reasoning, and hold that the grant is a grant of *melvaram* only."

The facts of that case appear to us to be different from those in the present case. The Archakas in that case were found to have the *kudivaram* rights from before the Inam grant was made. In the copies of the Inam Register and Inam Statement filed in that case the Archakas were shown as the grantees and the present enjoyers of the Inam grant and the amount shown under the heading in column 2 of the Inam Register as the assessment was the same as the amount shown under column 3 of the Inam Statement under the heading "Income derived from Inam." In the case before us the Archakas are nowhere mentioned in either Exhibit P-3, or in Exhibit D-3, there is no evidence that they had any title to *kudivaram* rights and finally the amount of assessment shown under column 7 of the Inam Register Exhibit P-3 is Rs. 198-13-9 whereas the amount shown as income derived from the Inam as shown in column 13 of the Inam Statement Exhibit D-3 is Rs. 266-3-1. Apart from these points of distinction the decision relied on by the learned Attorney-General appears to us to be of doubtful authority. As will appear from the passages quoted above, the decision rested mainly, if not entirely, on the fact that the amount of assessment and the amount of income were the same and the conclusion was drawn that the Inam grant comprised only of the revenue assessment, *i.e.*, of *melvaram* rights. We are unable to follow the reasoning. Whether the Inam comprised the land itself, that is to say, both *melvaram* and *kudivaram* rights or only the *melvaram* rights the entries had to be made in the Inam Register in the same form and even in the case of the grant of the land itself comprising both the rights the amount of assessment had to be set out under column 7 of the Inam Register for it is not suggested that a different form had to be used where the grant comprised both the rights. It follows, therefore, that no inference that the Inam grant comprised only *melvaram* rights can be inferred from the fact that under column 7 only the amount of assessment is set out, and, therefore, the reasoning on which the decision relied on by the learned Attorney-General was founded cannot be supported as correct. Indeed, that decision has been dissented from by another Bench of the Madras High Court in *Yelamanchili Venkatadri and another* v. *Vedantam Seshacharyulu and others*[1]. In the present case the High Cour

1. I.L.R. (1948) Mad. 46 : (1947) 1 M.L.J. 287 : A.I.R. 1948 Mad. 72.

was, in our opinion, clearly right in preferring the last mentioned decision to the unreported decision mentioned above. Having regard to the different entries under the different columns in Exhibit P-3 and Exhibit D-3, there is no escape from the position that this Inam grant in favour of the temple comprised both the interests in the land.

An argument was sought to be raised by the learned Attorney-General that the grantor Janganna Rao was only the Collector of the revenue and as such could not grant more than what he had got. Reference was made to the Kistna District Manual by Gordon Mackenzie but it appeared that the person therein mentioned was not the same grantor as we are concerned with in this case and the point was not pursued and nothing further need be said about it.

Finally, the learned Attorney-General submits that these Archakas who were rendering services faithfully from generation to generation from ancient times should not, in equity, be ejected from the entire lands and that they should be allowed to remain in possession of the lands and be permitted to appropriate to themselves the expenses of the services and a reasonable remuneration and the rest of the income should be made over to the temple as its property. Reference was made to two unreported decisions of the Madras High Court in Appeal No. 218 of 1946, *Dandibhotla Kutumba Sastrulu* v. *Kontharapu Venkatalingam*, and in Appeal No. 709 of 1944, *Buddu Satyanarayana* v. *Dasari Butchayya, Executive Officer of the temple of Sri Malleswaraswami Varu, China Pulivaram.* In a proceeding for the framing of a scheme relating to a temple it may be permissible to take into account the claims, moral if not legal, of the Archakas and to make some provision for protecting their rights, but those considerations appear to us to be entirely out of place in a suit for ejectment on proof of title. If the two decisions lay down, as it is contended they do, that the principles which may have a bearing on a proceeding for framing of a scheme or for enforcing the scheme that is framed may be applied to a case of the kind we have now before us it will be difficult for us to uphold them either on authority or on principle. Further what is the conduct of the Archakas defendants appearing on the record of this case? Although they are Archakas they actually asserted an adverse right in the face of the honest admission of their predecessors-in-title, made in the Inam statement Exhibit D-3. Such conduct cannot but be regarded as disentitling them from any claim founded on equity. The explanation put forward for the first time in paragraph 7 of their present statement of case filed in this Court explaining the absence of a claim to the property by their predecessors at the time of the Inam Inquiry, namely, respect for the deity enjoined by Agama Shastra is not at all convincing. Further, the giving of such equitable relief must depend on questions of fact, namely, the income of the property, the reasonable expenses and remuneration for the services, the amounts appropriated by them all this time and so forth which have not been investigated into in this case, because, no doubt, this question of equitable relief has been put forward as a last resort after having lost their battle. We do not think in the circumstances of the case any indulgence should be shown to the Archakas even if it were permissible for the Court in a suit of this description to give such relief.

The result, therefore, is that this appeal must fail and is accordingly dismissed with costs.

Agent for Appellants : *S. Subramaniam.*

Agent for Respondent No. 1 : *M. S. K. Aiyangar.*

G.R./K.S. *Appeal dismissed*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT:—MEHRCHAND MAHAJAN AND S. R. DAS, JJ.

T. Saraswathi Ammal .. *Appellant**

v.

Jagadambal and another .. *Respondents.*

Hindu Law—Dancing girl—Inheritance to—Married and dasi daughters—Preference—Custom of dasi daughter excluding married daughters not proved—Rule of succession applicable.

In the absence of proof of existence of a custom governing succession to the estate of a dancing girl by which a dasi daughter excluded a married daughter, the case has to rest on rules of justice, equity and good conscience as no clear text of Hindu law applies to such a case. A just rule to apply in such a case is one of propinquity according to which the married and dasi daughters would take the mother's property in equal shares.

A community living in one particular district may have evolved a particular custom but from that it does not follow that the community living in another district is necessarily following the same custom.

A dasi daughter admittedly married to the idol and living a life of prostitution cannot claim preference as a maiden over her married sisters to succession under the Mitakshara text. It is inconceivable that when the sages laid down the principle of preference concerning unmarried daughters they would have intended to include a prostitute within the ambit of that text.

On Appeal from the Judgment and Decree, dated the 16th September, 1949, of the High Court of Judicature at Madras (Subba Rao and Chandra Reddi, JJ.) in Appeal No. 162 of 1946 arising out of Judgment and Decree, dated the 30th November, 1945, of the Court of the Subordinate Judge of Tanjore in Original Suit No. 34 of 1945.

S. Ramachandra Iyer, Advocate, for Appellant.

T. R. Srinivasan, Advocate, for Respondent No. 1.

The Judgment of the Court was delivered by

Mahajan, J.—One Thangathammal who was a dasi (dancing girl) lived in the Tanjore district in Madras State and died possessed of some properties. She left her surviving three daughters, Saraswathi, Jagadambal and Meenambal. Jagadambal filed the suit out of which this appeal arises against her sisters for partition of the movable and immovable properties set out in the plaint and for allotment of a third share to her therein. She alleged that her mother was married to one Thyagaraja Pillai, that the properties in suit were the stridhanam properties of her mother who died intestate on 26th July, 1943, and that according to the law or custom of the community to which the parties belonged she and her sisters were entitled to share equally the properties of her mother.

Saraswathi Ammal, the 1st defendant, contested the suit. She pleaded that her mother was not a married woman but a dasi who followed her hereditary occupation and was attached to Shri Saranatha Perumal temple at Tiruchurai in the Tanjore district, that of the three daughters the plaintiff and the 2nd defendant married and lived with their husbands, while she (1st defendant) was duly initiated as a dasi in the said temple and remained unmarried and that according to the law and custom of the community, the mother's property devolved solely on her to the exclusion of the plaintiff and the 2nd defendant. The 2nd defendant supported the 1st defendant's case. The material issue in the suit was issue No. 1 which was in these terms:—

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* Civil Appeal No. 105 of 1952. 27th February, 1953.

"Who is the proper heir of Thangathammal. Whether according to custom as set up by the plaintiff, all the daughters are heirs, or according to the custom put forward by the 1st defendant, the unmarried daughters alone are entitled to inherit."

The subordinate judge dismissed the suit holding that Thangathammal was a dasi and not a married woman, that according to the custom of the dasi community in South India, a dasi daughter is regarded as a nearer heir to the mother than a married daughter and that the 1st defendant was entitled to remain in possession of the suit properties. Against this decision an appeal was taken to the High Court. The High Court reversed the decree of the subordinate judge and held that the custom pleaded by the 1st defendant was not proved and that the rule of propinquity of Hindu law as a rule of justice, equity and good conscience, governed the succession and the married and dasi daughters were equally entitled to the inheritance. It was further held that a dasi daughter was not in the status of a maiden or unmarried daughter for purposes of succession to stridhanam property. Leave to appeal to the Supreme Court was granted under Article 133 of the Constitution.

After hearing the learned counsel for the appellant, we feel no hesitation in concurring with the decision of the High Court. It was contended that the High Court was in error in holding that the custom set up by the defendant was not proved. To prove the custom that a dasi daughter was a preferential heir and excluded her married sisters reliance was placed on the evidence of some members of the community and reference was also made to certain instances. The same kind of evidence was led by the plaintiff in support of her case. The evidence of both the parties on the issue of custom is of an unsatisfactory and inconclusive character and from it no inference can be drawn of the existence of a uniform, certain and ancient custom prevailing in the community on this point.

Out of the defendant's witnesses, the first witness, Rajagopal Pillai, deposed that his wife was the daughter of dasi Kamakshi who had six daughters of whom three were married and three were dasis, that on Kamakshi's death, her dasi daughters alone would take the inheritance and that his wife would be excluded. This statement does not hurt him in any way as his wife will not be bound by what he might state. His bald assertion about the custom in the community is not of much value. He does not disclose any source of his information. In cross-examination he admitted that he did not know a single specific instance where such a custom was enforced. The second witness on the point is the first defendant. She stated that one Tulasi's sister Mangalam got no share in her mother Ammani's properties. In cross-examination it was admitted that Mangalam died about forty years ago, *i.e.*, some time before the defendant was born. She could therefore have no personal knowledge about Ammani's instance. No written record of that inheritance is forthcoming. Mangalam's son Govindaswami Pillai appeared as D.W. 3. He deposed that Mangalam's mother Ammani had divided her properties between her dasi daughters in her lifetime. The instance therefore is not an instance concerning succession and cannot be treated as relevant in this enquiry. The 1st defendant further deposed to an instance in Srirangam when succession opened out on the death of dasi Chellappa. It was said that her property was taken by her dasi daughter Visalakshi to the exclusion of her married daughters Marakatham and Rukmini and that the assets were worth a lakh of rupees. One would have expected some written documents about that succession if it took place in the manner deposed to. In the absence of any evidence from the descendants of Chellappa and in the absence of any documentary evidence regarding that succession it is difficult to place any reliance on this so-called instance. Defendant No. 1 stated that her knowledge of it was only from hearsay, and the requirements of section 32 of the Evidence Act not being fulfilled, her evidence on this point cannot be treated as admissible. The third witness, about whom reference has already been made, apart from deposing as to Mangalam's instance

also deposed about the instance of dasi Meenakshi. Her daughter Jeevaratnam is married to the witness. He said that Meenakshi's dasi daughters inherited her property and that his wife was excluded. The only property alleged to belong to Meenakshi was a house, the value of which is not known. The succession is said to have occurred over twenty years ago. None of the daughters of Meenakshi have been examined as witnesses in the case, to enable the court to find out the details about it and merely on the statement of this witness the instance cannot be held proved. The fourth witness for the defendant is her non-contesting sister. She said nothing on the question of custom. She, however, stated that she was not entitled to a share in the assets of her mother. When asked why she was making that statement, she said that she was saying so because her husband and some elders (whose names were not disclosed) had told her so. Evidence of this character on the question of custom cannot be seriously considered. Venugopal Pillai is the fifth witness for the defendant. He is the husband of the second defendant. His evidence regarding the instance of Chellappa is purely hearsay. He deposed that he had learnt that a dasi's married daughter is not entitled to claim a share as she is not her heir in the presence of a dasi daughter and therefore he told his wife not to claim a share. He did not disclose the source of his information. Janaki Ammal, the sixth witness, is a dasi. She deposed that she has five daughters of whom two are married, one is a dasi and the other two are young girls and that according to their caste custom her properties on her death would devolve on her dasi daughters and that the married daughters must remain content with the presents given at their marriage. In cross-examination she admitted that she was deposing about the caste custom not from any specific instance in which the custom was observed but at the request of the defendant, and that she had heard of this custom from her elders whose names she did not disclose. She further admitted that she had an uncle living but she did not even ask him about the custom. The witness, it appears, knows nothing about the custom and is giving evidence in order to oblige the defendant. The next witness who gave evidence on the issue is D.W. 8, Kamalathammal, a dasi. Her mother was also a dasi. She deposed that her mother's properties were divided between her and her other dasi sister and Amba, her third sister, who was married, was not given a share. In cross-examination she admitted that Amba never asked for a share. Neither was Amba produced, nor any written municipal records showing that the witness actually inherited the property of her mother to the exclusion of Amba. It is difficult to hold this incident proved merely on the vague testimony of this witness. Pappathi Ammal, the next witness in the case, is also a dasi. She deposed that her father's mother's property devolved on her two dasi daughters on her death and that there was no married daughter in existence. This evidence is of a neutral character and is not of much use on the question of custom pleaded in the case. Apart from asserting that in this community dasi's property devolves on her death only on the dasi daughters to the exclusion of married daughters, she cited the instance of Chellappa, a dasi of Srirangam. It was elicited in cross-examination that Chellappa left a house and landed properties. No explanation is forthcoming why documentary evidence of revenue records about this instance has been withheld. Oral evidence as to instances which can be proved by documentary evidence cannot safely be relied upon to establish custom, when no satisfactory explanation for withholding the best kind of evidence is given. The last witness in the case is Rajamani Ammal, another dasi who does service in Sri Ranganathaswami temple. She also referred to the instance of Chellappa. She said that her jewels which were worth Rs. 1,000 would pass on her death to her dasi daughter. She went to the length of saying that if a dasi leaves an only child who is a married woman, even then her properties will pass to a next heir such as a cousin and not a married daughter. This is all the evidence led by the defendant to prove custom. On this meagre and unsatisfactory

material we cannot hold that the custom pleaded is proved. The opinion evidence is not of a convincing character and evidence as to specific instances in support of the custom is really nil.

Our attention was also drawn to a decision of the Madras High Court in *Shanmugathammal* v. *Gomathi Ammal*[1]. In that case the plaintiff, a member of the dasi community, claimed to succeed to her deceased maternal aunt and pleaded that the three surviving sisters of the deceased who were impleaded as defendants were not entitled to inherit because one of them had been adopted by another dancing girl and the other two had become married. The issue raised in the case was whether the custom set up by the plaintiff that among dancing women married women are excluded by a woman who continues to be a dasi is true, valid and enforceable. Certain dasis gave evidence in support of the custom. No evidence whatever was given to the contrary and the custom pleaded was held proved in the circumstances of that case. Emphasis was laid on the circumstance that there was no evidence whatsoever against the plaintiff and defendants 2 and 3 who denied the existence of the custom in their written statements did not venture to deny it on oath in the witness box. The dasi community concerned in that case was a small one consisting originally of twenty houses of which only seven or eight were then in existence and in that situation it was said that the custom might well be one that was well recognized and so much a part of the consciousness of the community, that any dispute like the present dispute amongst so small a body of women would be an extremely rare occurrence and therefore impossible of proof and that the plaintiff could not reasonably be expected to search the presidency for witnesses to speak to some similar dispute in other places. In our opinion, that decision does not furnish a good judicial instance in respect of the custom pleaded in the present case. There is no evidence that the customs of that small community of dasis are applicable to the community of dasis in the present case which form a considerable community in this district. Moreover, the case was decided on the peculiar circumstances of that case on very meagre materials and did not lay down any general customs of dasis on this point.

It is unnecessary to examine the plaintiff's evidence in detail. Suffice it to say that it is more than sufficient to rebut the evidence led by the defendant and it neutralizes its effect, if any. In the absence of proof of existence of a custom governing succession the decision of the case has to rest on the rules of justice, equity and good conscience because admittedly no clear text of Hindu law applies to such a case. The High Court thought that the just rule to apply was one of propinquity to the case, according to which the married and dasi daughters would take the mother's property in equal shares. No exception can be taken to this finding given by the High Court. No other rule was suggested to us leading to a contrary result.

It was argued that the dasis have a distinct status in Hindu society and that a rule has been evolved by judicial decisions under which the state of degradation by itself furnishes a rule of preference in a competition between dasi daughters and married daughters. The judicial decisions referred to concern the community of prostitutes and the rule evolved concerning them has been abrogated by later decisions. It was contended that though the said rule had been abrogated and was no longer applicable to that community concerning which it was evolved, it should by analogy be applied to cases of succession to dasis. *Narasanna* v. *Gangu*[2] was the first case cited. There, an adopted niece of a prostitute dancing girl was preferred to a brother remaining in caste. It was said that the legal relation between a prostitute dancing girl and her undegraded relations remaining in caste becomes severed and they are therefore not entitled to inherit the

1. (1934) 67 M.L.J. 861. 2. (1889) I.L.R. 13 Mad. 133.

estate. In *Subbaratna Madali* v. *Balakrishnaswami Naidu*,[1] the next case cited, the facts were that a deceased woman Palani inherited the property in dispute from her mother Nagu, who inherited it from her mother Mottai, who again inherited it from her father Arunachalam. Arunachalam had two brothers Ramaswami and Mathurbutham and the question in that case was whether Mathurbutham's daughter Seethai or Ramaswami's daughter's son Marudamuthu Mudali was the heir of Palani. The learned judges held that Mathurbutham's daughter was preferential heir to Ramaswami's daughter's son. It was pointed out that the rule of preference based on degradation was no longer good law. It was, however, added that in cases of dancing girls the law remained as it was before. Our attention was also drawn to certain observations in *Subbaraya Pillai* v. *Ramaswami Pillai*[2] at page 177, and to the decision in *Balasundaram* v. *Kamakshi Ammal*.[3] In the former case the learned Judges rejected the broad proposition that degradation of a woman in consequence of her unchastity entails in the eye of the law cessation of the tie of kindred between her and the members of her natural family and also between her and the members of her husband's family. We think that decision on this point is sound in law. Degradation of a woman does not and cannot sever the ties of blood and succession is more often than not determined by ties of blood than by the moral character of the heir.

In *Balasundaram* v. *Kamakshi Ammal*[3] it was held that the property acquired by the mother had been acquired by her as a married woman and notwithstanding her lapse into unchastity, it devolved on her daughters clothed with the ordinary character of property acquired by a Hindu female, that is to say, the daughters took a life estate in it.

The learned counsel attempted to persuade us to hold the custom pleaded proved by the assistance of decisions given in analogous cases and by applying the principles of the rules said to have been enunciated in some of them. Those cases were decided on their own facts and in some of them a rule was enunciated that degraded people are a class by themselves and their degraded relations are preferential heirs to the undegraded ones. As already said, we cannot subscribe to the view that any such rule can be evolved merely on logical grounds. Its existence can only be justified on the basis of established custom. No trustworthy evidence has been led in this case to establish that the daughters of a dasi by marriage lose their right of inheritance and form a separate community. The correct approach to a case where a party seeks to prove a custom is the one pointed out by their Lordships of the Privy Council in *Abdul Hussain Khan* v. *Sona Dero*.[4] It was there said that it is incumbent on a party setting up a custom to allege and prove the custom on which he relies and it is not any theory of custom or deductions from other customs which can be made a rule of decision but only any custom applicable to the parties concerned that can be the rule of decision in a particular case. It is well settled that custom cannot be extended by analogy. It must be established inductively, not deductively and it cannot be established by *a priori* methods. Theory and custom are antitheses, custom cannot be a matter of mere theory but must always be a matter of fact and one custom cannot be deduced from another. A community living in one particular district may have evolved a particular custom but from that it does not follow that the community living in another district is necessarily following the same custom.

The last point taken by the learned counsel was that under Hindu law the 1st defendant as a maiden was entitled to preference over her married sisters. Defendant No. 1 was admittedly married to the idol and she has been on her own showing living a life of prostitution. The text of the Mitakshara dealing with the

1. (1917) 33 M.L.J. 207.
2. (1899) I.L.R. 23 Mad. 171.
3. (1936) 71 M.L.J. 785.
4. (1917) 34 M.L.J. 48: L.R. 45 I.A. 10: I.L.R. 45 Cal. 450 (P.C.).

case of a virgin cannot be applied to her case. [Vide *Tara* v. *Krishna*.[1]] It is inconceivable that when the sages laid down the principle of preference concerning unmarried daughters they would have intended to include a prostitute within the ambit of that text.

For the reasons given above we see no force in this appeal and it is dismissed with costs.

Agent for Appellant: *S. Subramaniam.*

Agent for Respondent No. 1: *M. S. K. Aiyangar.*

G.R.|K.S. *Appeal dismissed.*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT:—M. PATANJALI SASTRI, *Chief Justice*, B. K. MUKHERJEA, VIVIAN BOSE, GHULAM HASAN AND N. H. BHAGWATI, JJ.

The Election Commission, India .. *Appellant**

v.

Saka Venkata Rao .... *Respondent.*

The Union of India .. *Intervener.*

Constitution of India (1950), *Article* 133 (3)—*Scope—Decision of single Judge on question involving interpretation of the Constitution—Grant of certificate of fitness for appeal—Right of appeal—Article 226—Jurisdiction and powers under—Scope—Articles* 190 (3) *and* 192 (1)—*Applicability only to disqualifications arising after election.*

While it is true that constitutional questions could be raised in appeals filed without a certificate under Article 132 of the Constitution, the terms of that Article make it clear that an appeal is allowed from "any judgment, decree or final order of a High Court" provided, of course, the requisite certificate is given, and no restriction is placed on the right of appeal having reference to the number of Judges by him such judgment, decree or final order was passed. Had it been intended to exclude the right of appeal in the case of a judgment, etc., by one Judge, it would have been easy to include a reference to Article 132 also in the opening words of Article 133 (3) as in the immediately preceding clause. The whole scheme of the appellate jurisdiction of the Supreme Court clearly indicates that questions relating to the interpretation of the Constitution are placed in a special category irrespective of the nature of the proceedings in which they may arise, and a right of appeal of the widest amplitude is allowed in cases involving such questions. An appeal to the Supreme Court against the judgment of a single Judge of the High Court is not barred under Article 133 (3) of the Constitution.

The power of a High Court under Article 226 of the Constitution of India, 1950, is to be exercised "throughout the territories in relation to which it exercises jurisdiction", that is to say, the writs issued by the Court cannot run beyond the territories subject to its jurisdiction. The person or authority to whom the High Court is empowered to issue such writs must be "within those territories," which clearly implies that they must be amenable to its jurisdiction either by residence or location within those territories.

A tribunal or authority permanently located and normally carrying on its activities elsewhere (as for instance the Election Commission at New Delhi) exercises jurisdiction within those territorial limits (as in Madras State) so as to affect the rights of parties therein (in an election dispute) cannot be regarded as "functioning" within the territorial limits of the High Court and being therefore amenable to its jurisdiction under Article 226. The rule that cause of action attracts jurisdiction in suits is based on statutory enactment and cannot apply to writs issuable under Article 226, which makes no reference to any cause of action or where it arises, but insists on the presence of the person or authority "within the territories" in relation to which the High Court exercises jurisdiction.

Articles 190 (3) and 192 (1) are applicable only to disqualifications to which a member becomes subject after he is elected as such, and neither the Governor nor Election Commission has jurisdiction to enquire into the disqualification of a member which arose long before his election.

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1. (1907) I.L.R. 31 Bom. 495.

*Civil Appeal No. 205 of 1952. 27th February, 1953.

On Appeal from the Judgment and Order dated the 16th September, 1952, of the High Court of Judicature at Madras (Subba Rao, J.) in Writ Petition No. 599 of 1952 filed under the Special Original Jurisdiction of the High Court under Article 226 of the Constitution of India.

M. C. Setalvad, Attorney-General for India and *G. N. Joshi,* Advocate, with him, for Appellant and Intervener.

Mohan Kumaramangalam, Advocate, for Respondent.

The Judgment of the Court was delivered by

Patanjali Sastri, C.J.—This is an appeal from an order of a single Judge of the High Court of Judicature at Madras issuing a writ of prohibition restraining the Election Commission, a statutory authority constituted by the President and having its offices permanently located at New Delhi, from enquiring into the alleged disqualification of the respondent for membership of the Madras Legislative Assembly.

The respondent was convicted by the Sessions Judge of East Godavari and sentenced to a term of seven years' rigorous imprisonment in 1942, and he was released on the occasion of the celebration of the Independence Day on 15th August, 1947. In June, 1952, there was to be a by-election to a reserved seat in the Kakinada constituency of the Madras Legislative Assembly, and the respondent, desiring to offer himself as a candidate but finding himself disqualified under section 7 (*b*) of the Representation of the People Act, 1951, as five years had not elapsed from his release, applied to the Commission on 2nd April, 1952, for exemption so as to enable him to contest the election. No reply to the application having been received till 5th May, 1952, the last day for filing nominations, the respondent filed his nomination on that day, but no exception was taken to it either by the Returning Officer or any other candidate at the scrutiny of the nomination papers. The election was held on 14th June, 1952 and the respondent, who secured the largest number of votes, was declared elected on 16th June, 1952. The result of the election was published in the Fort St. George Gazette (Extraordinary) on 19th June, 1952, and the respondent took his seat as a member of the Assembly on 27th June, 1952. Meanwhile, the Commission rejected the respondent's application for exemption and communicated such rejection to the respondent by its letter dated 13th May, 1952, which however was not received by him. On 3rd July, 1952, the Speaker of the Assembly read out to the House a communication received from the Commission bringing to his notice, "for such action as he may think fit to take", the fact that the respondent's application for exemption had been rejected. A question as to the respondent's disqualification having thus been raised, the Speaker referred the question to the Governor of Madras who forwarded the case to the Commission for its "opinion" as required by Article 192 of the Constitution. The respondent having thereupon challenged the competency of the reference and the action taken thereon by the Governor, the Commission notified the respondent that his case would be heard on 21st August, 1952. Accordingly, the Chief Election Commissioner (who was the sole Member of the Commission for the time being) went down to Madras and heard the respondent's counsel and the Advocate-General of Madras on 21st August, 1952, when it was agreed that, in case the petitioner's counsel desired to put forward any further representations or arguments, the same should be sent in writing so as to reach the Commission in Delhi by 28th August, 1952, and the Commission should take them into consideration before giving its opinion to the Governor.

On the same day (21st August, 1952), the respondent applied to the High Court under Article 226 of the Constitution contending that Article 192 of the Constitution was applicable only where a member became subject to a disqualification after he was elected but not where, as here, the disqualification arose long before the election, in which case the only remedy was to challenge the validity of

the election before an Election Tribunal. He accordingly prayed for the issue of a writ of *mandamus* or of prohibition directing the Commission to forbear from proceeding with the reference made by the Governor of Madras who was not, however, made a party to the proceeding. On receipt of the *rule nisi* issued by the High Court, the Commission demurred to the jurisdiction of the Court to issue the writs asked for, on the ground that the Commission was not "within the territory in relation to which the High Court exercised jurisdiction". A further objection to the maintainability of the application was also raised to the effect that the action of the Governor in seeking the opinion of the Commission could not be challenged in view of the immunity provided under Article 361 (1), and that the Commission itself, which had not to "decide" the question of disqualification, but had merely to give its "opinion", could not be proceeded against under Article 226. On the merits, the Commission contended that Article 192 was, on its true construction, applicable to cases of disqualification arising both before and after the election and that both the reference of the question as to the respondent's disqualification to the Governor of Madras and the latter's reference of the same to the Commission for its opinion were competent and valid.

The application was heard by Subba Rao, J., who overruled the preliminary objections and held that Article 192 on its true construction applied only to cases of supervening disqualifications and that the Commission had, therefore, no jurisdiction to deal with the respondent's disqualification which arose long before the election took place. He accordingly issued a writ prohibiting the Commission from proceeding with the enquiry in regard to the question referred to it by the Governor under Article 192. The learned Judge, however, granted a certificate under Article 132 that the case involved substantial questions of law as to the interpretation of the Constitution, and the Commission has accordingly preferred this appeal.

A preliminary objection was raised by Mr. Mohan Kumaramangalam, who argued the case for the respondent with marked ability, that the appeal brought from the judgment of a single Judge was barred under Article 133 (3) of the Constitution despite the certificate granted by the learned Judge overruling the same objection which was also raised before him. It has been urged that, so far as civil matters are concerned, the more comprehensive provisions in Article 133 (1) (*c*) for the grant of a certificate of fitness for appeal to the Supreme Court completely overlap Article 132 (1) which relates only to one specific ground, namely, a substantial question of law being involved as to the interpretation of the Constitution, and that the Court's power, therefore, to grant a certificate of fitness on any ground, including the ground referred to above, must be deemed to arise under Article 133 (1) (*c*), with the result that the exercise of such power is excluded by the opening words of clause (3) of that article which bars an appeal from the judgment, decree or final order of one Judge of a High Court. The argument was sought to be reinforced by reference to clause (2) of that Article and the proviso to Article 145 (3) both of which contemplate appeals involving substantial questions of law as to the interpretation of the Constitution being brought without a certificate having been obtained under Article 132. The argument has no force. While it is true that constitutional questions could be raised in appeals filed without a certificate under Article 132, the terms of that Article make it clear that an appeal is allowed from "*any* judgment, decree or final order of a High Court" provided, of course, the requisite certificate is given, and no restriction is placed on the right of appeal having reference to the number of Judges by whom such judgment, decree or final order was passed. Had it been intended to exclude the right of appeal in the case of a judgment, etc., by one Judge, it would have been easy to include a reference to Article 132 also in the opening words of Article 133 (3), as in the immediately preceding clause. If the respondent's contention were accepted, not only would Article 132 become

redundant so far as it relates to *civil* proceedings, but the object of the Explanation to that Article, which was designed to supersede the decision of the Federal Court in *S. Kuppuswami Rao* v. *The King*[1] and thus to secure a speedy determination of constitutional issues going to the root of a case, would be defeated, as the explanation is not made applicable to the same expression "final order" used in Article 133 (1). The whole scheme of the appellate jurisdiction of the Supreme Court clearly indicates that questions relating to the interpretation of the Constitution are placed in a special category irrespective of the nature of the proceedings in which they may arise, and a right of appeal of the widest amplitude is allowed in cases involving such questions. We accordingly overrule the preliminary objection and hold that the appeal is maintainable.

Turning now to the question as to the powers of a High Court under Article 226, it will be noticed that Article 225 continues to the existing High Courts the same jurisdiction and powers as they possessed immediately before the commencement of the Constitution. Though there had been some conflict of judicial opinion on the point, it was authoritatively decided by the Privy Council in the *Parlakimedi case*[2] that the High Court of Madras—the High Courts of Bombay and Calcutta were in the same position—had no power to issue what were known as high prerogative writs beyond the local limits of its original civil jurisdiction, and the power to issue such writs within those limits was derived by the Court as successor of the Supreme Court which had been exercising jurisdiction over the Presidency Town of Madras and was replaced by the High Court established in pursuance of the Charter Act of 1861. The other High Courts in India had no power to issue such writs at all. In that situation, the makers of the Constitution, having decided to provide for certain basic safeguards for the people in the new set-up, which they called fundamental rights, evidently thought it necessary to provide also a quick and inexpensive remedy for the enforcement of such rights and, finding that the prerogative writs, which the Courts in England had developed and used whenever urgent necessity demanded immediate and decisive interposition, were peculiarly suited for the purpose, they conferred, in the States' sphere, new and wide powers on the High Courts of issuing directions, orders, or writs primarily for the enforcement of fundamental rights, the power to issue such directions, etc., "for any other purpose" being also included with a view apparently to place all the High Courts in this country in somewhat the same position as the Court of King's Bench in England. But wide as were the powers thus conferred, a two-fold limitation was placed upon their exercise. In the first place, the power is to be exercised "throughout the territories in relation to which it exercises jurisdiction", that is to say, the writs issued by the Court cannot run beyond the territories subject to its jurisdiction. Secondly, the person or authority to whom the High Court is empowered to issue such writs must be "within those territories", which clearly implies that they must be amenable to its jurisdiction either by residence or location within those territories.

Such limitation is indeed a logical consequence of the origin and development of the power to issue prerogative writs as a special remedy in England. Such power formed no part of the original or the appellate jurisdiction of the Court of King's Bench. As pointed out by Prof. Holdsworth (History of English Law, Vol. I, p. 212, *et seq.*) these writs had their origin in the exercise of the King's prerogative power of superintendence over the due observance of the law by his officials and tribunals, and were issued by the Court of King's Bench—*habeas corpus,* that the King may know whether his subjects were lawfully imprisoned or not; *certiorari,* that he may know whether any proceedings commenced against them are conformable to the law; *mandamus,* to ensure that his officials did such

1. (1947) F.C.R. 180: (1947) F.L.J. 129 (140) : I.L.R. (1944) Mad. 457 (P. C.). 110: (1948) 1 M.L.J. 103.
2. (1943) 2 M.L.J. 254: L.R. 70 I.A.

acts as they were bound to do under the law, and prohibition to oblige the inferior tribunals in his realm to function within the limits of their respective jurisdiction. See also the introductory remarks in the judgment in the *Parlakimedi* case[1]. These writs were thus specifically directed to the persons or authorities against whom redress was sought and were made returnable in the Court issuing them and, in case of disobedience, were enforceable by attachment for contempt. These characteristics of the special form of remedy rendered it necessary for its effective use that the persons or authorities to whom the Court was asked to issue these writs should be within the limits of its territorial jurisdiction. We are unable to agree with the learned Judge below that if a tribunal or authority permanently located and normally carrying on its activities elsewhere exercises jurisdiction within those territorial limits so as to affect the rights of parties therein, such tribunal or authority must be regarded as "functioning" within the territorial limits of the High Court and being therefore amenable to its jurisdiction under Article 226.

It was, however, urged by the respondent's counsel that the High Court had jurisdiction to issue a writ to the Commission at New Delhi because the question referred to it for decision related to the respondent's right to sit and vote in the Legislative Assembly at Madras and the parties to the dispute also resided in the State of Madras. The position, it was claimed, was analogous to the Court exercising jurisdiction over persons outside the limits of its jurisdiction, provided the cause of action arose within those limits. Reliance was placed upon the following observations of the Privy Council in the *Parlakimedi case*[1]:

"The question of jurisdiction must be regarded as one of substance and that it would not have been within the competence of the Supreme Court to claim jurisdiction over such a matter as the present of issuing *certiorari* to the Board of Revenue on the strength of its location in the Town. Such a view would give jurisdiction to the Supreme Court in the matter of the settlement of rents of ryoti holdings in Ganjam between parties not otherwise subject to its jurisdiction, which it would not have had over the Revenue Officer who dealt with the matter at first instance".

We cannot accede to this argument. The rule that cause of action attracts jurisdiction in suits is based on statutory enactment and cannot apply to writs issuable under Article 226 which makes no reference to any cause of action or where it arises but insists on the presence of the person or authority "within the territories" in relation to which the High Court exercises jurisdiction. Nor is much assistance to be derived from the observations quoted above. That case arose out of proceedings before a special Revenue Officer for settlement of fair rent for certain holdings within the Zemindary Estate of Parlakimedi situated beyond the local limits of the original civil jurisdiction of the Madras High Court. Dissatisfied with the settlement made by the Revenue Officer, the ryots appealed to the Board of Revenue which had its offices at Madras. The appeal was accepted by a single member of the Board who reduced the rent as desired by the ryots. The Zemindar appealed by way of revision to the Collective Board which sanctioned an enhancement. Thereupon the ryots applied to the High Court for the issue of a writ of *certiorari* to bring up and quash the proceedings of the Collective Board which passed the order complained of in the Town of Madras. The Privy Council considered the question of jurisdiction from two separate standpoints:—

"(*a*) independently of the local civil jurisdiction which the High Court exercises over the Presidency town; or

(*b*) solely by reason thereof, as an incident of the location of the Board of Revenue within the town".

On question (*a*), they examined the powers of the Supreme Court at Madras to issue *certiorari* beyond the Presidency Town under clause 8 of the Charter of

1. (1943) 2 M.L.J. 254: L.R. 70 I.A. 129 (140): I.L.R. (1944) Mad. 457 (P.C.).

1800, as it was suggested that the High Court succeeded to the jurisdiction and powers of the Supreme Court which had been granted the same powers of issuing prerogative writs as the Court of King's Bench in England throughout the Province, and they recorded their conclusion thus:

> Their Lordships are not of opinion that the Supreme Court would have had any jurisdiction to correct or control a country court of the Company deciding a dispute between Indian inhabitants of Ganjam about the rent payable for land in that district.

Then, dealing with question (*b*) and referring to their decision in *Mrs. Annie Besant's case*[1] that the High Courts of Calcutta, Madras and Bombay had power to issue *certiorari* in the exercise of their local jurisdiction, they held that the principle could not be applied

> "to the settlement of rent for land in Ganjam merely on the basis of the location of the Board of Revenue as a body which is ordinarily resident or located within the town of Madras, or on the basis that the order complained of was made within the town. If so, it would seem to follow that the jurisdiction of the High Court would be avoided by the removal of the Board of Revenue beyond the outskirts of the town and that it would never attach but for the circumstance that an appeal is brought to, or proceedings in revision taken by the Board of Revenue".

Then followed the passage already quoted on which the respondent's counsel laid special stress. It will thus be seen that the decision is no authority for dispensing with the necessity of the presence or location, within the local limits of the Court's jurisdiction, of the person or authority to whom the writ is to be issued, as the basis of its power to issue it. Their Lordships considered, in the peculiar situation they were dealing with, that the mere location of the appellate authority alone in the Town of Madras was not a sufficient basis for the exercise of jurisdiction whereas both the subject-matter, *viz.*, the settlement of rent for lands in Ganjam, and the Revenue Officer authorised to make the settlement at first instance were outside the local limits of the jurisdiction of the High Court. If the Court in Madras were recognised as having jurisdiction to issue the writ of *certiorari* to the appellate authority in Madras, it would practically be recognising the Court's jurisdiction over the Revenue Officer in Ganjam and the settlement of rents for lands there, which their Lordships held it never had. That was the "substance" of the matter they were looking at, and their observations lend no support to the view that if the subject-matter or the cause of action and the parties concerned were within the territorial limits of the jurisdiction, the High Court could issue prerogative writs to persons or authorities who are not within those limits. In any case, the decision did not turn on the construction of a statutory provision similar in scope, purpose or wording to Article 226 of the Constitution, and is not of much assistance in the construction of that Article.

It was said that it could not have been contemplated that an inhabitant of the State of Madras, feeling aggrieved by a threatened interference with the exercise of his rights in that State by an authority located in Delhi and acting without jurisdiction, should seek his remedy under Article 226 in the Punjab High Court. It is a sufficient answer to this argument of inconvenience to say that, the language of the Article being reasonably plain, it is idle to speculate as to what was or was not contemplated.

Our attention has been called to certain decisions of High Courts dealing with the situation where the authority claiming to exercise jurisdiction over a matter at first instance is located in one State and the appellate authority is located in another State. It is not necessary for the purposes of this appeal to decide which High Court would have jurisdiction in such circumstances to issue prerogative writs under Article 226.

1. (1919) 37 M.L.J. 139: L.R. 46 I.A. 176: I.L.R. 43 Mad. 146 (P.C.)

In the view we have expressed above as to the applicability of Article 226 to the present case, it is unnecessary to enter upon a discussion of the question whether Article 192 (1) applies only to members who, having been already elected, have become subject to a disqualification by reason of events happening after their election; but having heard the point fully argued before us, we think it right to express our opinion thereon, especially as both sides have invited us to do so in view of its general importance.

The relevant provisions of the Constitution on which the determination of the question turns are as follows:—

190. (3) If a member of a House of the Legislature of a State—

(a) becomes subject to any of the disqualifications mentioned in clause (1) of Article 191; or

(b) resigns his seat by writing under his hand addressed to the Speaker or the Chairman, as the case may be,

his seat shall thereupon become vacant.

191. (1) A person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State—

(a) if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder;

(b) if he is of unsound mind and stands so declared by a competent court;

(c) if he is an undischarged insolvent;

(d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State or is under any acknowledgment of allegiance or adherence to a foreign State;

(e) if he is so disqualified by or under any law made by Parliament.

192. (1) If any question arises as to whether a member of a House of the Legislature of a State has become subject to any of the disqualifications mentioned in clause (1) of Article 191, the question shall be referred for the decision of the Governor and his decision shall be final.

(2) Before giving any decision on any such question, the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion.

193. If a person sits or votes as a member of the Legislative Assembly or the Legislative Council of a State...........when he knows that he is not qualified or that he is disqualified for membership thereof, or that he is prohibited from so doing by the provisions of any law made by Parliament or the Legislature of the State, he shall be liable in respect of each day on which he so sits or votes to a penalty of five hundred rupees to be recovered as a debt due to the State.

As has been stated already, the respondent's conviction and sentence in 1942 disqualified him both for being chosen as, and for being, a member of the Legislative Assembly under Article 191 (1) (e) read with section 7 of the Representation of the People Act, 1951, passed by Parliament, the period of five years since his release on August 15, 1947, not having elapsed before the date of the election. The respondent having thus been under a disqualification since before his nomination on March 15, 1952, could he be said to have "become" subject to that disqualification within the meaning of Article 192? The rival contentions of the parties centred round the true interpretation to be placed on that word in the context of the provisions quoted above.

The Attorney-General argued that the whole fasciculus of the provisions dealing with "disqualifications of Members", *viz.*, Articles 190 to 193, should be read together, and as Articles 191 and 193 clearly cover both pre-existing and supervening disqualifications, Articles 190 and 192 should also be similarly understood as relating to both kinds of disqualification. According to him all these provisions together constitute an integral scheme whereby disqualifications are laid down and machinery for determining questions arising in regard to them is also provided. The use of the word "become" in Articles 190 (3) and 192 (1) is not inapt, in the context, to include within its scope pre-existing disqualifications also, as becoming subject to a disqualification is predicated of "a member of a House of

Legislature", and a person, who, being already disqualified, gets elected, can, not inappropriately, be said to "become" subject to the disqualification *as a member* as soon as he is elected. The argument is more ingenious than sound. Article 191, which lays down the same set of disqualifications for election as well as for continuing as a member, and Article 193 which prescribes the penalty for sitting and voting when disqualified, are naturally phrased in terms wide enough to cover both pre-existing and supervening disqualifications; but it does not necessarily follow that Articles 190 (3) and 192 (1) must also be taken to cover both. Their meaning must depend on the language used which, we think, is reasonably plain. In our opinion these two Articles go together and provide a remedy when a member incurs a disqualification after he is elected as a member. Not only do the words "becomes subject" in Article 190 (3) and "has become subject" in Article 192 (1) indicate a *change in the position* of the member *after* he was elected, but the provision that his seat is to become *thereupon* vacant, that is to say, the seat which the member was filling theretofore becomes vacant on his becoming disqualified, further reinforces the view that the Article contemplates only a sitting member incurring the disability while so sitting. The suggestion that the language used in Article 190 (3) can equally be applied to a pre-existing disqualification as a member can be supposed to vacate his seat the moment he is elected is a strained and far-fetched construction and cannot be accepted. The Attorney-General admitted that if the word "is" were substituted for "becomes" or "has become", it would more appropriately convey the meaning contended for by him, but he was unable to say why it was not used.

It was said that on the view that Articles 190 (3) and 192 (1) deal with disqualifications incurred after election as a member, there would be no way of unseating a member who became subject to a disqualification *after* his nomination and *before* his election, for, such a disqualification is no ground for challenging the election by an election petition under Article 329 of the Constitution read with section 100 of the Representation of the People Act, 1951. If this is an anomaly, it arises out of a lacuna in the latter enactment which could easily have provided for such a contingency, and it cannot be pressed as an argument against the respondent's construction of the constitutional provisions. On the other hand, the Attorney-General's contention might, if accepted, lead to conflicting decisions by the Governor dealing with a reference under Article 192 and by the Election Tribunal inquiring into an election petition under section 100 of the Parliamentary statute referred to above.

For the reasons indicated we agree with the learned Judge below in holding that Articles 190 (3) and 192 (1) are applicable only to disqualifications to which a member becomes subject after he is elected as such, and that neither the Governor nor the Commission has jurisdiction to enquire into the respondent's disqualification which arose long before his election.

As, however, we have held that the High Court was not competent under Article 226 to issue any prerogative writ to the appellant Commission, the appeal is allowed and the writ of prohibition issued by the learned Judge is quashed. We make no order as to costs.

Agent for Appellant and Intervener: *G. H. Rajadhyaksha.*

Agent for Respondent: *S. Subramaniam.*

G.R.|K.S. *Appeal allowed.*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT:—M. PATANJALI SASTRI, *Chief Justice*, B. K. MUKHERJEA, VIVIAN BOSE AND N. H. BHAGWATI, JJ.

Asrumati Debi .. *Appellant**

v.

Kumar Rupendra Deb Raikot and others .. *Respondents.*

Letters Patent (Calcutta), clause 13—Order under for transfer of suit to High Court to be tried in its Extraordinary Original Civil Jurisdiction—If a "judgment" under clause 15 for purposes of appeal.

An order under clause 13 of the Letters Patent (Calcutta) allowing an application for transfer of a suit to the High Court to be tried in its Extraordinary Original Civil Jurisdiction is not a "judgment" within the meaning of clause 15 of the Letters Patent for purposes of appeal. Meaning of the word "Judgment" and conflicting decisions thereon considered.

On Appeal by Special Leave from the Judgment and Order dated the 16th May, 1951, of the High Court of Judicature at Calcutta (Harries, C.J. and Das, J.) in Appeal from Original Order No. 136 of 1949 arising out of Judgment and Order dated the 25th April, 1949, of the said High Court (Banerjee, J.) in Extraordinary Suit No. 2 of 1948.

N. C. Chatterjee, Senior Advocate (*B. Sen*, Advocate, with him), for Appellant.

S. P. Sinha, Senior Advocate (*A. K. Dutt*, Advocate, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Mukherjea, J.—This appeal, which has come before us on special leave, is directed against a judgment of an Appellate Bench of the Calcutta High Court, dated the 16th of May, 1951, by which the learned Judges dismissed an appeal taken against an order, made by a single Judge on the Original Side of that Court, under clause 13 of the Letters Patent, on the preliminary ground that the appeal was not competent in law.

There is no dispute about the material facts of the case which lie within a short compass. On 7th August, 1947, a suit was filed by the respondent Kumar Rupendra Deb Raikot in the Court of the Subordinate Judge at Jalpaiguri in West Bengal,—being Title Suit No. 40 of 1947,—for recovery of possession of a large estate known as Baikunthapur Raj situated in that district, on the allegation that he being the eldest son of late Prosanna Deb Raikot, the last holder of the estate, became entitled to the properties on the death of his father under a custom of the family which excludes all females from inheritance and follows the rule of lineal primogeniture in matters of succession. Prosanna died in December, 1946, and Asrumati Debi, the appellant before us, is admittedly his widow. There was no son born to her and her only child is a daughter named Prativa. According to the plaintiff respondent, his mother Renchi Debi, who is Lepcha by birth was another lawfully wedded wife of Prosanna and was married to the latter in what is known as the 'Gandharba' form. Prosanna had three sons by this wife, the plaintiff being the eldest. Asrumati, it is alleged, took possession of the bulk of the properties comprised in the estate on the death of her husband, although she had no legal right to the same and it was to evict her from these properties that this suit was brought. Besides Asrumati, the plaintiff also impleaded three other agnatic relations of the deceased (who are defendants Nos. 2 to 4) and also his own two younger brothers as defendants to the suit.

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*Civil Appeal No. 92 of 1952. 27th February, 1953.

Asrumati filed her written statement on 19th January, 1948, and the main defence put forward by her was that there was no legal marriage between her husband and the plaintiff's mother, the latter being only one of the several mistresses of her husband. She denied that there was any custom in the family under which females were excluded from inheritance. The defendants 2 to 4 also filed written statements, challenging the legitimacy of the plaintiff and his claim to succession, and put forward their own rights as heirs under the customary law obtaining in the family.

On 30th April, 1948, the plaintiff presented an application in the Original Side of the High Court of Calcutta under clause 13 of the Letters Patent, praying for transfer of the suit filed in the Jalpaiguri Court to the High Court to be tried in its Extraordinary Original Civil Jurisdiction. This application was heard by Banerjee, J., sitting singly and by his order dated the 25th of April, 1949, the learned Judge allowed the application, substantially on the ground that having regard to the atmosphere of prejudice that was created in the locality by the supporters of the defendant, who wielded a considerable influence in the district, the plaintiff might have a legitimate apprehension that he would not get fair trial in the district court.

Against this decision the defendant No. 1 took an appeal to the Appellate Bench of the High Court of Calcutta and the learned Judges (Trevor Harries, C.J. and Das, J.) dismissed the appeal on the ground that the order appealed against was not a 'judgment' within the meaning of clause 15 of the Letters Patent. It is the propriety of this decision that has been challenged before us in this appeal.

The High Court of Calcutta in holding the appeal before it to be incompetent based its decision entirely upon an earlier pronouncement of a Division Bench of the same Court, where it was held by Mookerjee, A.C.J., sitting with Fletcher, J., that an order for transfer of a suit made under clause 13 of the Letters Patent was not a 'judgment' within the meaning of clause 15, see *Khatizan* v. *Sonairam*[1]. Reliance was placed by the learned Judges for this view upon the pronouncement of Sir Richard Couch, C.J., in the well-known and often cited case of *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company*[2], where the learned Chief Justice said as follows:—

> "We think that 'judgment' in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final or preliminary, or interlocutory, the difference between them bring that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined".

The identical question, whether an order for transfer under clause 13 of the Letters Patent is a 'judgment' for purposes of appeal, was pointedly raised before the Madras and the Rangoon High Courts, and while the Madras High Court, vide *Krishna Reddy v. Thanikachala*[3], answered the question in the affirmative, a definitely negative answer was given by the Rangoon High Court *vide,* In re *Dayabhai* v. *Murugappa Chettiar*[4]. The Madras decision purports to be in accordance with the view enunciated by a Full Bench of that court in *Tuljaram* v. *Alagappa*[5] where Sir Arnold White, C.J., sitting with Krishnaswami Aiyar and Ayling, JJ., formulated a definition of 'judgment' in a comprehensive manner differing from the wide interpretation put upon the term in the earlier case of *DeSouza* v. *Coles*[6]. "The test seems to me" thus observed the learned Chief Justice, "to be not what is the form of the adjudication, but what is its effect on the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding

1. (1920) I.L.R. 47 Cal. 1104.
2. (1872) 8 Ben. L.R. 433.
3. (1923) 45 M.L.J. 153: I.L.R. 47 Mad. 136.
4. (1935) I.L.R. 13 Rang. 457 (F.B.).
5. (1910) 21 M.L.J. 1: I.L.R. 35 Mad. 1 (F.B.).
6. (1868) 3 M.H.C.R. 384.

so far as the court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause". This decision, it may be pointed out, has not only been adhered to in Madras since then without any comment, but the Calcutta High Court has in several instances manifested a marked leaning towards it, vide *Mathura Sundari* v. *Haran Chandra*,[1] *Chandi Charan* v. *Jnanendra*[2] and *Lea Badin* v. *Upendra Mohan Roy Chaudhury*.[3]

On the other hand, a Full Bench, (In re *Dayabhai* v. *Murugappa Chettiar*[4]) of the Rangoon High Court presided over by Page, C.J., took a view altogether different from that of the Calcutta and the Madras High Courts as regards the meaning of the word 'judgment' in clause 13 of the Rangoon Letters Patent, which corresponds to clause 15 of the Letters Patent of the Calcutta and Madras High Courts. It was held by the Full Bench of the Rangoon High Court that the term 'judgment' in the Letters Patent means and is a decree in a suit by which the rights of the parties in the suit are determined. In other words, a 'judgment' is not what is defined in section 2 (9) of the Civil Procedure Code as being the statement given by the Judge of the grounds of a decree or order, but is a judgment in its final and definitive sense embodying a decree. A final judgment is an adjudication which conclusively determines the rights of the parties with regard to all matters in issue in the suit, whereas a preliminary or interlocutory judgment is a decree by which the right to the relief claimed in the suit is decided but under which further proceedings are necessary before a suit in its entirety can be disposed of. Save and except final and preliminary judgments thus defined, all other decisions are 'orders' and they do not come within the description of 'judgments' under the relevant clause of the Letters Patent. No 'order' is appealable unless an appeal is expressly provided against it by the Civil Procedure Code or some other Act of the Legislature. In this view an 'order' for transferring a suit from a subordinate court to the High Court could not possibly be regarded as a 'judgment', and consequently no appeal would lie against such an order. This definition of 'judgment' has been accepted in several cases by the Nagpur High Court, vide *Kunwar Lal Singh* v. *Uma Devi*,[5] *Shankar Deo* v. *Kalyani*,[6] and substantially this seems to be the view of the Allahabad High Court also, vide *Shahzadi Begam* v. *Alakh Nath*[7]. A Full Bench of the Lahore High Court, vide *Shaw Hari* v. *Sonah Malbeli Ram*[8], however, has refused to accept this view and has preferred to follow the tests enumerated by the Calcutta and the Madras High Courts. The Bombay High Court accepted the Calcutta view from the very beginning, vide *Sonebai* v. *Ahmedbhai*.[9]

In view of this wide divergence of judicial opinion, it may be necessary for this court at some time or other to examine carefully the principles upon which the different views mentioned above purport to be based and attempt to determine with as much definiteness as possible the true meaning and scope of the word 'judgment' as it occurs in clause 15 of the Letters Patent of the Calcutta High Court and in the corresponding clauses of the Letters Patent of the other High Courts. We are, however, relieved from embarking on such enquiry in the present case as we are satisfied that in none of the views referred to above could an order of the character which we have before us, be regarded as a 'judgment' within the meaning of clause 15 of the Letters Patent.

Couch, C.J., as said already, defined 'judgment' to be a decision which determines some right or liability affecting the merits of the controversy between the parties. It is true that according to the learned Chief Justice an adjudication, in

1. (1915) I.L.R. 43 Cal. 857.
2. (1917) 29 C.L.J. 225 at 229.
3. (1934) 39 C.W.N. 155.
4. (1935) I.L.R. 13 Rang. 457 (F.B.).
5. I.L.R. (1945) Nag. 286: A.I.R. 1945 Nag. 156.
6. I.L.R. (1947) Nag. 351: A.I.R. 1948 Nag. 85.
7. (1935) I.L.R. 57 All. 983 (F.B.).
8. (1942) I.L.R. 23 Lah. 491.
9. (1872) 9 Bom.H.C.R. 398.

order that it might rank as a 'judgment', need not decide the case on its merits, but it must be the final pronouncement of the court making it, the effect of which is to dispose of or terminate the suit or proceeding. This will be apparent from the following observations made by Couch, C.J., in the course of his judgment in the case referred to above:

> "It is, however, said that this Court has already put a wider construction upon the word 'judgment' in clause 15 by entertaining appeals in cases where the *plaint has been rejected as insufficient*, or as showing that *the claim is barred by limitation*, and also in cases where orders have been made in execution. These however are both within the above definition of a judgment, and it by no means follows that, because we hold the order in the present case not to be appealable, we should be bound to hold the same in the cases referred to. For example, *there is an obvious difference between an order for the admission of a plaint and an order for its rejection.* The former determines nothing, but is merely the first step towards putting the case in a shape for determination. The latter determines finally so far as the Court which makes the order is concerned that the suit, as brought, will not lie. The decision, therefore, is a judgment in the proper sense of the term".

It cannot be said, therefore, that according to Sir Richard Couch every judicial pronouncement on a right or liability between the parties is to be regarded as a 'judgment', for in that case there would be any number of judgments in the course of a suit or proceeding, each one of which could be challenged by way of appeal. The judgment must be the final pronouncement which puts an end to the proceeding so far as the court dealing with it is concerned. It certainly involves the determination of some right or liability, though it may not be necessary that there must be a decision on the merits. This view, which is implied in the observation of Sir Richard Couch, C.J., quoted above, has been really made the basis of the definition of 'judgment' by Sir Arnold White, C.J., in the Full Bench decision of the Madras High Court to which reference has been made, vide *Tuljaram* v. *Alagappa*[1]. According to White, C.J., to find out whether an order is a 'judgment' or not, we have to look to its effect upon the particular suit or proceeding in which it is made. If its effect is to terminate the suit or proceeding, the decision would be a 'judgment' but not otherwise. As this definition covers not only decisions in suits or actions but 'orders' in other proceedings as well which start with applications, it may be said that any final order passed on an application in the course of a suit, *e.g.*, granting or refusing a party's prayer for adjournment of a suit or for examination of a witness, would also come within the definition. This seems to be the reason why the learned Chief Justice qualifies the general proposition laid down above by stating that

> "an adjudication on an application, which is nothing more than a step towards obtaining a final adjudication in the suit, is not a judgment within the meaning of Letters Patent".

As stated already, it is not our purpose in the present case to frame an exhaustive definition of the word 'judgment' as used in clause 15 of the Letters Patent. We have indicated what the essential features of a 'judgment' are according to both the Calcutta and the Madras High Courts and all that we need say is, that in our opinion, an order under clause 13 of the Letters Patent does not satisfy the tests of a 'judgment' as formulated by either of these High Courts.

The question that requires determination in an application under clause 13 of the Letters Patent is, whether a particular suit should be removed from any court which is subject to the superintendence of the High Court and tried and determined by the latter as a court of extraordinary original jurisdiction. It is true that unless the parties to the suit are agreed on this point, there must arise a controversy between them which has to be determined by the court. In the present case, a single judge of the High Court has decided this question in favour of the plaintiff in the suit; but a decision on any and every point in dispute between the parties to a suit is not necessarily a 'judgment'. The order in the present case

1. (1910) 21 M.L.J. 1: I.L.R. 35 Mad. 1.

neither affects the merits of the controversy between the parties in the suit itself, nor does it terminate or dispose of the suit on any ground. An order for transfer cannot be placed in the same category as an order rejecting a plaint or one dismissing a suit on a preliminary ground as has been referred to by Couch, C.J., in his observations quoted above. An order directing a plaint to be rejected or taken off the file amounts to a final disposal of the suit so far as the court making the order is concerned. That suit is completely at an end and it is immaterial that another suit could be filed in the same or another court after removing the defects which led to the order of rejection. On the other hand, an order of transfer under clause 13 of the Letters Patent, is, in the first place, not at all an order made by the court in which the suit is pending. In the second place, the order does not put an end to the suit which remains perfectly alive and that very suit is to be tried by another court, the proceedings in the latter, to be taken only from the stage at which they were left in the court in which the suit was originally filed.

Mr. Chatterjee in the course of his arguments placed considerable reliance upon the pronouncement of the Calcutta High Court in *Hadjee Ismail* v. *Hadjee Mahomed*[1], where it was held by Couch, C.J., and Pontifex, J., that an order refusing to rescind leave to sue granted under clause 12 of the Letters Patent was a 'judgment' under clause 15 and could be challenged by way of appeal. This decision was followed by the Bombay High Court in *Vaghoji* v. *Camaji*[2]; and it is argued by Mr. Chatterjee that there is no difference in principle between an order of that description and an order transferring a suit under clause 13 of the Letters Patent. The contention of Mr. Chatterjee undoubtedly receives support from the judgment of the Madras High Court in *Krishna Reddy* v. *Thanikachala*[3] where precisely the same line of reasoning was adopted. In our opinion, this reasoning is not sound and there is an essential difference between an order rescinding or refusing to rescind leave to sue granted under clause 12 of the Letters Patent and one removing a suit from a subordinate court to the High Court under clause 13 of the Letters Patent, and this distinction would be apparent from the observations of Arnold White, C.J., in the Madras Full Bench case, vide *Tuljaram* v. *Alagappa*[4] mentioned above, to which sufficient attention does not appear to have been paid by the learned Judges of the same Court who decided the later case. Referring to the decision of the Bombay High Court in *Vaghoji* v. *Camaji*[2], White, C.J., observed as follows:

> "As regards the Bombay authorities I may refer to *Vaghoji* v. *Camaji*[2], where it was held that an appeal lay from an order dismissing a Judge's summons to show cause why leave granted under clause 12 of the Letters Patent should not be rescinded and the plaint taken off the file. Here the *adjudication asked for, if made, would have disposed of the suit.* So also would an order made under an application to revoke a submission to arbitration. I think such an order is appealable."

Leave granted under clause 12 of the Letters Patent constitutes the very foundation of the suit which is instituted on its basis. If such leave is rescinded, the suit automatically comes to an end and there is no doubt that such order would be a judgment. If, on the other hand, an order is made dismissing the Judge's summons to show cause why the leave should not be rescinded, the result is, as Sir Lawrence Jenkins pointed out, vide *Vaghoji* v. *Camaji*[2], that a decision on a vital point adverse to the defendant, which goes to the very root of the suit, becomes final and decisive against him so far as the court making the order is concerned. This brings the order within the category of a 'judgment' as laid down in the Calcutta cases. We need not express any final opinion as to the propriety or otherwise of this view. It is enough for our purpose to state that there is a difference between an order refusing to rescind leave granted under

1. (1874) 13 Beng.L.R. 91.
2. (1904) I.L.R. 29 Bom. 249.
3. (1923) 45 M.L.J. 153: I.L.R. 47 Mad. 136.
4. (1910) 21 M.L.J. 1: I.L.R. 35 Mad. 1 (F.B.).

clause 12 of the Letters Patent and one under clause 13 directing the removal of a suit from one court to another, and there is no good reason to hold that the principle applicable to one applies to the other also.

The result, therefore, is that, in our opinion, the view taken by the High Court is right and this appeal should fail, and is dismissed with costs.

Agent for Appellant: *P. K. Bose.*

Agent for Respondent No. 1: *Sukumar Ghose* for *P. C. Dutt.*

G.R.|K.S. *Appeal dismissed.*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT:—MEHRCHAND MAHAJAN AND S. R. DAS, JJ.

Namdeo Lokman Lodhi .. *Appellant**

v.

Narmadabai and others .. *Respondents.*

Transfer of Property Act (IV of 1882), section 111 (g)—*Notice if necessary for determination of lease for non-payment of rent where lease was executed before the coming into force of the Transfer of Property Act, section* 114—*Discretion to grant relief against forfeiture.*

Section 111 (*g*) of the Transfer of Property Act cannot be made to govern a lease which was executed in the year 1870. The lease is excluded from the provisions of the Act by section 2. The amendment made by Act (XX of 1929), not being retrospective cannot touch such a lease.

The provision as to notice in writing as a preliminary to a suit for ejectment based on forfeiture of a lease is not based on any principle of justice, equity or good conscience and cannot govern leases made prior to the coming into force of the Transfer of Property Act, 1882, or to lease executed prior to 1st April, 1930.

In exercising the discretion under section 114 of the Transfer of Property Act to grant relief against forfeiture for non-payment of rent, each case must be judged by itself, the delay, the conduct of the parties and the difficulties to which the landlord has been put should be weighed against the tenant.

On appeal from the Judgment and Decree, dated the 23rd June, 1949, of the High Court of Judicature at Bombay (Chagla, C.J. and Gajendragadkar, J.) in Appeal No. 557 of 1945 from Appellate Decree against the Judgment and Decree, dated the 19th March, 1945, of the Court of Small Causes, Poona, in Civil Appeal No. 175 of 1943, arising from the Decree, dated the 31st March, 1943, of the Court of the Extra Joint Sub-Judge of Poona in Suit No. 858 of 1941.

C. K. Daphtary, Solicitor-General for India (*J. B. Dadachanji,* Advocate, with him), for Appellant.

V. M. Tarkunde, Advocate, for Respondents.

The Judgment of the Court was delivered by

Mahajan, J.—This is an appeal by Defendant No. 1 from the decree of the High Court of Judicature at Bombay in Second Appeal No. 557 of 1945, whereby the High Court confirmed the decree of the lower courts granting possession of land to the respondents on the forfeiture of a lease. The appeal is confined to survey No. 86|2 at Mundhava in Poona district.

The principal question arising for decision in the appeal is whether notice as contemplated by section 111 (*g*) of the Transfer of Property Act is necessary for the determination of a lease for non-payment of rent even where such lease was executed before the coming into force of the Transfer of Property Act. The only other question that falls for determination is whether the High Court should have

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*Civil Appeal No. 154 of 1952. 27th February, 1953.

interfered with the discretion of the lower courts in refusing relief against forfeiture in the circumstances of this case.

The present respondents are the daughter and grandsons of the original plaintiff Vinayakbhat. His adoptive mother was Ramabai. She owned two inam lands at Mundhava which were then numbered Pratibhandi Nos. 71 and 72. Present Survey Nos. 86|1 and 86|2 together correspond to old Pratibhandi No. 71. On 1st July, 1863, Ramabai, while she was in financial difficulties, passed a permanent lease of both these numbers to one Ladha Ibrahim Sheth. The lessee paid a premium of Rs. 999 for the lease, and also agreed to pay a yearly rent of Rs. 80 to Ramabai during her lifetime and after her death a yearly amount equal to the assessment of the two lands to the heirs of Ramabai. The lease provided that in default of payment of rent the tenant's rights would come to an end. On 18th August 1870 Ladha Ibrahim sold his tenancy rights to one Girdhari Balaram Lodhi for Rs. 7,999. The sale deed provided that in default of payment of rent to Ramabai or her heirs, the purchaser would have no rights whatsoever left over the property. On the same day the purchaser passed a rent note in favour of Ramabai. The rent note provided for the payment of the agreed rent in the month of Poush every year, and stated that in case of default the tenant or his heirs would have no right over the land. Defendant No. 1 and the other defendants are the grandsons of Seth Girdhari Balaram.

In spite of the nullity clause in the lease it appears that the lessee has been more or less a habitual defaulter in the payment of rent. In the year 1913, rent for six years was in arrears. Vinayakbhat filed Suit No. 99 of 1913 in the Court of the II Class Sub-Judge, Poona, against the present defendants for possession of the demised premises on the ground of forfeiture. A number of defences were raised by them. *Inter alia,* it was pleaded that as no notice had been given to them the forfeiture was not enforceable. These contentions were negatived but the Court granted relief against forfeiture. Defendant No. 1 was a minor at that time and became a major in or about 1925.

In the year 1928 again rent for two years was in arrears. Vinayakbhat filed Civil Suit No. 258 of 1928 against the present defendants for possession on the ground of forfeiture. The plaintiff subsequently waived the forfeiture by accepting three years' rent which by then had fallen in arrears and costs of the suit.

In the year 1931 rent for three years again fell into arrears. The amount was then sent by money order and the landlord accepted it.

In the year 1934 again rent for three years remained unpaid. At that time proceedings were started by Government for the acquisition of the Old Survey No. 72. The landlord claimed that he was entitled to the whole compensation money as the tenant's rights had ceased by forfeiture for non-payment of rent. Defendant No. 1 through his pleader sent a notice to Vinayakbhat to come and take the arrears of rent. He agreed and accepted the arrears of rent and the forfeiture was again waived. As a result of this the defendants got Rs. 32,000 by way of compensation for the permanent tenancy rights in Old Survey No. 72, while Vinayakbhat got Rs. 1,400 for compensation for the acquisition of his rights as landlord in that land.

In 1938 rent for four years was again in arrears. Vinayakbhat filed Civil Suit No. 982 of 1938 in the Court of First Class Sub-Judge at Poona against all the present defendants for possession of Survey Nos. 86|1 and 86|2 on the ground that the lease had determined by forfeiture for non-payment of rent. In that suit Defendant No. 1 pleaded that there was no forfeiture because no rent was fixed in respect of the suit property and also because it was for the plaintiff to recover rent and not for the defendants to go to the plaintiff and pay it. These contentions were negatived. It was held that forfeiture had occurred but relief against forfeiture was again granted.

On plaintiff's appeal in this case, the learned District Judge refused to interfere with the discretion of the trial judge in granting relief against forfeiture but observed that the defendants having obtained relief against forfeiture thrice before, should not expect to get it for a fourth time if they again make default in the payment of rent.

The default which has given rise to the present suit occurred on 28th January, 1941 and the plaintiff filed the suit out of which this appeal arises for possession on the ground of forfeiture and for the arrears of rent which remained unpaid. It was alleged in the plaint that the rent due on 28th January, 1941, was not paid, though demanded. Plaintiff asked for possession of Survey Nos. 86|1 and 86|2 after removal of the structures thereon. Defendant No. 1 pleaded that as a result of partition rights in Survey No. 86|2 had fallen to his share, that according to the terms of the rent note it was for the plaintiff to approach the defendants and not for the defendants to go to the plaintiff and pay it, that as the plaintiff did not approach the defendants and no demand for rent was made, no forfeiture occurred, that Defendant No. 1 did offer the rent to the plaintiff, but the plaintiff fraudulently refused to accept it, that the plaintiff ought to have sent a notice according to law if he wanted to enforce the right of forfeiture and that without prejudice to the above contentions he should be granted relief against forfeiture.

The trial court decreed the plaintiff's suit and negatived the contentions raised by the defendants. In awarding possession of the entire property to the plaintiff the trial court imposed a condition that Defendant No. 1 should continue to be in possession of the two structures in Survey No. 86|2 till the end of March, 1950. On the question whether a notice was necessary before the lease could be terminated, the trial court expressed the view that the provision in the rent note that on non-payment of rent the rights of the tenant would come to an end was a clause of nullity and not merely a clause of forfeiture and that the lease was therefore determined under section 111 (*b*) and not under section 111 (*g*) of the Transfer of Property Act and that no notice as required by section 111 (*g*) was necessary for terminating the lease in suit. On the issue whether forfeiture should be relieved against, the trial court said that relief could have been given to the lessee against forfeiture under section 114 had it not been for the fact that the defendants had disentitled themselves to relief by contumacious conduct on their part, that even this paltry rent had never been paid in time during the last twenty years at any rate, and that after Defendant No. 1 had attained majority and got the estate in his charge in 1922-23 he had uniformly defaulted in the payment of rent and that the defendants raised totally false defences and in every suit a false excuse was set up in an attempt to justify the arrears of rent.

In pursuance of the trial court's decree plaintiff took possession of all the suit lands in April, 1943, except one acre which he took possession on 13th September, 1943. Defendant No. 1 remained in possession of the two structures on Survey No. 86|2. Against the decision of the trial judge Defendant No. 1 alone filed an appeal to the District Judge of Poona. The lower appellate court confirmed the decree of the trial court with two modifications. Defendant No. 1 was allowed to remove the buildings on Survey No. 86|2 and also the trees therein within three months. On the issue whether a notice was necessary, the appellate court found that the lease came to an end not under section 111 (*b*) but under section 111 (*g*) of the Transfer of Property Act, but that no notice of forfeiture was necessary as the lease had been executed prior to the coming into force of the Transfer of Property Act. The appellate court saw no valid reason for interfering with the finding of the trial judge on the question concerning relief against forfeiture.

From this appellate decree Defendant No. 1 filed a second appeal to the High Court of Judicature at Bombay. The plaintiff filed cross-objections in regard to the trees and costs. The High Court dismissed the appeal and allowed the cross-

objections... An application was made for leave to appeal to the Supreme Court and it was granted with reference to S. No. 86|2.

The law with regard to the determination of a lease by forfeiture is contained in section 111 (*g*) of the Transfer of Property Act. Under that provision a lease is determined by forfeiture in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter, or in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself, or the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event and a certain further act is done by the lessor as thereinafter mentioned. Prior to its amendment by Act XX of 1929, this sub-section further provided:

"And in any of these cases the lessor or his transferee does some act showing his intention to determine the lease."

By Act XX of 1929, this sub-section was amended and the amended sub-section now reads:

"And in any of these cases the lessor or his transferee gives *notice in writing* to the lessee of his intention to determine the lease."

Section 111 (*g*) in terms makes the further act an integral condition of the forfeiture. In other words, without this act there is no completed forfeiture at all. Under the old section an overt act evidencing the requisite intention was essential. As the law stands to-day under the Act, notice in writing by the landlord is a condition precedent to a forfeiture and the right of re-entry. Section 63 of Act XX of 1929 restricts the operation of this amendment to transfers of property made after 1st April, 1930. The lease in this case was executed before the Transfer of Property Act came into force in 1882. The amendment therefore made in this sub-section by Act XX of 1929 not being retrospective, cannot touch the present lease and it is also excluded from the reach of the Transfer of Property Act by the provisions of section 2. The position was not seriously disputed in the High Court or before us that the statutory provisions of section 111 (*g*) as such cannot be made to govern the present lease which was executed in the year 1870. It was however strongly argued that the amendment made in 1929 to section 111 (*g*) of the Act embodies a principle of justice, equity and good conscience and notwithstanding section 2 of the Act, that principle was applicable in this case and there can be no forfeiture unless notice in writing to the lessee of his intention to determine the lease by the lessor had been given.

It is axiomatic that the Courts must apply the principles of justice, equity and good conscience to transactions which come up before them for determination even though the statutory provisions of the Transfer of Property Act are not made applicable to these transactions. It follows therefore that the provisions of the Act which are but a statutory recognition of the rules of justice, equity and good conscience also govern those transfers. If, therefore, we are satisfied that the particular principle to which the legislature has now given effect by the amendment to section 111 (*g*) did in fact represent a principle of justice, equity and good conscience, undoubtedly the case will have to be decided in accordance with the rule laid down in the section, although in express terms it has not been made applicable to leases executed prior to 1929 or even prior to the Transfer of Property Act coming into force.

The main point for consideration thus is whether the particular provision introduced in sub-section (*g*) of section 111 of the Transfer of Property Act in 1929 is but a statutory recognition of a principle of justice, equity and good conscience, or whether it is merely a procedural and technical rule introduced in the section by the legislature and is not based on any well-established principles of equity. The High Court held, and we think rightly, that this provision in sub-section (*g*) of section 111 in regard to notice was not based upon any principle of justice, equity and good conscience. In the first instance it may be observed that it is errone-

ous to suppose that every provision in the Transfer of Property Act and every amendment effected is necessarily based on principles of justice, equity and good conscience. It has to be seen in every case whether the particular provisions of the Act relied upon restates a known rule of equity or whether it is merely a new rule laid down by the legislature without reference to any rule of equity and what is the true nature and character of the rule. Now, so far as section 111 (*g*) of the Act is concerned, the insistence therein that the notice should be given *in writing* is intrinsic evidence of the fact that the formality is merely statutory and it cannot trace its origin to any rule of equity. Equity does not concern itself with mere forms or modes of procedure. If the purpose of the rule as to notice is to indicate the intention of the lessor to determine the lease and to avail himself of the tenant's breach of covenant it could as effectively be achieved by an oral intimation as by a written one without in any way disturbing the mind of a chancery Judge. The requirement as to written notice provided in the section therefore cannot be said to be based on any general rule of equity. That it is not so apparent from the circumstance that the requirement of a notice in writing to complete a forfeiture has been dispensed with by the legislature in respect to leases executed before 1st April, 1930. Those leases are still governed by the unamended sub-section (*g*) of section 111. All that was required by that sub-section was that the lessor was to show his intention to determine the lease by some act indicating that intention. The principles of justice, equity and good conscience are not such a variable commodity, that they change and stand altered on a particular date on the mandate of the legislature and that to leases made between 1882 and 1930 the principle of equity applicable is the one contained in sub-section (*g*) as it stood before 1929, and to leases executed after 1st April, 1930, the principle of equity is the one stated in the sub-section as it now stands. Question may also be posed, whether according to English law a notice is a necessary requisite to complete a forfeiture.

The English law on the subject is stated in Foa's General Law of Landlord and Tenant (7th edition) at page 316 in these terms:—

"In no case can the lessee take advantage of the proviso for re-entry in order to avoid the lease, even where it is in the form (not that the lessor may re-enter, but) that the term shall cease, or that the lease shall be void for 'all purposes,' or 'absolutely forfeited'; for expressions of this kind only mean that the tenancy shall determine at the option of the lessor.............This has been usually expressed by saying that the lease is voidable and not void; but the true principle appears to be that the lease does become void to all intents and purposes, though this is subject to the condition that the party who is seeking to set up its invalidity is not himself in default, for otherwise he would be taking advantage of his own wrong. It follows that where the proviso makes the lease void, the landlord must, in order to take advantage of it, do some unequivocal act notified to the lessee, indicating his intention to avail himself of the option given to him. The service upon the lessee in possession of a writ in ejectment is sufficient."

The Law of Property Act, 1925, by section 146 has consolidated the law in England on this subject. The provision with regard to the giving of notice before a right of re-entry accrues to the landlord is expressly excluded by sub-section 11 in cases of re-entry on forfeiture for non-payment of rent. In England it is not necessary in case of non-payment of rent for a landlord to give notice before a forfeiture results. It cannot, therefore, be said that what has been enacted in sub-section (*g*) of section 111 is a matter which even to-day in English law is considered as a matter of justice, equity and good conscience. In English law the bringing of an action which corresponds to the institution of a suit in India is itself an act which is definitely regarded as evidencing an intention on the part of the lessor to determine a lease with regard to which there has been a breach of covenant entitling the lessor to re-enter. Vide *Toleman* v. *Portbury*[1] and *Prakashchandra Das* v. *Rajendranath Basu*[2].

1. (1871) L.R. 6 Q.B. 245.
2. (1931) I.L.R. 58 Cal. 1359.

In India there is a substantial body of judicial authority for the proposition that in respect of leases made before the Transfer of Property Act forfeiture is incurred when there is a disclaimer of title or there is non-payment of rent. Any subsequent act of the landlord electing to take advantage of a forfeiture is not a condition precedent to the right of action for ejectment. The bringing by a landlord of a suit for ejectment is simply a mode of manifesting his election. The principle of these cases rests upon the ground that the forfeiture is complete when the breach of the condition or the denial of title occurs. But as it is left to the lessor's option to take advantage of it or not, the election is not a condition precedent to the right of action and the institution of the action is a sufficient manifestation of the election. The same principle is applied for actions for relief on the ground of fraud. [Vide *Padmanabhaya* v. *Ranga*[1], *Korapalu* v. *Narayana*[2].] In *Rama Aiyangar* v. *Gurusami Chetti*[3], it was said that as the lease was not governed by the Transfer of Property Act, the institution of the suit was a sufficient determination of the lease and no other previous act determining the same such as a notice to quit was necessary for maintaining the action. The same view was expressed in *Venkatachari* v. *Rangasami Aiyar*[4]. In *Venkatarama Aiyar* v. *Ponnuswami Padayachi*[5], it was observed that the forfeiture will not be produced merely by the unilateral act of ceasing to comply with the conditions upon which the property is held, but it must involve also some expression of intention to enforce the forfeiture on the part of the lessor. In other words, the lessee cannot by his unilateral act terminate the lease and cannot take advantage of his own wrong. That is an intelligible principle and is based on a maxim of equity. But the defaulting lessee cannot claim the benefit of a notice in writing to complete the forfeiture he has incurred. The lessor has to simply express an intention that he is going to avail of the forfeiture and that can be done by the filing of a suit, as in English law, in all cases not governed by the Transfer of Property Act.

Again in *Ramakrishna Mallya* v. *Baburaya*[6], it was said that in an ejectment suit based on leases executed prior to the Transfer of Property Act, no act on the part of the landlord showing that he elected to take advantage of the forfeiture for non-payment of rent was necessary. The contrary view expressed in *Nourang Singh* v. *Janardan Kishore*[7], that the institution of a suit for ejectment could not be regarded as a requisite act to show the intention of a landlord to determine a lease within the meaning of section 111 (*g*), was dissented from in *Prakashchandra Das* v. *Rajendranath Basu*[8]; and it was said that there is no special reason why the lessor's election must be made at some time prior to the institution of a suit and that it was difficult to find a *raison d'etre* for the view that the cause of action has not completely accrued if the election is made at the moment when the suit is instituted, *i.e.*, the moment the plaint is presented. The cause of action for the suit can arise simultaneously with the presentation of a plaint. In our opinion the provision as to notice in writing as a preliminary to a suit for ejectment based on forfeiture of a lease is not based on any principle of justice, equity or good conscience and cannot govern leases made prior to the coming into force of the Transfer of Property Act, 1882, or to leases executed prior to 1st April, 1930. The rights and obligations under those leases have to be determined according to the rules of law prevailing at the time and the only rule applicable seems to be that a tenant cannot by his unilateral act and by his own wrong determine the lease unless the lessor gives an indication by some unequivocal expression of intention on his part of taking advantage of the breach. On

1. (1910) 20 M.L.J. 930: I.L.R. 34 Mad. 161.
2. (1913) 25 M.L.J. 315: I.L.R. 38 Mad. 445.
3. (1918) 35 M.L.J. 129.
4. (1919) 36 M.L.J. 532.
5. A.I.R. 1935 Mad. 918.
6. (1912) 24 I.C. 139.
7. (1917) I.L.R. 45 Cal. 469.
8. (1931) I.L.R. 58 Cal. 1359.

no principle of equity is a tenant entitled to a notice in writing telling him that the lease has been determined. The High Court was therefore right in the view that it took of the matter and there are no valid reasons for taking a contrary view.

Considerable reliance was placed by Mr. Daphtary on the decision of Chandrasekhara Aiyar, J., sitting singly in the case of *Umar Pulavar* v. *Dawood Rowther*[1], wherein the learned Judge said that section 111 (*g*) as amended in 1929, embodied a principle of justice, equity and good conscience and must be held to govern even agricultural leases and where there was a forfeiture by denial of the landlord's title, a notice in writing determining the lease was necessary. It was there observed that the principle so embodied in the sub-section as a result of the amendment becomes, so to say, a principle of justice, equity and good conscience. The learned Judge for this view placed reliance on the decision in *Krishna Shetti* v. *Gilbert Pinto*[2]; in which it was said that the Transfer of Property Act was framed by eminent English lawyers to reproduce the rules of English law, in so far as they are of general application and rest on principle as well as authority and its provisions are binding on us as rules of justice, equity and good conscience. With respect, we are constrained to observe that this is too broad a statement to make. It seems that the attention of the learned Judges was not drawn to the fact that the provision as to notice for determining a lease for non-payment of rent was not a part of the English law. It also does not seem to have been fully appreciated that the rule enunciated in sub-section (*g*) of section 111 prior to its amendment in 1929 and which still governs leases executed before 1st April, 1930, on the reasoning of the decision would also be a rule of justice, equity and good conscience and according to it the institution of a suit for ejectment would be sufficient indication on the part of the landlord for determination of the lease and a notice in writing as required by the amended section would not be a prerequisite for institution of such a suit. In our judgment, this case was wrongly decided and we are unable to support it.

As pointed out by Napier, J., in *Krishna Shetti* v. *Gilbert Pinto*[2], the courts should be very careful in applying statutory provisions and the assistance of the Transfer of Property Act as a guide on matters which have been excluded from the purview of the Act by express words should not be invoked, unless the provisions of the Act embody principles of general application.

Mr. Daphtary also placed reliance on certain observations contained in the Full Bench decision in *Brahmayya* v. *Sundaramma*[3]. There it was said that although section 106 of the Transfer of Property Act does not apply to leases for agricultural purpose by virtue of section 117 of the Act, nevertheless the rules in section 106 and in the other sections (sections 105 to 116) in Chapter V of the Act are founded upon reason and equity and they are the principles of English law and should be adopted as the statement of the law in India applicable also to agricultural leases. In our opinion, the above statement is again formulated in too wide a language. S. 105 gives a statutory definition of the word "lease". It enunciates no principle of equity. The relation of lessor and lessee is one of contract and in Bacon's Abridgment a lease is defined as a contract between the lessor and the lessee for the possession and profits of land on the one side and recompense by rent or other consideration on the other. The statute has given a more comprehensive definition of the term. Section 107 makes registration of a lease compulsory. This section again does not concern itself with any principle of justice or equity. Section 108 (*j*) enacts that the lessee may transfer absolutely by way of mortgage or sub-lease the whole or any part of his interest

1. (1946) 2 M.L.J. 229: A.I.R. 1947 Mad. 68.
2. (1919) 36 M.L.J. 367: I.L.R. 42 Mad. 654.
3. (1948) 1 M.L.J. 96: I.L.R. (1948) Mad. 757: A.I.R. 1948 Mad. 275 (F.B.).

in the property and any transferee of such interest or part may again transfer it. The law in India and England on this subject is not the same and it cannot be said that this sub-section enacts or enunciates any general principle of equity. Parts of sections 109, 110 and 111 contain mere rules of procedure or rules of a technical nature. These certainly cannot be said to be based on any principles of equity. In our judgment, therefore, the statement in this decision that sections 105 to 116 of the Transfer of Property Act are founded upon principles of reason and equity cannot be accepted either as correct or precise. Of course, to the extent that those sections of the Act give statutory recognition to principles of justice, equity and good conscience they are applicable also to cases not governed by the Act.

Reference was also made to the decision of the Bombay High Court in *Tatya Savla Sudrik* v. *Yeshwanta Kondiba Mulay*[1], where it was said that the principle embodied in section 111 (*g*) of the Transfer of Property Act that in the case of forfeiture by denial of landlord's title a notice in writing determining the lease must be given is a principle of justice, equity and good conscience which must be held to govern even agricultural leases. In that case it was contended that following upon forfeiture which had been incurred a suit was filed by the plaintiffs in eviction and nothing more needed to be done by the plaintiffs. For this contention reliance was placed on two earlier decisions of the Bombay High Court, *Venkaji Krishna Nadkarni v. Lakshman Devji Kandar*[2] and *Vidyavardhak Sangh Co.* v. *Ayyappa*[3]. This contention was negatived in view of the decision of Chandrasekhara Aiyar, J., above referred to, and also in view of a binding decision of a division bench of that Court in *Mahiboobkhan Muradkhan* v. *Ghanashyam Jamnaji*[4]. The learned Chief Justice in the judgment under appeal has explained the distinction between the present case and that case and has not followed his own earlier decision in arriving at his conclusions here. With respect we think that that decision did not state the law on the point correctly. Under English law the institution of a suit for ejectment has always been considered an unequivocal act on the part of the landlord for taking advantage of the default of the tenant and for enforcing the forfeiture in case of non-payment of rent, and even in other cases except where statutory provisions were made to the contrary.

Reference was also made to the observations of their Lordships of the Privy Council in *Aditya Prasad* v. *Ram Ratan Lal*[5]. Their Lordships dealing with the question whether a certain document created a charge upon a village observed that the appellant could not redeem it without paying both the mortgage debt and the amount subsequently raised and it was said that the provisions of the Transfer of Property Act on the point were identical with the principles of justice, equity and good conscience. The observation made in that case must be limited to that case and cannot be held as applicable to all cases irrespective of the nature of the provisions involved. Similar observations are contained in another decision of their Lordships of the Privy Council in *Mohammad Raza* v. *Abbas Bandi Bibi*[6], which concerned the provisions of section 10 of the Transfer of Property Act which recognizes the validity of a partial restriction upon a power of disposition in the case of a transfer *inter vivos*. It was held that there was no authority that a different principle applied in India before the Act was passed and that under English law a partial restriction was not repugnant even in the case of a testamentary gift.

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1. I.L.R. (1951) Bom. 293: 52 Bom. L.R. 909.
2. (1895) I.L.R. 20 Bom. 354 (F.B.).
3. (1925) I.L.R. 49 Bom. 842: 27 Bom. L.R. 1152.
4. (1949) F.A. Nos. 149, 153, 154 of 1949 decided by Chagla, C.J. and Shah, J. on 21st, April, 1949, (unreported).
5. (1930) 59 M.L.J. 342: L.R. 57 I.A. 173: I.L.R. 5 Luck. 365 (P.C.).
6. (1932) 63 M.L.J. 180: L.R. 59 I.A. 236: I.L.R. 7 Luck. 257 (P.C.).

Lastly Mr. Daphtary drew our attention to the decision in *Roberts* v. *Davey*[1], which relates to a licence. There it was observed that it was necessary for the licensor to have done some act showing his intention to determine the licence and until such act was shown, it continued in force. Littledale, J., in this case said that the instrument was,

"a mere licence to dig, and did not pass the land. An actual entry, therefore, was unnecessary to avoid it; but by analogy to what is required to be done in order to determine a freehold lease which, by the terms of it, is to be void on the non-performance of covenants, it seems to follow that, to put an end to this licence, the grantor should have given notice of his intention so to do".

The basis of the decision was that some act amounting to an exercise of the option had to be proved before the licence was determined. This decision therefore does not in any way affect the decision of the High Court in this case.

On the question whether the tenant should have been given relief against forfeiture the High Court held that the matter was one of discretion and both the lower Courts had exercised their discretion against the appellant and that being so, unless they were satisfied that the discretion was not judicially exercised or was exercised without proper materials they would not ordinarily interfere with it in second appeal. It was said that the non-payment in this case seems to have become chronic and that this was not a case for the exercise of equitable jurisdiction.

Mr. Daphtary contended that the High Court failed to appreciate the rule applicable for the exercise of the discretion in such cases and that the rule is that if at the time relief is asked for the position has been altered so that relief cannot be given without causing injury to third parties relief will be refused, but if that position is not altered so that no injustice will be done there is no real discretion and the Court should make the order and give the relief. Reference was made to the decision of Page, J., in *Debendralal Khan* v. *F. M. A. Cohen*[2], wherein it was said that the Court normally would grant relief against forfeiture for non-payment of rent under section 114 of the Transfer of Property Act and that if the sum required under the section was paid or tendered to the lessor at the hearing of the suit the Court has no discretion in the matter and must grant relief to the tenant. We do not think that the learned Judges intended to lay down any hard and fast rule. Indeed the learned Judge proceeded to observe as follows:—

"In exercising the discretion with which it is invested under section 114 a Court in India is not bound by the practice of a Court of Chancery in England; and I am not disposed to limit the discretion that it possesses. Those who seek equity must do equity, and I do not think merely because a tenant complies with the conditions laid down in section 114 that he becomes entitled as of right to relief".

In our opinion, in exercising the discretion, each case must be judged by itself, the delay, the conduct of the parties and the difficulties to which the landlord has been put should be weighed against the tenant. This was the view taken by the Madras High Court in *Appayya Shetty* v. *Mahammade Beari*[3], and the matter was discussed at some length. We agree with the ratio of that decision. It is a maxim of equity that a person who comes in equity must do equity and must come with clean hands and if the conduct of the tenant is such that it disentitles him to relief in equity, then the Court's hands are not tied to exercise it in his favour. Reference in this connection may also be made to *Ramakrishna Mallya* v. *Baburaya*[4], and *Ramabrahmam* v. *Rami Reddi*.[5]

The argument of Mr. Daphtary that there was no real discretion in the Court and relief could not be refused except in cases where third party interests

1. (1833) 110 E.R. 606: 4 B. & Ad. 664.
2. (1927) I.L.R. 54 Cal. 485.
3. (1915) 29 M.L.J. 381: I.L.R. 39 Mad. 834.
4. (1912) 24 I.C. 139.
5. A.I.R. 1928 Mad. 250.

intervene is completely negatived by the decision of the House of Lords in *Hyman v. Rose*.[1] Relief was claimed in that case under the provisions of section 14 (2) of the Conveyancing Act, 1881, against forfeiture for breaches of covenant in the lease. The appellants offered as the terms on which relief should be granted to deposit a sum sufficient to ensure the restoration of the premises to their former condition at the end of the term and make full restitution. It was argued that the matter was one of discretion and the Court should lean to relieve a tenant against forfeiture and if full recompense can be made to the landlord the relief should be granted. Lord Loreburn in delivering the opinion of the House observed as follows:—

"I desire in the first instance to point out that the discretion given by the section is very wide. The Court is to consider all the circumstances and the conduct of the parties. Now it seems to me that when the Act is so express to provide a wide discretion, meaning, no doubt, to prevent one man from forfeiting what in fair dealing belongs to some one else, by taking advantage of a breach from which he is not commensurately and irreparably damaged, it is not advisable to lay down any rigid rules for guiding that discretion. I do not doubt that the rules enunciated by the Master of the Rolls in the present case are useful maxims in general, and that in general they reflect the point of view from which judges would regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise the free discretion given by the statute would be fettered by limitations which have nowhere been enacted. It is one thing to decide what is the true meaning of the language contained in an Act of Parliament. It is quite a different thing to place conditions upon a free discretion entrusted by statute to the Court where the conditions are not based upon statutory enactment at all. It is not safe, I think, to say that the Court must and will always insist upon certain things when the Act does not require them, and the facts of some unforeseen case may make the Court wish it had kept a free hand."

With great respect we think that the observations cited above contain sound principles of law. We are, therefore, unable to accede to the contention of Mr. Daphtary that though section 114 of the Transfer of Property Act confers a discretion on the Court, that discretion except in cases where third party interests intervene must always be exercised in favour of the tenant irrespective of the conduct of the tenant. It is clear that in this case the tenant is a recalcitrant tenant and is a habitual defaulter. For the best part of 25 years he has never paid rent without being sued in Court. Rent has been in arrears at times for six years, at other times for three years and at other times for four years and so on, and every time the landlord had to file a suit in ejectment which was always resisted on false defences. No rule of equity, justice or good conscience can be invoked in the case of a tenant of this description. He cannot always be allowed to take advantage of his own wrong and to plead relief against forfeiture on every occasion, particularly when he was warned by the Court of appeal on a previous occasion. He had already had relief three times on equitable grounds and it is time that the Court withheld its hands and ordered his ejectment. In this situation the High Court was fully justified in finding that in second appeal it would not interfere with the discretion of the Courts below in refusing to grant relief against forfeiture.

The result, therefore, is that this appeal fails and is dismissed with costs.

Agent for Appellant: *Ratnaparkhi Anant Govind.*

Agent for Respondents: *Rajinder Narain.*

G.R.|K.S. *Appeal dismissed.*

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1. 1912 A.C. 623.

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT:—MEHRCHAND MAHAJAN AND N. H. BHAGWATI, JJ.

Hiralal and others .. *Appellants**

v.

Badkulal and others .. *Respondents.*

Practice—Suit for balance due on mutual accounts—Defendants signing in plaintiffs' account books acknowledging the ascertained balance due on mutual dealing—Defendant holding back his own account books contending that onus of proof was on the plaintiffs—Propriety and effect—Suit based on acknowledgment—Maintainability.

Where a suit was filed for recovery of a certain amount and interest due on the foot of mutual dealings evidenced by the defendants acknowledging the amount due by signing in the plaintiffs' ledger but the defendants who did not admit the claim kept back their own account books contending that it was no part of the defendants' duty to produce the books unless they were called upon to do so and that the onus rested on the plaintiffs to prove their case.

Held: (1) It was an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light on the proposition. *Murugesan Pillai* v. *Manickavasaga Pandara,* (1917) L.R. 44 I.A. 98 and *Rameshwar Singh* v. *Bajit Lal Pathak,* (1929) 57 M.L.J. 565: A.I.R. 1929 P.C. 95, relied on.

(ii) An unqualified acknowledgment like the one in the suit and the statement of account under which the entry had been made were sufficient to furnish a cause of action (as on an account stated) to the plaintiffs for maintaining the present suit. *Gulam Murtaza* v. *Fasihunnissa,* (1934) I.L.R. 57 All. 434, overruled.

On Appeal from the Judgment and Decree dated the 23rd July, 1951, of the Court of the Judicial Commissioner, Vindhya Pradesh in Civil First Appeal No. 26 of 1951, arising out of the Judgment and Decree dated the 14th March, 1951, of the Court of the District Judge, Umaria, in Case No. 32 of 1951.

N. S. Bindra, Senior Advocate (*S. L. Chhibber,* Advocate, with him), for Appellants.

S. P. Sinha, Senior Advocate (*K. B. Asthana,* Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

Mahajan, J.—The suit out of which this appeal arises was instituted by the plaintiff-respondents in the Court of the district Judge of Umaria, for recovery of Rs. 34,000 principal, and Rs. 2,626 interest, due on foot of mutual dealings. The suit was dismissed by the District Judge but was decreed on appeal by the Judicial Commissioner of Vindhya Pradesh. A certificate for leave to appeal to this Court was granted as the case fulfilled all the conditions and requirements in force relating to appeals to the Supreme Court.

The defendants did not admit the claim and it was pleaded that no accounts were explained to them when the signatures of Bhaiyalal and Hiralal were obtained in the plaintiffs' ledger on 3rd September, 1949, acknowledging the suit amount as due from them. It was further pleaded that no suit could be based merely on an acknowledgment of the debt. In paragraph 4 of the written statement it was alleged that the plaintiff No. 2 Dipchand having threatened to bring a suit against defendants 1 and 2 whose financial position was bad and having represented that plaintiff No. 1 Badkulal would be angry and abuse plaintiff No. 2, and having assured on oath by placing his hand on a deity in a temple that no suit shall be brought, and that amount of interest would be reduced, asked defendants 1 and 2 to sign the khata, who signed the same without going through the accounts, on the faith of these statements made by Dipchand and that the defendants were

*Civil Appeal No. 168 of 1952. 12th March, 1953.

not bound by these signatures. In paragraph 9 of the written statement it was alleged that in fact Rs. 15,000 or 16,000 as principal sum were due to plaintiffs from defendants but the suit had been filed for a much larger sum than due. Issue 1 framed by the District Judge was in these terms:

"Did the defendants Hiralal and Bhaiyalal sign on Bhadon Sudi 11 Samvat 2006 in the capacity of manager and head of the family, on the khata of the plaintiffs after understanding the debit and credit accounts and accepting Rs. 34,000 as the correct balance due to the plaintiffs."

It would have been more correct had a separate issue been framed on the two points compositely mentioned in this issue. Be that as it may, the form in which the issue was framed is not material for the decision of the appeal. Issue 7 was in these terms:

"Did the plaintiff Dipchand obtain the signature of defendants 1 and 2, in their bahi under the threat of instituting a suit and giving the assurance of the suit being not filed and leaving the interest which is incorrect and very much exaggerated, by saying that Badkulal shall be very angry with him."

The frame of the issue shows that the learned Judge at this stage made no effort to ascertain or apprehend the nature of the plea taken in the written statement. He seems to have acted more as an automaton than as a Judge in the discharge of his responsible duties. Before framing an issue like this it was his duty to examine the parties and to find out the precise nature of the plea involved within these facts; in other words, whether the defendants wished to plead in defence fraud, coercion, undue influence or a mistake of fact entitling them to reopen the accounts. Mr. Bindra for the appellants was unable to tell us what real plea was involved in the facts stated under this issue.

The manner in which the learned Judge dealt with this issue lends support to our view that he did not at all apprehend what he had to decide. It was held that the defendants did not sign the entry after understanding, settling, and adjusting of the accounts, but that plaintiff Dipchand obtained their signatures without explaining the accounts to them.

The fact that the entry was signed by both the defendants who represented their family was not denied. Hiralal, defendant, in the witness box admitted that the defendants deal in gold, silver and kirana and maintain regular books of account. It was also admitted that two or three muneems are in their employ for maintaining regular books of the business dealings. Hiralal was questioned "How much money was due from the defendants-firm to the plaintiff-firm?". The answer was evasive, *viz.*, "He could not say how much was due". When questioned about his accounts, he replied that he had not filed them as he was ill. He further deposed that he had looked into his accounts and Rs. 10,000 to Rs. 15,000 as principal and interest were due but he could not say what was the correct amount. When asked whether on the date of signing the acknowledgment he looked into the books to see what amount was due from him, his answer was in the negative. He further said that even after receiving notice he did not look into his own accounts to check as to what the correct balance was. A leading question was put to him whether on Bhadon Sudi 11 Samvat 2006 there was an entry of Rs. 34,000 in the defendants' khata as being the balance due from them to the plaintiffs. The answer was again evasive. He said "I could not say whether there was any such entry in his books." In these circumstances there was no justification for throwing out the plaintiffs' suit on the ground that the accounts were not explained to the defendants by the plaintiffs. The defendants had written the accounts in their own books from which the true balance could be ascertained. An inference from the statement of Hiralal can easily be raised that the balance entry of Rs. 34,000 also existed in his own books. Mr. Bindra tried to get out of this situation by urging that it was no part of the defendants' duty to produce the books unless they were called upon to do so and the onus rested on the plaintiffs to prove their case. This argument has to be negatived

in view of the observations of their Lordships of the Privy Council in *Murugesam Pillai* v. *Manickavasaga Pandara*[1], which appositely apply here. This is what their Lordships observed:

"A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly, to furnish to the courts the best material for its decision. With regard to third parties this may be right enough—they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is in their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the court the written evidence in their possession which would throw light upon the proposition."

This rule was again reiterated in *Rameshwar Singh* v. *Bajit Lal Pathak*[2].

On the evidence of the parties it is clear that both parties are businessmen and each party has been maintaining accounts of their mutual dealings, and they met on 3rd September and in the plaintiffs' book the defendants signed an entry on page 58 of the ledger which runs thus:—

"Rs. 34,000 balance due to be received up to Bhadon Sudi 11 Samvat 2006 made by check and understanding of accounts with Hiralalji's books."

This acknowledgment was made below a number of entries made in this khata on the credit and debit side and the mutual dealings had continued since several years. The acknowledgment is signed by Hiralal and Bhaiyalal, with the following endorsement:

"After adjusting the accounts Rs. 34,000 found correct payable."

In these circumstances we are not able to understand the view of the district Judge that it was not proved that the accounts were explained to the defendants by Dipchand. It was unnecessary to do so because the defendants themselves were keeping accounts and they would not have signed the balance for Rs. 34,000 with the endorsement above cited, without reference to their own books or in the manner suggested in the written statement. Plaintiff Dipchand in the witness box supported the plaintiffs' case as laid in the plaint. He deposed that:

"This accounting was done by my muneem Puranlal and Ram Prasad, muneem of Hiralal.........Muneems explained and Hiralal signed after understanding it."

In cross-examination he said that muneems were checking the accounts and when both the muneems said that so much was the balance, Hiralal then signed and that Hiralal and Bhaiyalal themselves did not check any account. The learned district Judge and Mr. Bindra criticized the evidence of this witness and it was urged that he had made false and highly improbable statements with regard to the manner and circumstances in which the entry was signed. The discrepancies in the statement relate to matters of no consequence. In our opinion, his evidence along with the entry was sufficient to hold the plaintiffs' case proved when the best evidence of their own books to disprove the plaintiffs' case had been withheld by the defendants. No satisfactory explanation had been given for the non-production of the defendants' books, and the evidence given by Hiralal does not do much credit to him.

Mr. Bindra contended that it should have been held that Bhaiyalal did not sign at the same time when the entry was written but he signed later on. On this point Hiralal deposed that when he signed Bhaiyalal was not present, that he signed afterwards, that Kulai muneem came with the bahi saying that Badkulal and Dipchand had quarrelled among themselves that there should also be the signature of Bhaiyalal, that Bhaiyalal questioned him as to why the witness had signed, that he replied that Dipchand had told him after pointing his hand towards God that he would take no action so long as he lived, so he did not check, nor any one explained him the accounts, that on this he asked Bhaiyalal to sign and on

1. (1917) 32 M.L.J. 369: L.R. 44 I. A. 98: I.L.R. 40 Mad. 402 (P.C.).

2. (1929) 57 M.L.J. 565: A.I.R. 1929 P.C. 95.

his asking he signed. It was for Bhaiyalal to explain his signature by going into the witness box but he did not give evidence in the case and there is no explanation why he did not do so. Mr. Bindra's contention therefore that it should be held that Bhaiyalal was not present when the acknowledgment was signed cannot be sustained.

The defendants tried to support their case by the statements of Kulai Prasad, muneem, and the other two muneems Ram Prasad and Puranlal. So far as Kulai Prasad is concerned, he was in the plaintiffs' service and was dismissed by Badkulal, plaintiff, on 31st March 1950. Much reliance cannot be placed on the statement of a dismissed and disgruntled employee. He stated that Hiralal was not made to understand any accounts and Dipchand assured him on oath that he would raise no trouble during his life and asked Hiralal to sign and that Bhaiyalal signed on a different date. This evidence is of a partisan character and no reliance can be placed on it.

Ram Prasad stated that he did not check the accounts of the plaintiffs from Bhadon Samvat 2006 and that Hiralal did not sign in his presence. In cross-examination he admitted that there were mutual dealings between the parties and that Hiralal might have signed after accounting was done. He pretended ignorance of what happened on Bhadon Samvat 2006.

As regards Puranlal, he stated that after looking into the accounts and after mutual talk, Ex. P-1 was written on Dip Chand's asking, that accounts might have been told by Dipchand on the basis of the statement which he had with him, that no accounts were explained. He further stated that Hiralal said to Dipchand "Please see me", on which Dipchand replied after raising his hand towards the temple "I shall not do anything unfair in my lifetime." In cross-examination he admitted that the words "signed Bhurey Naik Raghunandan Prasad Bakalam Hira Lal", and the words "after adjusting the accounts Rs. 34,000 found correctly payable signed Hiralal" were written by Hiralal himself. It was further elicited in cross-examination that the witness had forged a receipt and for forging that receipt he was sentenced to one year's imprisonment in a criminal case started by Badkulal, plaintiff. This evidence therefore is not of much consequence in this case.

In these circumstances we are satisfied that the District Judge not only approached the decision of the case from an erroneous point of view but he also incorrectly appreciated the material on the record. The learned Judicial Commissioner was therefore perfectly justified in reversing his decision and in holding that on 3rd September, 1949, there was an adjustment of accounts actually done by the muneems and accepted by the principals and the story of coercion and misrepresentation was false.

Mr. Bindra next urged that the plaintiffs' suit should have been dismissed because it could not be maintained merely on the basis of an acknowledgment of liability, that such an acknowledgment could only save limitation but could not furnish a cause of action on which a suit could be maintained. The Judicial Commissioner took the view that an unqualified acknowledgment like the one in the suit, and the statement of the account under which the entry had been made, were sufficient to furnish a cause of action to the plaintiffs for maintaining the present suit. We are satisfied that no exception can be taken to this conclusion. It was held by the Privy Council in *Maniram* v. *Seth Rupchand*[1], that an unconditional acknowledgment implies a promise to pay because that is the natural inference if nothing is said to the contrary. It is what every honest man would mean to do. In *Fateh Chand* v. *Ganga Singh*[2] the same view was taken. It

1. (1906) 16 M.L.J. 300: L.R. 33 I.A. 165: I.L.R. 33 Cal. 1047 (P.C.).
2. (1929) I.L.R. 10 Lah. 748.

was held that a suit on the basis of a balance was competent. In *Kakan Chand Dula Ram* v. *Daya Ram-Amrit Lal*[1] the same view was expressed and it was observed that the three expressions "balance due", "account adjusted" and "balance struck" must mean that the parties had been through the account. The defendant there accepted the statement of account contained in the plaintiffs' account book, and made it his own by signing it and it thus amounted to an "accounts stated between them" in the language of Article 64 of the Limitation Act. The same happened in the present case. The acknowledgment which forms the basis of the suit was made in the ledger of the plaintiffs in which earlier mutual accounts had been entered and truly speaking, the suit was not based merely on this acknowledgment but was based on the mutual dealings and the accounts stated between them and was thus clearly maintainable.

Mr. Bindra drew our attention to a decision of the Allahabad High Court in *Ghulam Murtaza* v. *Fasihunnissa*[2], wherein it was held that even if an acknowledgment implies a promise to pay it cannot be made the basis of suit and treated as giving rise to a fresh cause of action. We have examined the decision and we are satisfied that it does not lay down good law.

For the reasons stated above this appeal has no merits and we accordingly dismiss it with costs.

Agents for Appellants: *Govind Saran Singh.*

Agent for Respondents: *A. D. Mathur.*

G.R.|K.S. *Appeal dismissed.*

SUPREME COURT OF INDIA.

[Civil Appellate Jurisdiction.]

PRESENT:—MEHRCHAND MAHAJAN AND S. R. DAS, JJ.

Messrs. Trojan & Company ... *Appellant**

v.

RM. N. N. Nagappa Chettiar ... *Respondent.*

Damages—Stockbroker selling shares without disclosing his knowledge of the probable slump in the market—Right of purchaser to damages—Principles for assessing—Interest—Right to.

Where a stockbroker is found to be guilty of fraud in selling some shares owned by himself to a constituent without disclosing his knowledge of the probable slump in the market, the constituent is entitled to recover as damages the loss suffered by him. Ordinarily the market rate of the shares on the date when the fraud was practised would represent their real price in the absence of any other circumstance. If, however, the market was vitiated or was in a state of flux or panic in consequence of the very fact that was fraudulently concealed, then the real value of the shares has to be determined on a consideration of a variety of circumstances, disclosed by the evidence led by the parties. Thus though ordinarily the market rate on the earliest date when the real facts became known may be taken as the real value of the shares, nevertheless, if there is no market or there is no satisfactory evidence of a market rate for some time which may safely be taken as the real value then if the representee sold the shares although not bound to do so, and if the re-sale has taken place within a reasonable time and on reasonable terms and has not been unnecessarily delayed, then the price fetched at the re-sale may well be taken into consideration in determining retrospectively the true market value of the shares on the crucial date. If there is no market at all or if the market rate cannot, for reasons referred to above, be taken as the real or fair value of the thing and the representee has not sold the things, then in ascertaining the real or fair value of the thing on the date when deceit was practised subsequent events may be taken into consideration provided such subsequent events are not attributable to extraneous circumstances which supervened on account of the retaining of the thing.

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1. (1928) I.L.R. 10 Lah. 745. 2. (1934) I.L.R. 57 All. 434.

* Civil Appeal No. 139 of 1952. 20th March, 1953.

In the case of money obtained or retained by fraud interest is allowed by a Court of equity.

On Appeal from the Judgment and Decree, dated the 17th March, 1950, of the High Court of Judicature at Madras (Horwill and Balakrishna Ayyar, JJ.) in O.S.A. No. 34 of 1947, arising out of Judgment and Decree, dated the 18th April, 1947, of the said High Court (Clark, J.) in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 208 of 1940.

V. Rangachari, Senior Advocate (*K. Mangachary* and *Murugappa Chettiar,* Advocates, with him), for Appellant.

K. Krishnaswami Iyengar, Senior Advocate (*K. Parasuraman,* Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Mahajan, J.—The dispute in this appeal is between a constituent and a firm of stock brokers. Sometime before April, 1936, the plaintiff, then a young man, came into possession of property worth about 2 lakhs of rupees on a partition between him and his brothers. In the hope of getting rich by obtaining quick dividends by speculating on the stock-exchange he through the defendant firm and certain other stock-holders entered into a series of speculative transactions and it seems he did not fare badly in the beginning. But subsequent events tell a different tale.

In 1937, two iron and steel companies in North India, *viz.,* Indian Iron & Steel Co., Ltd., and the Bengal Iron & Steel Co., Ltd., merged into one concern and a new issue of shares was made. The scheme was that for every five shares which a person held in the Indian Iron Co., Ltd., on 22nd April, 1937, one fully paid-up share would be given to him at a price of Rs. 25. The market price at the time this scheme was announced was about Rs. 55 per share. A wave of speculation followed this announcement and there was a boom in the market. Prices of Indian Iron shares were going up to unreal heights. To stabilize the situation thus created by heavy speculation, three members of the committee of the Calcutta Stock Exchange presented a petition to the Committee on 5th April, 1937, to close the Calcutta Stock Exchange for a while. On the same evening plaintiff's stock-broker Annamalai Chettiar who was carrying on business in firm name Trojan & Co., had telephonic conversation with one Ramdev Chokani, a member of the Calcutta Stock Exchange on this subject and from this conversation he gathered that a sharp fall in the prices of Indian Irons was likely. At that time Annamalai Chettiar had on his hands some 5000 of these shares. Shortly after this conversation and after business hours the same night, between the hours of 7-30 and 8-30, Annamalai Chettiar rang up the plaintiff and suggested to him that it would be a good thing for him to buy these shares. The youthful plaintiff in his anxiety to get rich quickly accepted the suggestion and purchased these shares, some at Rs. 77 and others at Rs. 77-4-0. Another firm of brokers, Ramlal & Co., had also in their hands another 4000 of these shares. They too found in the plaintiff a ready buyer. They also contacted him on the phone after Annamalai had done so, and sold him 4000 shares that they held. Out of the lot which the plaintiff purchased from the defendants he sold 1300 shares to Ramanathan Chetti at cost price.

On the 6th April, the Committee of the Calcutta Stock Exchange Association passed a resolution closing the stock exchange on the 8th and 9th April.

From the 6th April onwards the market sagged and the prices came down, at first gradually and then literally at a run. The result of it was that the plaintiff had to sell at a very heavy loss.

The defendants made demands on the plaintiff for the price of those shares. Between 5th April and 20th April, 1937, he made payments to defendants of

various amounts totalling Rs. 60,000. A lot of 700 shares was sold by the plaintiff to Pilani & Co., and on 19th April, 1937, he instructed the defendants for sale of the remaining 3000 shares at the best price obtainable. The defendants sold 2000 shares on 20th April, 1937, for prices ranging between Rs. 47-4-0 to Rs. 44-12-0 per share. The remaining 1000 shares were sold by him through Messrs. Ramlal & Co., at Rs. 42-8-0 per share on 22nd April, 1937. The result of it was that on 22nd May, 1937, when the accounts between the plaintiff and the defendants were settled it was found that plaintiff was heavily indebted to them in the sum of Rs. 51,712-7-0 and the credit balance of Rs. 64,000 that he had with the defendants at the end of March, 1937, had been wiped off. For the amount found due he passed a promissory note in favour of defendants, Ex. P-33. After giving credit for payments received on the promissory note the defendants filed a suit against him (O.S. No. 150 of 1937) on the Original Side of the Madras High Court and obtained an *ex parte* interim order for attachment before judgment and attached plaintiff's movable and immovable properties at Madras, and also at Kottaiyur in Ramnad District. Owing to the attachment proceedings the firm of Ramlal & Co. filed a petition for adjudication of the plaintiff as an insolvent. On 22nd September, 1937, Trojan & Co. also filed a petition for the same relief. An order adjudicating the plaintiff an insolvent was made by the High Court on 5th October, 1937, on the petition of Ramlal & Co.

In the course of the insolvency proceedings defendants tendered proof of their claim on the promissory note, Ex. P-33. The Official Assignee having acquired knowledge about the telephonic conversation that had passed between Annamalai Chettiar and Ramdev Chokani on the evening of the 5th April, 1937, came to the conclusion that the insolvent had been a victim of a fraud perpetrated by the defendants and dismissed their claim. Defendants-firm was guilty of fraud both in respect of the failure to disclose the fact that the Indian Iron shares or most of them belonged to one of its partners, Annamalai Chettiar and also on account of the failure on its part to disclose its knowledge of the likelihood of a slump in the market because of the notice given by its members to close the stock exchange.

On an application made to the High Court against the order of the Official Assignee it was set aside by Mockett, J., and he directed that the claim of the defendants be disposed of on a Court motion, the claim being heard as if it were a suit. In pursuance of this direction Trojan and Co., on 29th September, 1938, filed an application in the High Court, No. 313 of 1938. The Official Assignee representing the estate of the plaintiff denied its liability on the promissory note on the ground of fraud. On 15th March, 1940, Somayya, J., dismissed the claim of the defendants. He held the defendants-firm guilty of fraud in both respects. From this there was an appeal which was dismissed on 12th August, 1942. The defendants applied for leave to appeal to His Majesty in Council but leave was refused. Defendants then applied to the Privy Council for special leave and that application was also dismissed sometime in October, 1943.

On the 28th September, 1940, when the appeal from the decision of Somayya, J., was still pending, the Official Assignee as representing the estate of the plaintiff filed the suit out of which this appeal arises against Trojan & Co. for an account of the transactions between himself as principal and the defendants as agents and claiming damages for loss sustained by him and for various other reliefs. The suit embraced in particular claims in respect of four transactions. The first related to the 5000 Indian Iron shares. The second referred to a transaction of Associated Cements. On 22nd March, 1937, the plaintiff had sold through the defendants 50 shares in Associated Cements at Rs. 180-8-0 per share. On 30th March, 1937, he had similarly sold a further 200 shares in Associated Cements at Rs. 183 per share. The plaintiff did not have on hand even a single share in Associated Cements. It became necessary for him therefore to "cover

the sales". On 21st July, 1937, defendants purchased on plaintiff's account 100 shares at Rs. 161-12-0 per share. On 1st September, 1937, they purchased a further 150 shares at Rs. 151 a share. The difference between the prices at which these shares had been sold and bought amounted to Rs. 6,762-8-0 and for this amount the defendants gave the plaintiff credit by adjusting it towards the promissory note account. In respect of this transaction the case of the Official Assignee was that the purchase which had been made by the defendants was not only unauthorized, but contrary to instructions and was not valid and binding on the plaintiff as it had been made after the commencement of the insolvency. No claim was made in the alternative that if this contention failed, the plaintiff was entitled to recover the amount credited towards the promissory note on the ground of failure of consideration. The third transaction related to 300 shares in Tatas, and the fourth one was in respect of shares in Ayer Mani Rubber Co. The last claim was abandoned at the trial and the claim on the third transaction was decreed in favour of the plaintiff and the correctness of the order of the trial Judge was not canvassed in the appeal before the High Court. The amount decreed as regards these 300 shares was in the sum of Rs. 1,050.

The defendants denied liability for the entire claim and pleaded that they were not guilty of any fraud and that in any case the plaintiff was not entitled to claim any damage, as he could have easily sold away all his shares soon after his purchase without incurring any loss, and that he retained them in order to make profit.

The suit was first heard by Bell, J., who decreed the claim of the plaintiff on 9th March, 1943. The defendants appealed. The appellate Court set aside the decision of Bell, J., and remanded the suit for fresh disposal on 25th August, 1944. Meantime, that is to say, on 21st February, 1944, the adjudication of the plaintiff was annulled and on his application he was brought on the record in the place of the Official Assignee and he continued the suit. Clark, J., who tried the suit after remand gave a decree in favour of the plaintiff for the sum of Rs. 61,787-9-0 with interest at the Court rate of six per cent. per annum from 1st September, 1937, until payment or realization with costs. Against this decree the defendants preferred an appeal. The appellate Bench modified the decree of Clark, J., and reduced the amount of the decree by a sum of Rs. 9,100. Each party was made to pay proportionate costs throughout. Leave to appeal to this Court against the decree was granted and the appeal is now before us under the certificate so granted.

As above stated, the claim in respect of Ayer Mani rubber shares was abandoned at the trial and the claim on the third transaction relating to 300 shares in Tatas was decreed for the sum of Rs. 1,050 and the correctness of this order was not canvassed in the appeal before the High Court. The two claims discussed in that Court were in respect of the transaction of 5,000 Indian Iron shares and in respect of the transaction made in Associated Cements. The dispute before us so far as the Indian Iron shares are concerned, has narrowed down to the question of quantum of damages in respect of 3000 out of the 5000 shares that were transferred by the defendants to the plaintiff on the night of the 5th April, 1937, 1300 out of these shares having been sold at cost price by the plaintiff the day after the purchase, and 700 having been sold to Pilani & Co., and regarding which the plaintiff's claim was rejected in the High Court and plaintiff preferred no further appeal.

The finding of Somayya, J., that the defendants firm was guilty of fraud both in respect of the failure to disclose the fact that the Indian Iron shares or most of them belonged to one of its partners, Annamalai Chettiar, and also on account of its failure to disclose its knowledge of the probable slump in the market by reason of the notice given by three members of the stock exchange to temporarily close it was not contested before Clark, J., and it was conceded that that finding had become final. The main question convassed at this trial was whether

the plaintiff had suffered any damage as a consequence of this fraud and if so, how were the damages to be measured. In the plaint plaintiff claimed that he was entitled to be recompensed for all loss and damage which he had suffered. A sum of Rs. 45,042-9-0 was credited in his account in respect of the sale of 3000 shares made on 20th and 22nd April, 1937. He claimed the whole of this amount as damages on this count; in other words, according to the plaintiff, the damage suffered by him was to be measured according to the difference between the purchase price of the shares and the price for which they were ultimately sold. The shares were bought on 5th April at Rs. 77 and Rs. 77-4-0 and sold at prices ranging between Rs. 42-8-0 and Rs. 47-4-0 on the 20th and 22nd April, 1937. This method of measuring damages was successfully challenged by the defendants before the trial Judge. Clark, J., in spite of holding that measure of damages in a case like this could not be as suggested by the plaintiff, estimated the damage suffered by him at the difference between the rate at which the plaintiff purchased the shares and the rate at which he actually sold them, on the ground that the price at which he sold them was more than the fair value of these shares realizable on the 5th April, 1937, between *bona fide* purchasers and sellers having knowledge of the real state of affairs.

Before the appeal bench of the High Court it was contended that the trial Judge was in error in his assessment of the real value of these shares on 5th April, 1937, and that in any case they could not be valued at four different rates. It was urged that damages had been over-estimated. This contention was negatived and it was held that in the circumstances of this case it could not be said that the plaintiff acted unreasonably in holding on to the shares for the time that he did and that the defendants had by their own double dealings placed the plaintiff in a difficult position.

The learned counsel for the appellant reiterated before us the contentions raised by him in the High Court and urged that the true measure of damages in actions like this, is the difference between the price paid and the real value of the shares at the time of the transaction, and that any loss caused to the plaintiff by his retaining the shares after that date could not be decreed. It was strenuously contended that had the plaintiff sold the remaining shares like the 1300 he sold, he would not have suffered any damage whatsoever, as the market price of these shares on the 6th and 7th was not below the cost price. It was said that the loss that the plaintiff suffered was merely due to the circumstance that he retained the shares for a fortnight, and was not as a consequence of the fraud. Lastly, it was contended that even if it could be held that the market on the 6th and 7th was affected by the very fact concealed from the plaintiff, its effect disappeared by the 10th April when the fact became fully known and damage should have been assessed on the difference between the market price of these shares, which ruled at Rs. 62 per share on 10th April, 1937, and their cost price.

Now the rule is well settled that damages due either for breach of contract or for tort are damages which, so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act. Difficulty however arises in measuring the amount of this money compensation. A general principle cannot be laid down for measuring it, and every case must to some extent depend upon its own circumstance. It is, however, clear that in the absence of any special circumstances the measures of damages cannot be the amount of the loss ultimately sustained by the representee. It can only be the difference between the price which he paid and the price which he would have received if he had resold them in the market forthwith after the purchase provided of course that there was a fair market then. The question to be decided in such a case is what could the plaintiff have obtained if he had resold forthwith that which he had been induced to purchase by the fraud of the defendants. In other words, the mode of dealing with damages in

such a case is to see what it would have cost him to get out of the situation, *i.e.*, how much worse off was his estate owing to the bargain in which he entered into. The law on this subject has been very appositely stated in *McConnel* v. *Wright*[1], by Lord Collins in these terms:—

"As to the principle upon which damages are assessed in this case, there is no doubt about it now. It has been laid down by several judges, and particularly by Cotton, L.J., in *Peek* v. *Derry*[2]; but the commonsense and principle of the thing is this. It is not an action for breach of contract, and, therefore, no damages in respect of prospective gains which the person contracting was entitled by his contract to expect to come in, but it is an action of tort—it is an action for a wrong done whereby the plaintiff was tricked out of certain money in his pocket; and therefore, *prima facie,* the highest limit of his damages is the whole extent of his loss, and that loss is measured by the money which was in his pocket and is now in the pocket of the company. That is the ultimate final, highest standard of his loss. But, in so far as he has got an equivalent for that money, that loss is diminished; and I think, in assessing the damages *prima facie* the assets as represented are taken to be an equivalent and no more for the money which was paid. So far as the assets are an equivalent, he is not damaged; so far as they fall short of being an equivalent, in that proportion he is damaged."

The sole point for determination therefore in the case is whether the shares handed over to the plaintiff were an equivalent for the money paid or whether they fell short of being the equivalent and if so, to what extent. Ordinarily the market rate of the shares on the date when the fraud was practised would represent their real price in the absence of any other circumstance. If, however, the market was vitiated or was in a state of flux or panic in consequence of the very fact that was fraudulently concealed, then the real value of the shares has to be determined on a consideration of a variety of circumstances, disclosed by the evidence led by the parties. Thus though ordinarily the market rate on the earliest date when the real facts became known may be taken as the real value of the shares, nevertheless, if there is no market or there is no satisfactory evidence of a market rate for some time which may safely be taken as the real value, then if the representee sold the shares, although not bound to do so, and if the resale has taken place within a reasonable time and on reasonable terms and has not been unnecessarily delayed, then the price fetched at the resale may well be taken into consideration in determining retrospectively the true market-value of the shares on the crucial date. If there is no market at all or if the market rate cannot, for reasons referred to above, be taken as the real or fair value of the thing and the representee has not sold the things, then in ascertaining the real or fair value of the thing on the date when deceit was practised subsequent events may be taken into account, provided such subsequent events are not attributable to extraneous circumstances which supervened on account of the retaining of the thing. These, we apprehend, are the well settled rules for ascertaining the loss and damage suffered by a party in such circumstances.

If damages had been measured on the rules above stated by the Courts below, this Court would have then respected the concurrent finding on this point as the question of assessment of damages primarily is a question of fact and the concurrent findings of the Courts below on such points except in very exceptional circumstances are not reviewed by this Court. We however find that in spite of the circumstance that the Courts below correctly enunciated the rule of measuring damages in such cases, they estimated them on the difference between the cost price and the price realized at the sale on the 20th and 22nd at four different rates. These four rates could obviously not represent the true value of the shares on the 5th. Moreover the finding that the true value of these shares was lower than what was actually realized on their resale on the 20th and 22nd is not based on any evidence whatsoever. Such a finding could only be arrived at on the basis of evidence on the record and by reference to that evidence, and this has not been done. The High Court did not make an attempt to find out to what extent

1. (1903) 1 Ch. 546. 2. (1887) 37 Ch.D. 541.

the value of the shares fell short of being an equivalent for the money taken from the plaintiff. Without determining this crucial issue we think it was not right to estimate the damage on the vague finding that the true value of the shares was lower than the value which they fetched at the resale on the 20th and 22nd. In this situation, we have no alternative but to arrive at our own finding on this question in spite of the concurrent finding and we have to find as to what could be said to have been the true value of these shares on the relevant date. In other words, the question for our determination is what the market-value would have been on 5th April, of these shares if all buyers and sellers had information that the market was to be closed on 8th and 9th April to enable settlement of outstanding transactions to be effected, and had appreciated the effect of that decision. In the words of Buckley, J., in *Broome* v. *Speak*[1], it is indeed a difficult question to answer but that difficulty is no ground for refusing to answer it as has been done by the Court below.

In order to determine the real price of these 3000 shares sold to plaintiff by concealment of certain facts, the first question that needs decision is whether the market for these shares the rate prevailing wherein would *prima facie* be a true index of their value, had been affected by the very fact concealed of which the plaintiff complains. In this case from the proved facts it is clear that the market rate of these shares was seriously affected by reason of the impending decision of the stock exchange for closing it to stop the wave of speculation that had taken the frenzy of the market by reason of the merger of the two steel companies doing business in northern India. The market reports for the week ending 19th March, show that the Indian Irons were standing at or around Rs. 55. By Saturday the 3rd April after the announcement of the terms of the merger by reason of the keen speculation the shares were being dealt at around Rs. 73. On Monday the 5th April the price was Rs. 77. On Tuesday the 6th, the day when the decision was taken to close the market for two days, these shares touched Rs. 79, but by the close of business fell back to Rs. 72, a sudden drop of Rs. 7. On Wednesday the 7th April in the Calcutta market they closed at Rs. 58, a drop of Rs. 14 in a day. These sudden rises and falls in the market during the course of these two days are sufficient indication of the fact that the drop was due to the decision of the stock exchange to close the exchange for two days. There is no evidence that any other factor was then disturbing the market rate of these shares. The share market report of the defendants themselves issued on 10th April, 1937, amply bears out this fact. In this report it was stated as follows:—

> "The outstanding feature of the Indian markets during the week under review was the sudden landslide in Indian Iron and Steel shares, which proved infectious to the other sections of the market. The week opened with a cheerful bullish sentiment and Indian Iron and Steels touched Rs. 80. At this dizzy height, the markets lost their *equilibrium* and frenzied selling resulted in a *sensational decline of about 25 points*. The heavy liquidation was due to a predominance of weak-holders that had come into the market at a late stage. Further, *selling was accentuated by the decision of Calcutta Stock Exchange to close the Calcutta market on the 8th and 9th April* to enable brokers to make deliveries and effect settlements for transactions in Indian Iron and Steel shares. Heavy volume of business has been outstanding between brokers on account of the delay in getting certificates. Prospect of immediate delivery of share certificates scared off weak-holders and prices declined on heavy liquidation."

It is clear therefore that the decision of the Calcutta stock exchange to close the Calcutta market on 8th and 9th affected the market prices considerably. The Calcutta market on the 7th dropped from 72 to 58, as already stated. The decision of the Calcutta stock exchange was published in the Hindu of Madras on the evening of the 7th. From the statement of account, Ex. P-41 filed by Trojan & Co. on 7th, about half a dozen transactions in these shares took place through them. Most of the transactions, it appears, were by small holders of 100

1. (1903) 1 Ch. 586.

scrips or so, who unloaded their shares between 71 to 60 per share. On the 8th three transactions took place at Rs. 62. No transaction took place between 8th and 14th. There were two transactions on the 14th at Rs. 56, and there was a transaction on the 15th at Rs. 57-8-0. On the 20th Trojan & Co. sold 2000 of the plaintiff's shares at rates varying between Rs. 44-12-0 and Rs. 47-4-0.

According to the statement of account of another broker, Ramlal & Co., there were about 16 transactions in these shares on the 7th. Most of them were sold in lots of 100 or 200 and the sale price of these shares ranged from Rs. 74 to 64. On the 8th there were a few transactions, the rates varying between Rs. 57 to Rs. 66. There was a transaction on the 9th at Rs. 60. There were two or three transactions on the 10th also near about this rate. No transaction after the 10th made by this company has been exhibited on the record. Ex. P-23 is another weekly share market report of Trojan & Co. issued on 17th April, 1937. It states as follows:—

"In the first place, Indian Irons are very cheap around Rs. 46. The company is doing extremely well and the stage is set for a steady rise to Rs. 70.

Indian Iron and Steels fluctuated between Rs. 55 to Rs. 60 and closed at Rs. 47. The recent hectic speculation has brought its own nemesis."

This report proves that there was really no market as it appears from the evidence on the record in Madras between the 8th and 17th which was a Saturday, and on the 17th the prices seemed to be settling down at Rs. 46. On the 19th the plaintiff gave to the defendants an order to sell his 3000 shares and it was said "Please retain this order till executed". The defendants were only able to dispose of 2000 of these shares on the 20th at prices varying between Rs. 44-12-0 to Rs. 47-4-0. The remaining 1000 shares the plaintiff was able to sell through Ramlal & Co. at Rs. 42-8-0 on 22nd April, 1937. It is quite possible and probable that had the plaintiff placed an order before the 19th, say on the 16th or 17th, with the defendants or with Ramlal & Co., he might have been able to sell these 1000 shares also at about the same price as he was able to dispose of his 2000 shares. No member of the defendants-firm gave evidence in the case. Plaintiff went into the witness box and stated that had he known what the defendants knew, he would not have purchased the shares. The information was withheld from him that these shares were likely to go down. He said that he was told by the defendants to sell the shares but no purchasers were available and in spite of his keenness to liquidate them he was not able to do so before the 20th and 22nd, that he approached Trojan & Co., the defendants-firm for selling them but they were not able to sell more than 2000 shares. Considering the whole of this material, we are satisfied that the market rate prevailing on the 5th, 6th and 7th had been affected by reason of the decision of the Calcutta stock exchange to keep the market closed on the 8th and 9th and the market did not settle down till about the 17th or 18th and the prices then ruling can in the circumstances of this case be said to be their true market price. In our judgment, Rs. 46 per share was the real price of these shares when they were put in the plaintiff's pocket and he got Rs. 46 for each share in lieu of what he paid for either at Rs. 77 or at Rs. 77-4-0. He is entitled to commission also which he would have to pay on the sale of these shares. The difference between these two rates is the damage that he has suffered and he is entitled to it. For the reasons given above we modify the order passed by Clark, J., and by the appellate Bench of the High Court to the extent indicated above and we estimate the plaintiff's damage at Rs. 93,000 on account of the 3000 shares at the rate of Rs. 31 per share.

The second question canvassed before the High Court and also before us, was in respect of the Associated Cement shares. As above stated, the plaintiff's account was credited in the sum of Rs. 6,762-8-0 on account of the purchase of these shares. Plaintiff had pleaded that the transaction was not authorised by him and that it had been made in contravention of his instructions. He had

claimed compensation on the ground of breach of instructions, he did not in the alternative claim on the ground of failure of consideration the amount credited by the defendants in the promissory note account and which credit disappeared by reason of the failure of the suit on the promissory note. At the hearing of the case before Bell, J., the contention that the purchase was unauthorized was abandoned by counsel and the same position was adopted before Clark, J. During cross-examination of the plaintiff it was elicited that he either instructed the defendants to purchase the shares or at any rate ratified the purchase which the defendants had made on his behalf. It was argued before the appellate bench of the High Court that having pleaded one thing and having led evidence in support of that thing but later on having been forced to admit in the witness box that the true state of things was different the plaintiff had disentitled himself to relief as regards these shares and he could not be granted the relief that he had not asked for. The High Court negatived this contention on the ground that though a claim for damages in respect of a particular transaction may fail, that circumstance was no bar to the making of a direction that the defendants should pay the plaintiff the money actually due in respect of that particular transaction. It also held that the plaintiff's claim in respect of this item of Rs. 6,762-8-0 was within limitation. We are unable to uphold the view taken by the High Court on this point. It is well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint the Court was not entitled to grant the relief not asked for and no prayer was ever made to amend the plaint so as to incorporate in it an alternative case. The allegations on which the plaintiff claimed relief in respect of these shares are clear and emphatic. There was no suggestion made in the plaint or even when its amendment was sought at one stage that the plaintiff in the alternative was entitled to this amount on the ground of failure of consideration. That being so, we see no valid grounds for entertaining the plaintiff's claim as based on failure of consideration on the case pleaded by him. In disagreement with the Courts below we hold that the plaintiff was wrongly granted a decree for the sum of Rs. 6,762-8-0 in respect of the Associated Cement shares in this suit. Accounts settled could only be re-opened on proper allegations.

The next point canvassed in the Courts below was in respect of the claim of the plaintiff regarding interest on the amount found due to the plaintiff from 5th April, 1937, to the date of the suit. It was contended that no interest could be allowed on damages because to do so would amount to awarding damages on damages which is opposed to precedent and principle. Clark, J., however, awarded interest by placing reliance on certain English decisions which enunciate the rule that an agent who receives or deals with the money of his principal improperly and in breach of his duty or who refused to pay it over on demand is liable to pay interest from the time when he so receives or deals with the same or from the time of the demand. We think it is well settled that interest is allowed by a Court of equity in the case of money obtained or retained by fraud. As stated in Article 423 of Vol. I of Halsbury, the agent must also pay interest in all cases of fraud and on all bribes and secret profits received by him during his agency. Their Lordships of the Privy Council in *Johnson* v. *Rex*[1], observed as follows:—

> "In order to guard against any possible misapprehension of their Lordships' views they desire to say that in their opinion there can be no doubt whatever, that money obtained by fraud and retained by fraud can be recovered with interest, whether the proceedings be taken in a Court of equity, or a Court of law, or in a Court, which has jurisdiction both equitable and legal."

The appeal Court affirmed the view of Clark, J., on this point. The learned counsel for the appellant contended that the decisions relied upon concern cases where the agent had retained some money of his principal in his hands but that

1. (1904) A.C. 817.

in the present case the claim was merely for damages. This contention is fallacious. By reason of the transaction brought about by fraudulent concealment plaintiff paid to the defendants a sum of Rs. 60,000 in cash which he would not have parted with otherwise and he also lost the money which stood at his credit with the defendants. It is thus clear that the agents had a large sum of the plaintiff with them which they would not have acquired but by reason of the fraud that they practised on him. In this view of the case we see no force in the contention of the learned counsel and we repel it.

The only other point that was argued before us was in respect of future interest. It was not denied that plaintiff was entitled to future interest as allowed to him at the rate of 6% on the amount found due. It was however argued that the plaintiff should not have been allowed interest for the period of one year and six months during which the decree stood satisfied. The facts are that on 9th March, 1943, a decree for Rs. 51,805-1-0 carrying interest at six per cent. was passed in favour of the plaintiff. On the 11th May, 1943, an amount of Rs. 71,000. due under this decree was paid by the defendants to the Official Assignee. This amount was returned by the Official Assignee to the defendants on 12th September, 1944 after that decree had been set aside. Meanwhile the plaintiff's adjudication had been annulled and he had been brought on the record on 16th March, 1944. It was contended that during the period when the money remained with the Official Assignee who was the plaintiff no future interest was payable as the decree stood satisfied during that period. The High Court rejected this contention on the ground that when this money was paid into Court, it was coupled with a prayer that it should not be paid out to the creditors of the insolvent's estate pending disposal of the appeal, and therefore as the money was not distributable amongst the insolvent's creditors, interest for this period had been rightly allowed. In our opinion, this view cannot be sustained. So far as the defendants' judgment-debtors are concerned they had done their part and paid the money to the decree-holder and had thus satisfied the decree. It was open to the Official Assignee, the decree-holder, not to take the money on the condition on which it was given to him and if he had not taken the money from the defendants he could then justly have claimed future interest on this amount, but having taken the money and kept it, it could not be said that during this period anything was due to the plaintiff from the defendants. The defendants certainly had paid the decretal amount and whether the plaintiff or his predecessor in interest was able to use it or not was a circumstance wholly immaterial in considering whether future interest should or should not be allowed. In our judgment, the plaintiff was not entitled to future interest at the rate allowed for one year and six months period, beginning from 9th March, 1943, and ending with 12th September, 1944.

The appeal is therefore allowed to the extent indicated above. The decree of the High Court will be modified and plaintiff will be entitled to damages in the sum of Rs. 93,000 on the 3000 Indian Iron Shares. The decree given to the plaintiff in respect of Rs. 6,762-8-0 is set aside over and above the decree for Rs. 9,100 in his favour set aside by the High Court. In the calculation of future interest the plaintiff will not be allowed interest from 9th March, 1943, to 12th September, 1944. In the result the decree given to the plaintiff in the sum of Rs. 61,787-9-0 is reduced to Rs. 42,175. He will get interest at six per cent. per annum from 5th April, 1937, until payment or realization except for a period of one year and six months. Plaintiff will get proportionate costs throughout.

Agent for Appellant: *Ganpat Rai.*

Agent for Respondent: *M. S. K. Sastri.*

G.R.|K.S. *Decree modified.*

[THE SUPREME COURT OF INDIA.]

[Criminal Appellate Jurisdiction.]

PRESENT:—M. PATANJALI SASTRI, *Chief Justice*, B. K. MUKHERJEA, VIVIAN BOSE, GHULAM HASAN AND N. H. BHAGWATI, JJ.

Poppatlal Shah, Partner of Messrs. Indo-Malayan Trading Company .. *Appellant**

v.

The State of Madras, represented by the Deputy Commercial Tax Officer, Sowcarpet, Madras .. *Respondent.*

The Union of India, The State of Bihar, The State of Punjab, The State of Mysore, The State of U. P., The State of Travancore-Cochin, The State of Madhya Pradesh, Husain Kasain Dada (India), Ltd. .. *Interveners.*

Government of India Act (1935), *section* 100 (3) *and Schedule VII, List II, Entry No.* 48 *—Power of Provincial Legislature to pass Sales-tax Statute—Limits.*

Madras General Sales Tax Act (IX of 1939), *before amendment by Madras Act (XXV of* 1947)*—Section.* 2 (*h*)*—"Sale"—Construction.*

By virtue of section 100 (3) of the Government of India Act, 1935, which corresponds to Article 246 (3) of the Constitution of India, 1950, a Provincial Legislature could not pass a taxation Statute which would be binding on any other part of India outside the limits of the province, but it would be quite competent to enact a legislation imposing taxes on transactions concluded outside the province, provided that there was sufficient and a real territorial nexus between such transactions and the taxing province. This principle is applicable to sale-tax legislation.

The mere fact that the contract of sale was entered into within the province of Madras does not make the transaction, which was completed admittedly within another province, where the property in the goods passed, a sale within the province of Madras according to the provisions of the Madras General Sales Tax Act (before its amendment in 1947) and no tax could be levied on such a transaction under the provisions of the Act. A contract of sale becomes a sale under the Sale of Goods Act only when the property in the goods is transferred to the buyer under the terms of the contract itself. The presence of the goods within the province at the time of the contract would undoubtedly make the sale, if subsequently completed, a sale within the province by reason of the explanation added by Madras Act XXV of 1947 to section 2 (*h*) of the Madras General Sales Tax Act. But in respect of such transactions prior to the amendment, assessment of sales-tax is illegal and not warranted by the provisions of the Act. A conviction of an assessee for an offence under section 15 of the Madras General Sales Tax Act in respect of such illegal assessment is unsustainable. (1952) 2 M.L.J. 593, reversed.

Appeal under Articles 132 (1) and 134 (1) (*c*) of the Constitution of India from the Judgment and Order, dated the 29th August, 1952 of the High Court of Judicature at Madras (Rajamannar, C.J., and Venkatarama Ayyar, J.†), in Criminal Appeal No. 129 of 1952 arising out of the Order, dated the 25th February, 1952, of the Court of the VII Presidency Magistrate, Egmore, Madras, in C. T. No. 1358 of the Calendar for 1950.

B. Somayya, Senior Advocate, (*C. R. Pattabhi Raman*, Advocate, with him), for Appellant.

V. K. T. Chari, Advocate-General of Madras, (*V. V. Raghavan and Alladi Kuppuswamy*, Advocates with him), for Respondent.

For the Interveners:

M. C. Setalvad, Attorney-General for India, (*G. N. Joshi* and *P. A. Mehta*, Advocates, with him), for the Union of India.

B. K. P. Sinha, Advocate, for the State of Bihar.

S. M. Sikri, Advocate-General of Punjab, (*M. L. Sethi*, Advocate, with him), for the State of Punjab.

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*Criminal Appeal No. 92 of 1952. 30th March, 1953.

† (1952) 2 M.L.J. 593.

A. R. Somnatha Iyer, Advocate-General of Mysore, (*R. Ganapathy Iyer*, Advocate, with him), for the State of Mysore.

K. B. Asthana, Advocate, for the State of U. P.

T. N. Subramania Iyer, Advocate-General of Travancore-Cochin, (*M. R. Krishna Pillai and Balakrishna Iyer*, Advocates, with him), for the State of Travancore-Cochin.

V. N. Sethi, Advocate, for the State of Madhya Pradesh.

Hajarnavis, Advocate, for Intervener No. 8.

The Judgment of the Court was delivered by

Mukherjea, J.—This appeal, which has come before us on a certificate granted by the Madras High Court under Articles 134 (1) (*c*) and 132 (1) of the Constitution, is directed against an appellate judgment of a Division Bench of the High Court of Madras, passed in Criminal Appeal No. 129 of 1952, by which the learned Judges affirmed an order of the Seventh Presidency Magistrate, Madras, dated 25th February, 1952, convicting the appellant of an offence punishable under section 15 of the Madras General Sales Tax Act and sentencing him to pay a fine of Rs. 1,000; in default to suffer imprisonment for a period of 3 months.

The appellant is a partner of a firm of merchants called "Indo-Malayan Trading Company" which has its Head Office in the City of Madras and carries on the business of selling and purchasing groundnut oil, sago and kirana articles. For the period—April 1, 1947, to December 31, 1947—the company was assessed to sale tax under the Madras Act IX of 1939 for an amount of Rs. 37,771, annas odd on a total turnover of Rs. 37,75,257 and for failure to pay the same, proceedings were instituted against him under the provision of section 15 of the Act which resulted in his conviction as mentioned above. The course of business, which is usually followed by the company and which was actually followed during the period for which assessment is made, is as follows: The company receives orders in its Madras Office from Calcutta merchants for supply of certain articles. These articles are purchased in the local markets and they are despatched to Calcutta by rail or steamer. The railway receipts and bills of lading are taken in the name of the vendor company and so also are the insurance policies, and they are sent to the company's bankers in Calcutta who deliver the same to the consignees on payment of prices and other charges. The sole point that requires consideration is, whether in these circumstances the sale transactions were liable to be taxed under the General Sales Tax Act of Madras?

Before the High Court both the parties seem to have accepted the position that if on the facts stated above, which were not disputed by either side, the sales could be held to have taken place within the province of Madras, the tax could legitimately be levied on them but not otherwise. The parties differed, however, as regards the test to be applied, in determining whether the sales did take place within the province of Madras or not. On behalf of the appellant the contention raised was that the place of sale in regard to all the transactions was Calcutta, as the property in the goods sold, admittedly passed to the purchasers, in that city. The contention of the respondent State on the other hand was that the true test for determining the locality of the sale was not where the property in the goods sold passed, but where the actual transaction was put through. As the company had its Head Office in the City of Madras, its accounts were maintained there and the goods were delivered to the common carrier in that city, the sale, according to the respondent, must be deemed to have taken place in Madras even though the property in the goods sold passed outside the province.

The High Court accepted this contention of the respondent State. In the opinion of the learned Judges, the word "sale" has both a legal and a popular meaning. In the legal sense, it imports passing of property in the goods and it is

in this sense that the word is used in the Sale of Goods Act. In the popular sense, however, it signifies the transaction itself which results in the passing of property. As the object of the Legislature in the Sales Tax Act is to impose a tax on the occasion of the sale, it is immaterial that the sale has been completed outside the province. The place where the property passes is, it is said, a matter of no concern to the taxing authority and in such context the popular meaning of the word is more appropriate and should be adopted. The further contention raised on behalf of the appellant, that if this view was accepted, the sale tax would have to be regarded as being extra-territorial in its operation and as such *ultra vires* the Provincial Legislature, was repelled by the High Court on the authority of the well-known decision of the Judicial Committee in *Wallace Brothers, etc., & Company* v. *The Commissioner of Income-Tax, Bombay*.[1]

It is the propriety of this decision that has been challenged before us and the contentions raised by Mr. Somayya, who appeared in support of the appeal, are of a two-fold character. The learned counsel has argued in the first place that the Provincial Legislature functioning under the Government of India Act, 1935, was constitutionally incompetent to enact a legislation of this character which according to the interpretation put upon it by the High Court is capable of operating on sale transactions concluded outside the province. The other contention is that on a proper construction of the relevant provisions of the Madras Sales Tax Act the High Court ought to have held that they do not authorise the imposition of sale-tax in respect of a transaction of sale where property in the goods sold passes outside the province.

The first contention appears to us to be unsustainable. Section 100 (3) of the Government of India Act, 1935, upon which Mr. Somayya, relied and which corresponds to Article 246 (3) of the Constitution runs as follows:

"Subject to the two preceding sub-sections, the Provincial Legislature has and the Federal Legislature has not, power to make laws for a province or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule."

The entry in the Provincial List that is relevant for our purpose is Entry No. 48 and that speaks of 'taxes on the sale of goods and on advertisements'. The entry does not suggest that a legislation imposing tax on sale of goods can be made only in respect of sales taking place within the boundaries of the province; and all that section 100 (3) provides is that a law could be passed by a Provincial Legislature for purposes of the province itself. It admits of no dispute that a Provincial Legislature could not pass a taxation statute which would be binding on any other part of India outside the limits of the province, but it would be quite competent to enact a legislation imposing taxes on transactions concluded outside the province, provided that there was sufficient and a real territorial nexus between such transactions and the taxing province. This principle, which is based upon the decision of the Judicial Committee in *Wallace Brothers, etc. & Company* v. *The Commissioner of Income-Tax, Bombay*[1] has been held by this Court to be applicable to sales tax legislation, in its recent decision in the *Bombay Sales Tax Act Case* (*The State of Bombay* v. *United Motors* (*India*), *Ltd.*[2] and its propriety is beyond question. As a matter of fact, the legislative practice in regard to sale tax laws adopted by the Provincial Legislature prior to the coming into force of the Constitution has been to authorise imposition of taxes on sales and purchases which were related in some manner with the taxing province by reason of some of the ingredients of the transaction having taken place within the province or by reason of the production or location of goods within it at the time when the transaction took place. If in the Madras Sales Tax Act the basis adopted for taxation is the location of the place of busi-

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1. (1948) 2 M. L. J. 62: L. R. 75 I.A. 86; (1948) F.C.R. 1 (P.C.).

2. Since reported in (1953) S.C.J. 373.

ness or of the goods sold, within the Province of Madras, undoubtedly it would be a valid piece of legislation to which no objection on constitutional grounds could be taken. The controversy, therefore, narrows down to the short point as to what exactly has been adopted as the basis of the levy of sale tax by the Madras Legislature. This leads us to the question of interpretation of the Statute which is involved in the second point raised by Mr. Somayya.

It is a settled rule of construction that to ascertain the legislative intent, all the constituent parts of a statute are to be taken together and each word, phrase or sentence is to be considered in the light of the general purpose and object of the Act itself. The title of the Madras Sales Tax Act describes it to be an Act, the object of which is to provide for the levy of a general tax on the sale of goods in the province of Madras and the very same words are repeated in the preamble which follows. The title and preamble, whatever their value might be as aids to the construction of a statute, undoubtedly throw light on the intent and design of the Legislature and indicate the scope and purpose of the legislation itself. The title and preamble of the Madras Sales Tax Act clearly show that its object is to impose taxes on sales that take place within the province, though these words do not necessarily mean that the property in the goods sold must pass within the province. The expression "sale of goods" is a composite expression consisting of various ingredients or elements. Thus, there are the elements of a bargain or contract of sale, the payment or promise of payment of price, the delivery of goods and the actual passing of title, and each one of them is essential to a transaction of sale though the sale is not completed or concluded unless the purchaser becomes the owner of the property. The question is what element or elements have been accepted by the Madras Legislature as constituting a sale in the province upon which it is the object of the statute to levy tax. Section 2 (*h*) gives the definition of 'sale' and it is defined as meaning,

"every transfer of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge".

Unmistakably the stress is laid in this definition on the element of transfer of property in a sale and no other. The language gives no indication of the popular meaning of sale in which, according to the High Court, the word was used. It is to be noticed that there was no provision by way of explanation of this definition, in operation, at the material time to indicate in what cases a sale would be regarded as taking place within the Province of Madras, although the property in the goods sold did pass outside the boundaries of the province. Such explanations were added by the Madras Act XXV of 1947 and one of these explanations, namely, Explanation 2, provides as follows:

"Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale or purchase of any goods shall be deemed, for the purposes of this Act, to have taken place in this Province, wherever the contract of sale or purchase might have been made—

(*a*) if the goods were actually in this Province at the time when the contract of sale or purchase in respect thereof was made, or

(*b*) in case the contract was for the sale or purchase of future goods by description, then, if the goods are actually produced in this Province at any time after the contract of sale or purchase in respect thereof was made."

It would be clear from this that these transactions were not considered by the Legislature to constitute sales within the province of Madras under the definition itself, but by resort to a legal fiction they were declared to be so, notwithstanding any provision in the Sale of Goods Act to the contrary which, it was assumed, would otherwise be applicable. The explanation further shows that in defining "sale" in section 2 (*h*), the Legislature had in mind a sale in the Province of Madras and as these words occur in the title and preamble of the Act it was not deemed necessary to repeat them in the definition or the charging sections. Section 3 is the charging section in the Act and it provides for the

levy of a tax on the total turnover of a dealer for a particular year. A "turnover" is defined to be the aggregate amount for which goods are either bought or sold. The charging section purports to levy a tax on the sale of goods and the tax is on the sale of goods in the Province of Madras as defined in section 2 (*h*) of the Act read in the light of its title and preamble.

In our opinion, the mere fact that the contract for sale was entered into within the province of Madras does not make the transaction, which was completed admittedly within another province, where the property in the goods passed, a sale within the Province of Madras according to the provisions of Madras Sales Tax Act and no tax could be levied upon such a transaction under the provisions of the Act. A contract of sale becomes a sale under the Sale of Goods Act only when the property in the goods is transferred to the buyer under the terms of the contract itself. The presence of the goods within the province at the time of the contract would undoubtedly make the sale, if subsequently completed, a sale within the province by reason of the explanation added by Act XXV of 1947; but as this explanation was not in operation during the relevant period with which we are concerned, the assessment of sale tax, in our opinion, on the transactions during this period is illegal and not warranted by the provisions of the Act. It is worthwhile to mention in this connection that except for the period in question no tax was attempted to be levied on similar transactions of the appellant by the taxing authorities in any of the previous years, though the Act came into operation as early as the year 1939. It is not disputed also that the company is paying sale tax on its transactions with the Calcutta merchants since the explanation added by Act XXV of 1947 came into force. In our opinion, the appeal should be allowed and the conviction and sentence passed by the Courts below should be set aside. The fine and sales tax, if actually paid, should be refunded to the appellant.

Agent for Appellant: *M. S. K. Aiyangar.*

Agent for Respondent and the Interveners—The Union of India, the State of Punjab, the State of Mysore, the State of Travancore-Cochin and the State of Madhya Pradesh: *G. H. Rajadyaksha.*

Agent for Intervener No. 8: *Rajinder Narain.*

Agent for the State of Bihar: *R. C. Prasad.*

Agent for the State of Uttar Pradesh: *C. P. Lal.*

Agent for Intervenor No. 8: *Rajinder Narain.*

G.R.|K.S. *Appeal allowed.*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT:—M. PATANJALI SASTRI, *Chief Justice,* B. K. MUKHERJEA, VIVIAN BOSE, GHULAM HASAN AND N. H. BHAGWATI, JJ.

The State of Bombay and another .. *Appellants**

v.

The United Motors (India), Ltd. & others .. *Respondents.*

Union of India, and the States of Bihar, Madras, Mysore, West Bengal, U. P., Punjab and Travancore-Cochin .. *Interveners.*

Constitution of India (1950), *Articles* 245 *and* 286—*Scope—Power of State to enact sales-tax legislation—Limits—Inter-State trade—Power to levy sales-tax—Bombay Sales Tax Act* (*XXIV of* 1952)—*Constitutional validity—Rules under—R.* 5 (2)—*Validity.*

Constitution of India (1950), Article 226—Relief sought under an allegation of infringement of fundamental rights—Proper procedure.

It is always desirable, when relief under Article 226 is sought on allegations of infringement of fundamental rights, that the Court should satisfy itself that such allegations are well founded before proceeding further with the matter.

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*Civil Appeal No. 204 of 1952. 30th March, 1953.

The Legislature of any State has under Article 246 (3) of the Constitution read with Entry 54 of List II of the Seventh Schedule to the Constitution, the exclusive power to make laws "for such State or any part thereof" with regard to "taxes on the sale or purchase of goods other than newspapers". The expression "for such State or any part thereof" cannot be taken to import into Entry 54 the restriction that the sale or purchase referred to *must take place within* the territory of that State. All that it means is that the laws which a State is empowered to make must be for the purposes of that State. In the case of sales-tax it is not necessary that the sale or purchase should take place within the territorial limits of the State in the sense that all the ingredients of a sale like the agreement to sell, the passing of title, delivery of the goods, etc., should have a territorial connection with the State. Broadly speaking, local activities of buying or selling carried on in the State in relation to local goods would be a sufficient basis to sustain the taxing power of the State, provided of course, such activities ultimately resulted in a concluded sale or purchase to be taxed.

Article 286 (1) (*a*) of the Constitution read with the Explanation prohibits taxation of sales or purchases involving inter-State elements by all States except the State in which the goods are delivered for the purpose of consumption therein ("consumption" must be understood as having reference not merely to the individual importer or purchaser but as contemplating distribution eventually to consumers in general within the State). The latter State is left free to tax such sales or purchases, which power it derives not by virtue of the Explanation but under Article 246 (3) read with Entry 54 of List II. All buyers within the State of delivery from out of State sellers, except those buying for re-export out of the State, would be within the scope of the Explanation and liable to be taxed by the State on their inter-State transactions. Clause (2) of Article 286 was not intended to affect the power of the delivery State to tax inter-State sales or purchases of the kind mentioned in the Explanation.

The delivery State would tax both local and inter-State dealers equally without discrimination against either and that is the only measure of protection which Article 286 would reasonably be supposed to accord to inter-State sales or purchases when it is construed in the light of Articles 301 and 304.

The Bombay Sales-Tax Act (XXIV of 1952) does not contravene the provisions of Article 286 (1) (*a*) of the Constitution and the Act is *intra vires*. Rule 5 (2) (1) of the Rules under the Act making a distinction between the modes of transport sold or purchased in the course of inter-State trade is *ultra vires* the rule-making authority and therefore void. But it is clearly severable from rule 5 (1) (i) the exemption under which can be allowed to stand.

It cannot be said that the provisions of sections 5 and 10 of the impugned Act fixing minimum taxable turnover for general tax and special tax respectively are discriminatory and void under Article 14 read with Article 13 of the Constitution.

Taxing Statutes imposing tax on subjects divisible in their nature which do not exclude in express terms subjects exempted by the Constitution, should not for that reason, be declared wholly *ultra vires* and void, for in such cases, it is always feasible to separate taxes levied on authorised subjects from those levied on exempted subjects and to exclude the latter in the assessment of the tax. In such case the Statute itself must be allowed to stand, the taxing authority being prevented by injunction from imposing the tax on subjects exempted by the Constitution.

As under the Bombay Sales-Tax Act the tax is imposed on ultimate analysis, on receipts from individual sales or purchases of goods effected during the accounting period, and it is therefore possible to separate at the assessment the receipts derived from individual sales or purchases and allow the State to enforce the Statute with respect to the constitutionally taxable subjects, it being assumed that the State intends naturally to keep what it could lawfully tax, even when it purports to authorise the taxation of what is constitutionally exempt. Severability in such cases includes separability in enforcement and this principle should be applied in dealing with taxing statutes in this country. *Punjab Province* v. *Daulat Singh and others*, L.R. 73 I.A. 59: 1946 F.L.J. 41: (1946) 1 M.L.J. 426: 1946 F.C.R. 1 (P.C.) and *Romesh Thappar* v. *The State of Madras*; 1950 S.C.R. 394: 1950 S.C.J. 418: (1950) 2 M.L.J. 390 (S.C.), distinguished.

Per *Bose, J., dissenting*:—Article 286 (2) cannot be interpreted in the light of Article 304 (*a*). The two Articles deal with different things. Article 286 is concerned with sales and purchases while Article 304, relates to goods imported from other States. Apart from the Explanation to Article 286, a sale or a purchase can be taxed even though the goods are never actually delivered and even if they never reach the taxing State for the right is to tax the sale or purchase and that is something quite independent of actual delivery. Article 286 has to be construed without reference to Article 304.

The only purpose of the Explanation to Article 286 is to explain where the *situs* of a sale is and it is limited to sub-clause (2) of clause (1) of Article 286. The Explanation

does not govern clause (2) of Article 286. Clause (2) has a different object. Its purpose is to prohibit taxation on sales and purchases which take place in the course of inter-State trade or commerce.

Explanation 2 to definition of "sale" in the Bombay Sales Tax Act directly offends clause (2) of Art. 286 and as the ban imposed by that clause has not been lifted by Parliament, the provision is *ultra vires*. The rules framed under the Act which came into force simultaneously even assuming that they exclude all sales which are exempt under the Constitution cannot save the Act. In deciding as to the validity of the Act the rule under it must be ignored. When the question is whether an Act of the Legislature is *ultra vires*, there is no scope for the applicability of the severability and separability rule even in taxing Statute. Accordingly the impugned Act is *ultra vires* the Constitution of India.

Per *Bhagwati, J.*:—Article 286 and Article 304 (*a*) refer to different states of affairs and one cannot construe the provisions of Article 286 with reference to the provisions of Article 304 (*a*). The explanation to Article 286 (1) (*a*) and Art. 286 (2) lifts the transaction of sale or purchase covered by the explanation to Article 286 (1) (*a*) out of the category of the transactions in the course of inter-State trade or commerce assimilating it to a transaction of sale or purchase which takes place inside the delivery State thus investing it with the character of an intra-State sale qua the delivery State.

On appeal under Article 132 (1) of the Constitution of India from the Judgment and Order, dated the 11th December, 1952 of the High Court of Judicature at Bombay (Chagla, C.J. and Dixit, J.), in Miscellaneous Application No. 289 of 1952.

M. P. Amin, Advocate-General of Bombay, (*M. M. Desai* and *G. N. Joshi*, Advocates, with him), for Appellants.

H. M. Seervai and *J. B. Dadachanji*, Advocates, for Respondents.

For the Interveners:

M. C. Setalvad, Attorney-General for India, (*Porus A. Mehta*, Advocate with him), for Union of India.

Lal Narain Sinha, Advocate, for State of Bihar.

V. K. T. Chari, Advocate-General of Madras, (*Alladi Kuppuswamy*, Advocate, with him), for State of Madras.

A. R. Somnatha Iyer, Advocate-General of Mysore, (*R. Ganapathi Iyer*, Advocate, with him), for State of Mysore.

B. Sen, Advocate, for State of West Bengal.

K. L. Misra, Advocate-General of Uttar Pradesh, (*K. B. Asthana*, Advocate, with him), for State of U. P.

S. M. Sikri, Advocate-General of Punjab, (*M. L. Sethi*, Advocate, with him), for State of Punjab.

T. N. Subramania Iyer, Advocate-General of Travancore-Cochin, (*M. R. Krishna Pillai*, Advocate, with him), for State of Travancore-Cochin.

The Court delivered the following Judgments:—

Patanjali Sastri, C.J.—This is an appeal from the judgment and order of the High Court of Judicature at Bombay declaring the Bombay Sales Tax Act, 1952, (Act XXIV of 1952), *ultra vires* the State Legislature and issuing a writ in the nature of *mandamus* against the State of Bombay and the Collector of Sales Tax, Bombay, appellants herein, directing them to forbear and desist from enforcing the provisions of the said Act against the respondents who are dealers in motor cars in Bombay.

The Legislature of the State of Bombay enacted the Bombay Sales Tax Act, 1952, (hereinafter referred to as "the Act") and it was brought into force on October, 9, 1952, by notification issued under section 1 (3) of the Act, except sections 5, 9, 10 and 47 which came into operation on November 1, 1952, as notified under section 2 (3). On the same day the Rules made by the State Government in exercise of the power conferred by section 45 of the Act also came into force.

On November 3, 1952, the Respondents 1 to 6, who are companies incorporated under the Indian Companies Act, 1913, and Respondent No. 7, a partnership firm, all of whom are carrying on business in Bombay of buying and selling motor cars, presented a petition to the High Court under Article 226 of the Constitution challenging the validity of the Act on the ground that it is *ultra vires* the State Legislature, inasmuch as it purported to tax sales and purchases of goods regardless of the restrictions imposed on State legislative power by Article 286 of the Constitution. It was also alleged that the provisions of the Act were discriminatory in their effect and, therefore, void under Article 14 read with Article 13 of the Constitution. The respondents accordingly prayed for the issue of a writ in the nature of *mandamus* against the appellants preventing them from enforcing the provisions of the Act against the respondents. A further ground of attack was added by amendment of the petition to the effect that the Act being wholly *ultra vires* and void, the provisions requiring dealers to apply for registration in some cases and to obtain a licence in some others as a condition of carrying on their business, infringed the fundamental rights of the respondents under Article 19 (1) (*g*) of the Constitution.

In the affidavit filed in answer the appellants traversed the allegations in the petition and contended, *inter alia,* that the Act was a complete code and provided for special machinery for dealing with all questions arising under it, including questions of constitutionality, and, therefore, the petition was not maintainable, that the present case was not an appropriate one for the issue of a writ under Article 226 as the validity of the imposition of a tax was questioned, that no assessment proceedings having been initiated against the respondents and no demand notice having been issued, the respondents had no cause of action, and that, properly construed, the Act and the Rules did not contravene Article 286 or any other provisions of the Constitution and did not infringe any fundamental right of the respondents.

The petition was heard by a Division Bench of the High Court consisting of Chagla, C.J., and Dixit, J.. Chagla, C.J., who delivered the judgment, Dixit, J., concurring, overruled the preliminary objection distinguishing the decisions cited in support thereof by pointing out that the principle that a Court would not issue a prerogative writ when an adequate alternative remedy was available could not apply where, as here, a party came to the Court with an allegation that his fundamental rights had been infringed and sought relief under Article 226. The learned Judges however thought, in view of the conclusion they had come to on the question of competency of the State Legislature to pass the Act, it was "not necessary to consider the challenge that has been made to the Act under Articles 14 and 19" and expressed no opinion on the alleged infringement of the respondents' fundamental rights.

On the merits, the learned Judges held that the definition of "sale" in the Act was so wide as to include the three categories of sale exempted by Article 286 from the imposition of sales-tax by the States, and, as the definition governed the charging sections 5 and 10, the Act must be taken to impose the tax on such sales also in contravention of Article 286. The Act must, therefore, be declared wholly void, it being impossible to sever any specific offending provision so as to save the rest of the Act, as "the definition pervades the whole Act and the whole scheme of the Act is bound up with the definition of sale". The learned Judges rejected the argument that the Act and the Rules must be read together to see whether the State has made a law imposing a tax in contravention of Article 286, remarking that "if the Act itself is bad, the Rules made under it cannot have any greater efficacy". Nor was the Government, which was authorised to make rules for carrying out the purpose of the Act, under an obligation to exclude the exempted sales. The Rules, too, did not exclude all the three categories of exempted

sales but only two of them, and even such exclusion was hedged round with conditions which the rule-making authority had no power to impose under the Constitution. On all these grounds the whole Act was declared *ultra vires* and void, and a writ was issued as prayed for by the respondents.

In view of the importance of the issues involved, notice of the appeal was issued to the Advocates-General of States under Order 41, rule 1, and many of them intervened and appeared before us. The Attorney-General of India, to whom notice was also sent, intervened on behalf of the Union of India. We have thus had the assistance of a full argument dealing with all aspects of the case.

The Advocate-General of Bombay, appearing on behalf of the appellants, took strong exception to the manner in which the learned Judges below disposed of the objection to the maintainability of the petition. He complained that, having entertained the petition on the ground that infringement of fundamental rights was alleged, and that the remedy under Article 226 was, therefore, appropriate, the learned Judges issued a writ without finding that any fundamental right had in fact been infringed. Learned counsel for the State of West Bengal also represented that parties in that State frequently got petitions under Article 226 admitted by alleging violation of some fundamental right, and the Court sometimes issued the writ asked for without insisting on the allegation being substantiated. We are of opinion that it is always desirable, when relief under Article 226 is sought on allegations of infringement of fundamental rights, that the Court should satisfy itself that such allegations are well founded before proceeding further with the matter. In the present case, however, the appellants can have no grievance, as the respondents' allegation of infringement of their fundamental right under Article 19 (1) (*g*) was based on their contention that the Act was *ultra vires* the State Legislature, and that contention having been accepted by the Court below, there would clearly be an unauthorised restriction on the respondents' right to carry on their trade, registration and licence being required only to facilitate collection of the tax imposed. As Mr. Seervai for the respondents rightly submitted, the fact that the Court below left the question undecided, though the point was concluded by the decision of this Court in *Mohammad Yasin* v. *The Town Area Committee, Jalalabad*[1], which was brought to the notice of the learned Judges, was not the fault of the respondents and gave no real cause for complaint.

Before considering whether the appellant State has made a law imposing, or authorising the imposition of, a tax on sales or purchases of goods in disregard of constitutional restrictions on its legislative power in that behalf, it is necessary to ascertain the scope of such power and the nature and extent of the restrictions placed upon it by Article 286. The power is conferred by Article 246 (3) read with Entry 54 of List II of the Seventh Schedule to the Constitution. The Legislature of any State has, under these provisions, the exclusive power to make laws "for such State or any part thereof" with respect to "taxes on the sale or purchase of goods other than newspapers". The expression "for such State or any part thereof" cannot, in our view, be taken to import into Entry 54 the restriction that the sale or purchase referred to *must take place within* the territory of that State. All that it means is that the laws which a State is empowered to make must be for the purposes of that State. As pointed out by the Privy Council in the *Wallace Brothers case*[2] in dealing with the competency of the Indian Legislature to impose tax on the income arising abroad to a non-resident foreign company, the constitutional validity of the relevant statutory provisions did not turn on the possession by the legislature of extra-territorial powers but on the existence of a sufficient territorial connection between the taxing State and what it

1. (1952) S.C.R. 572: (1952) S.C.J. 162 (S.C.).

2. 1948 F.C.R. 1 : (1948) 2 M.L.J. 62 : L.R. 75 I.A. 86 (P.C.).

seeks to tax. In the case of sales-tax it is not necessary that the sale or purchase should take place within the territorial limits of the State in the sense that all the ingredients of a sale like the agreement to sell, the passing of title, delivery of the goods, etc., should have a territorial connection with the State. Broadly speaking, local activities of buying or selling carried on in the State in relation to local goods would be a sufficient basis to sustain the taxing power of the State, provided of course, such activities ultimately resulted in a concluded sale or purchase to be taxed.

In exercise of the legislative power conferred upon them in substantially similar terms by the Government of India Act, 1935, the Provincial Legislatures enacted sales-tax laws for their respective Provinces, acting on the principle of territorial nexus referred to above; that is to say, they picked out one or more of the ingredients constituting a sale and made them the basis of their sales-tax legislation. Assam and Bengal made among other things the actual existence of the goods in the Province at the time of the contract of sale the test of taxability. In Bihar the production or manufacture of the goods in the Province was made an additional ground. A net of the widest range perhaps was laid in Central Provinces and Berar where it was sufficient if the goods were actually "found" in the Province at any time after the contract of sale or purchase in respect thereof was made. Whether the territorial nexus put forward as the basis of the taxing power in each case would be sustained as sufficient was a matter of doubt not having been tested in a Court of law. And such claims to taxing power led to multiple taxation of the same transaction by different Provinces and cumulation of the burden falling ultimately on the consuming public. This situation posed to the Constitution makers the problem of restricting the taxing power on sales or purchases involving inter-State elements, and alleviating the tax-burden on the consumer. At the same time they were evidently anxious to maintain the State power of imposing non-discriminatory taxes on goods imported from other States, while upholding the economic unity of India by providing for the freedom of inter-State trade and commerce. In their attempt to harmonise and achieve these somewhat conflicting objectives they enacted Articles 286, 301 and 304. These articles read as follows:

286. (1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

(*a*) outside the State; or

(*b*) in the course of the import of the goods into, or export of the goods out of, the territory of India.

Explanation.—For the purposes of sub-clause (*a*), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce:

Provided that the President may by order direct that any tax on the sale or purchase of goods which was being lawfully levied by the Government of any State immediately before the commencement of this Constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty-first day of March, 1951.

(3) No law made by the Legislature of a State imposing or authorising the imposition of a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent.

301. Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.

304. Notwithstanding anything in Article 301 or Article 303, the Legislature of a State may by law—

(*a*) impose on goods imported from other States any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(*b*) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest:

Provided that no Bill or amendment for the purposes of clause (*b*) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

It will be seen that the principle of freedom of inter-State trade and commerce declared in Article 301 is expressly subordinated to the State power of taxing goods imported from sister States, provided only no discrimination is made in favour of similar goods of local origin. Thus the States in India have full power of imposing what in American State legislation is called the use tax, gross receipts tax, etc., not to speak of the familiar property tax, subject only to the condition that such tax is imposed on all goods of the same kind produced or manufactured in the taxing State, although such taxation is undoubtedly calculated to fetter inter-State trade and commerce. In other words, the commercial unity of India is made to give way before the State-power of imposing "any" non-discriminatory tax on goods imported from sister States.

Having thus provided for the freedom of inter-State trade and commerce subject to the important qualification mentioned above, the authors of the Constitution had to devise a formula of restrictions to be imposed on the State-power of taxing sales or purchases involving inter-State elements which would avoid the doubts and difficulties arising out of the imposition of sales-tax on the same transaction by several Provincial Legislatures in the country before the commencement of the Constitution. This they did by enacting clause (1) (*a*) with the Explanation and clause (2) of Article 286. Clause (1) (*a*) prohibits the taxation of all sales or purchases which *take place outside* the State, but a localised sale is a troublesome concept, for, a sale is a composite transaction involving as it does several elements such as agreement to sell, transfer of ownership, payment of the price, delivery of the goods and so forth, which may take place at different places. How, then, is it to be determined whether a particular sale or purchase took place within or outside the State? It is difficult to say that any one of the ingredients mentioned above is more essential to a sale or purchase than the others. To solve the difficulty an easily applicable test for determining what is an outside sale had to be formulated, and that is what, in our opinion, the Explanation was intended to do. It provides by means of a legal fiction that the State in which the goods sold or purchased are actually delivered for consumption therein is the State in which the sale or purchase is to be considered to have taken place, notwithstanding the property in such goods passed in another State. Why an "outside" sale or purchase is explained by defining what is an inside sale, and why actual delivery and consumption in the State are made the determining factors in locating a sale or purchase will presently appear. The test of sufficient territorial nexus was thus replaced by a simpler and more easily workable test: Are the goods actually delivered in the taxing State, as a direct result of a sale or purchase, for the purpose of consumption therein? Then, such sale or purchase shall be deemed to have taken place *in* that State and *outside* all other States. The latter States are prohibited from taxing the sale or purchase; the former alone is left free to do so. Multiple taxation of the same transaction by different States is also thus avoided.

It is, however, argued on behalf of Bombay that the Explanation does not say that the State of delivery is the *only* State in which the sale or purchase shall be deemed to have taken place. If that was the intention, it would have been easy to say so. On the other hand, the non-obstante clause in the Explanation is said to indicate that, apart from cases covered by the legal fiction, the passing of property in the goods is to determine the place of sale. Thus, both the State of delivery and the State in which the property in the goods sold passes are, it is

claimed, empowered to tax. We are unable to accept this view. It is really not necessary in the context to use the word "only" in the way suggested, for, when the Explanation says that a sale or purchase shall be deemed to have taken place *in* a particular State, it follows that it shall be deemed also to have taken place *outside* the other States. Nor can the non-obstante clause be understood as implying that, under the general law relating to the sale of goods, the passing of the property in the goods is the determining factor in *locating* a sale or purchase. Neither the Sale of Goods Act nor the common law relating to the sale of goods has anything to say as to what the *situs* of a sale is, though certain rules have been laid down for ascertaining the intention of the contracting parties as to *when* or *under what conditions* the property in the goods is to pass to the buyer. That question often raises ticklish problems for lawyers and Courts, and to make the passing of title the determining factor in the location of a sale or purchase would be to replace old uncertainties and difficulties connected with the nexus basis with new ones. Nor would the hardship of multiple taxation be obviated if two States were still free to impose tax on the same transaction. In our opinion, the non-obstante clause was inserted in the Explanation simply with a view to make it clear beyond all possible doubt that it was immaterial where the property in the goods passed, as it might otherwise be regarded as indicative of the place of sale.

It is also to be noted in this connection that, on the construction suggested by the Advocate-General of Bombay, namely, that the Explanation was not intended to deprive the State in which the property in the goods passed of its taxing power, but only to exclude the sales or purchases of the kind described in the Explanation from the operation of clause (1) (*a*) which prohibits taxation of outside sales or purchases, the Explanation would operate, not as an explanation, but as an exception or a proviso to that clause. It may be that the description of a provision cannot be decisive of its true meaning or interpretation which must depend on the words used therein, but, when two interpretations are sought to be put upon a provision, that which fits the description which the legislature has chosen to apply to it is, according to sound canons of construction, to be adopted provided, of course, it is consistent with the language employed, in preference to the one which attributes to the provision a different effect from what it should have according to its description by the legislature.

It was then said that the formula of delivery for consumption within a State could only cover the comparatively few cases of sales or purchases taking place directly between the consumers in the delivery State and dealers in other States, and inter-State sales or purchases between dealers in either State, which must be larger in number and volume, would still be outside the scope of the Explanation, which could not, therefore, have been intended to empower only one State, namely, the delivery State, to tax all inter-State sales or purchases. We see no force in this objection. It is to be noted that the Explanation does *not* say that the consumption should be by the purchaser himself. Nor do the words "as a direct result" have reference to consumption. They qualify "actual delivery". The expression "for the purpose of consumption in that State" must, in our opinion, be understood as having reference not merely to the individual importer or purchaser but as contemplating distribution eventually to consumers in general within the State. Thus all buyers within the State of delivery from out-of-State sellers, except those buying for re-export out of the State, would be within the scope of the Explanation and liable to be taxed by the State on their inter-State transactions. It should be remembered here that the Explanation deals only with inter-State sales or purchases and not with purely local or domestic transactions. That these are subject to the taxing power of the State has never been questioned.

We are therefore of opinion that Article 286 (1) (*a*) read with the Explanation prohibits taxation of sales or purchases involving inter-State elements by all States except the State in which the goods are delivered for the purpose of con-

sumption therein in the wider sense explained above. The latter State is left free to tax such sales or purchases, which power it derives not by virtue of the Explanation but under Article 246 (3) read with Entry 54 of List II.

We will now consider the effect of Article 286 (2) on the taxability of inter-State sales or purchases of the kind envisaged by the Explanation to clause (1) (*a*). As both the Explanation and clause (2) deal only with Inter-State transactions, it may appear at first blush that whatever taxing power the Explanation may have reserved to the State of delivery is nullified by clause (2), at any rate until Parliament chooses to lift the ban under the power reserved to it by the opening words of clause (2). As one way of avoiding this result it was suggested by the Advocate-General of Bombay that the expression "Inter-State trade and commerce" in clause (2) may be construed as meaning dealings between a trader in one State and a trader in another, so that the clause would be applicable only to sales or purchases in the course of dealings between such traders. The ban under clause (2) could not, in that view, affect the taxability of a sale by a trader in one State to a consumer or user in another. We cannot agree with this restrictive interpretation of the expression "Inter-State Trade and Commerce". The sale by a trader in one State to a user in another would be a sale "in the course of Inter-State Trade" according to the natural meaning of those words, and we can see no reason for importing the restriction that the transaction should be one between two traders only. This is, however, not to say that the ban under clause (2) extends to the taxing power which the delivery State is left free, under the Explanation, to exercise. We are of opinion that the operation of clause (2) stands excluded as a result of the legal fiction enacted in the Explanation, and the State in which the goods are actually delivered for consumption can impose tax on Inter-State sales or purchases. The effect of the Explanation in regard to Inter-State dealings is, in our view, to invest what, in truth, is an Inter-State transaction with an Intra-State character in relation to the State of delivery, and clause (2), can, therefore, have no application. It is true that the legal fiction is to operate "for the purposes of sub-clause (*a*) of clause (1)", but that means merely that the Explanation is designed to explain the meaning of the expression "outside the State" in clause (1) (*a*). When once, however, it is determined with the aid of the fictional test that a particular sale or purchase has taken place within the taxing State, it follows, *as a corollary*, that the transaction loses its Inter-State character and falls outside the purview of clause (2), not because the definition in the Explanation is used for the purpose of clause (2), but because such sale or purchase becomes in the eye of the law a purely local transaction. It is said that even though all the essential ingredients of a sale took place within one State and the sale was, in that sense, a purely Intra-State transaction, it might involve transport of the goods across the State-boundary, and that would be sufficient to bring it within the scope of clause (2). We find it difficult to appreciate this argument. As already stated, the Explanation envisages sales or purchases under which out-of-State goods are imported into the State. That is the essential element which makes such a transaction Inter-State in character, and if it is turned into an Intra-State transaction by the operation of the legal fiction which blots out from view the Inter-State element, it is not logical to say that the transaction, though now become local and domestic in the eye of the law, still retains its Inter-State character. The statutory fiction completely masks the Inter-State character of the sale or purchase which, as a collateral result of such masking, falls outside the scope of clause (2).

It is said that, on this view, clause (2) would become practically redundant, as clause (1) (*a*) read with the Explanation as construed by us would itself preclude taxation by other States of Inter-State sales or purchases of the kind referred to in the Explanation. As we have already pointed out, the Explanation does not cover cases of Inter-State sales or purchases under which the goods are imported

into the State for re-export to other States and possibly other categories of sales or purchases which do not satisfy all the requirements of the Explanation. Whether such transactions are sufficiently numerous for the Constitution to take note of is a matter of opinion and it cannot have much bearing on the question of construction.

On the other hand there are, in our judgment, cogent considerations which tend to support the view we have expressed above that clause (2) was not intended to affect the power of the delivery State to tax Inter-State sales or purchases of the kind mentioned in the Explanation. As we have seen, in our Constitution the principle of freedom of Inter-State trade and commerce is made to give way before the State-power of imposing non-discriminatory taxes on goods imported from other States. Now, Article 286 (2) is but one phase of the protection accorded to Inter-State trade and commerce from the fettering power of State taxation. As Article 286 deals with restrictions on the power of the States to impose tax on the sale or purchase of goods, the Constitution makers evidently thought that it should contain also a specific provision safeguarding sales or purchases of an Inter-State character against the taxing power of the States.

It is, however, reasonable to suppose that this particular form of protection to Inter-State trade and commerce provided in Article 286 (2) was not intended to have a wider operation than what is contemplated in Part XIII which enshrines the general principle of freedom of Inter-State commerce and defines the measure of constitutional protection it should enjoy. If such protection is intended to give way before the State-power of taxing goods imported from sister States, subject only to the condition against discrimination, it is legitimate to suppose that the ban under Article 286 (2) should not operate so as to nullify that power. True, Article 304 (*a*) deals with the restrictions as to imposition of tax on goods, while Article 286 deals with the restrictions as to imposition of tax on sales or purchases of goods. But this distinction loses its practical importance in the case of sales-tax imposed by the delivery State under the conditions mentioned in the Explanation, for, if we look behind the labels at the substance of the matter, it becomes clear that a tax on sales or purchases imposed by the State in which the goods are delivered for consumption, in the sense already explained, is, in economic quality, practically indistinguishable from a tax on the consumption or use of the goods. The words "in which the goods have actually been delivered" ensure that the goods have come into the State, and the expression "for the purpose of consumption in the State" shows that, though the tax is formally laid on sales, its incidence is aimed at the consumers in the State. Discussing the true nature of a duty of excise and a tax on the sale of goods, Gwyer, C.J., observed in the *Central Provinces and Berar Sales Tax Case*[1]:

> "It is common ground that the Court is entitled to look at the real substance of the Act imposing it, at what it does and not merely at what it says, in order to ascertain the true nature of the tax. Since writers on political economy are agreed that taxes on the sale of commodities are simply taxes on the commodities themselves, it is possible to regard a tax on the retail sale of motor spirit and lubricants as a tax on those commodities."

Therefore, sales-tax, the incidence of which is really directed against the consumer, is, in substance, a tax on the goods imposed, no doubt, on the occasion of the sale as a taxable event. It will now be seen why the Explanation insists on *actual delivery* of the goods in the State and their *consumption in the State*, and why an "outside" sale or purchase is explained by defining what is an inside sale. The object clearly is to assimilate the conditions, under which the delivery State is left free to tax Inter-State sales or purchases, to those under which a State is empowered to impose tax on goods imported into the State from other States under Article 304 (*a*). If then, a non-discriminatory use or consumption tax imposed under Article 304 on

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1. (1939) F.C.R. 18, 42 : (1938-1939) F.L.J. 6 : (1939) 1 M.L.J. (Supp.) 1 (F.C.).

goods imported from other States does not infringe the freedom of Inter-State commerce declared by Article 301, parity of reason and policy requires that a tax on sales or purchases imposed by the State in which the goods are actually delivered for consumption in the State should not be regarded as violative of the ban under Article 286 (2), and that is what the statutory fiction enacted in the Explanation was, in our judgment, designed to achieve by divesting the sale or purchase of the kind referred to in the Explanation of its Inter-State character in relation to the State of delivery.

There is another important consideration which strongly supports the view we have indicated above, namely, Article 286 (2) does not affect the taxation of such sale or purchase by the State of delivery. If both the exporting State and the delivery State were entitled, notwithstanding Article 286 (2), to tax the Inter-State sale or purchase, as suggested by the Advocate-General of Bombay, it would mean that the transaction is subjected to double taxation as compared with a sale by a local dealer which pays only one tax. It is precisely this type of discriminatory burden which the principle of freedom of Inter-State commerce seeks to avoid, for, it places Inter-State trade at a disadvantage in competition with local trade. On the other hand, if neither State could tax such sale or purchase as is referred to in the Explanation, until Parliament lifted the ban, as the Advocate-General of Madras was inclined to think, the result would be that consumers could get out-of-State goods more cheaply than local goods, and local dealers would suffer competitive disadvantage as compared with outside dealers. Does the principle of freedom of Inter-State commerce require that a State should foster such commerce to the *detriment* of domestic trade? It is one thing to avoid impeding Inter-State commerce by imposing discriminatory burdens upon it which internal trade does not have to bear, but quite another to place local products and local business at a disadvantage in competition with outside goods and dealers. It would be a curious perversion of the principle of freedom of Inter-State commerce to drive local custom across the border to outside dealers, and that, in our opinion, could not have been contemplated.

The view which we have expressed above avoids either anomaly and would place local trade and Inter-State trade on an equal footing. The delivery State would tax both local and out-of-State dealers equally without discrimination against either and that, we think, is the only measure of protection which Article 286 could reasonably be supposed to accord to Inter-State sales or purchases, when it is construed in the light of Articles 301 and 304.

The question next arises as to whether the Act contravenes all or any of the restrictions imposed by Article 286. It is the respondents' case that the sales and purchases made by them in Bombay, in the course of their business, include all the three categories excluded from the scope of State-taxation by Art. 286, and the Act seeking to bring all of them within its scheme of taxation is bad. It is, therefore, necessary to make a brief survey of the main provisions of the Act and of the Rules made thereunder, in order to see whether the respondents' complaint is well-founded, and, if so, whether the whole or any part of the Act is to be declared unconstitutional and void.

The Act provides for levy of two kinds of taxes, called the "general tax" and the "special tax", by the two charging sections 5 and 10, respectively. "Dealer" is defined in section 2 (7) as a person who carries on the business of selling goods in the State of Bombay whether for commission, remuneration or otherwise and includes a State Government which carries on such business and any society, club or association which sells goods to its members. The Explanation (2) to this definition provides that the manager or agent of a dealer who resides outside the State of Bombay and carries on the business of selling goods in the State of Bombay shall, in respect of such business, be deemed to be a dealer for the

purpose of the Act. "Sale" is defined by section 2 (14) with all its grammatical variations and cognate expressions as meaning any transfer of property in goods for cash or deferred payment or other valuable consideration and includes any supply by a society, a club, or an association to its members on payment of price or of fees or subscriptions but does not include a mortgage, hypothecation, charge or pledge. The words "buy" and "purchase" are to be construed accordingly. There are two Explanations attached to this definition of which the second, which is obviously based on the Explanation to clause (1) (*a*) of Article 286 provides that the sale of any goods which have actually been delivered in the State of Bombay as a direct result of such sale for the purpose of consumption in the said State, shall be deemed, for the purposes of this Act, to have taken place in the said State, irrespective of the fact that the property in the goods has, by reason of such sale, passed in another State. "Turnover" is defined by section 2 (21) as the aggregate of the amounts of sale price received and receivable by a dealer in respect of any sale of goods made during a given period after deducting the amount, if any, refunded by the dealer to a purchaser in respect of any goods purchased and returned by the purchaser within the prescribed period. Section 5 imposes the general tax on every dealer whose turnover in respect of sales within the State of Bombay during any of the three consecutive years immediately preceding the first day of April, 1952, has exceeded Rs. 30,000 or whose turnover in respect of such sales exceeds the said limit during the year commencing on the first day of April, 1952. The tax is to be levied on his taxable turnover in respect of sales of goods made on or after the appointed day, *i.e.*, November 1, 1952, at the rate of 3 pies in the rupee (section 6). By section 7 the taxable turnover is to be determined by first deducting, from the turnover of the dealer in respect of all his sales of goods during any period of his liability to pay the general tax, his turnover during that period, in respect of (*a*) sales of any goods declared from time to time as tax-free under section 8 and (*b*) "such other sales as may be prescribed". No dealer liable to pay the general tax shall carry on business as a dealer unless he has applied for registration (section 9). A more or less similar scheme is provided for the levy of a special tax on the sale of certain special goods specified in Schedule II. By section 10 every dealer whose turnover in respect of sales of special goods made within the State of Bombay has exceeded Rs. 5,000 during the year ended March 31, 1952, or exceeds the said limit during the year commencing from April 1, 1952, is charged with a special tax at the rate specified in Schedule II on his taxable turnover in respect of the sales of special goods made on or after the appointed day, *i.e.*, November 1, 1952. By section 11 the taxable turnover is to be determined by first deducting, from the turnover of the dealer in respect of his sales of special goods during any period of his liability, his turnover in respect of (*a*) sales of special goods purchased by him on or after the appointed day at a place in the State of Bombay from a dealer holding a licence under section 12 and (*b*) "such other sales as may be prescribed". Every dealer liable to pay the special tax is required to obtain a licence as a condition of his carrying on his business (section 12). Then follow certain provisions for returns, assessment, payment and recovery of tax. Section 18 imposes a purchase tax at the rate of 3 pies in the rupee on the purchases of such goods as may be notified by the State Government from time to time which have been despatched or brought from any place in India outside the State of Bombay or are delivered as a direct result of a sale to a buyer in the State of Bombay for consumption therein, and also an additional tax if the goods are special goods. Section 21 (2) prohibits any person selling goods from collecting from the purchaser any amount by way of tax unless he is a registered dealer or a licenced dealer and is liable to pay the tax under this Act in respect of such sale. Chapter VI contains provisions for production of accounts, supply of information and cancellation of registration or licence. Chapter VII deals with proceedings including appeals and revision and the determination of certain questions of law by reference to the High Court.

Section 45 empowers the State Government to make rules "for carrying out the purposes of this Act". In particular, such Rules may prescribe, among other things, "the other sales, turnover in respect of which may be deducted from a dealer's turnover in computing his taxable turnover as defined in section 7 and in section 11" [sub-section (2) (*e*)].

In exercise of the powers conferred by this section, the State Government made and published Rules called the Bombay Sales Tax Rules, 1952, which were brought into force on the same day on which the charging sections 5 and 10 of the Act were also brought into force, namely, November 1, 1952. Of these, rules 5 (1) and 6 (1) are important, and they provide for the deduction of the following sales in calculating taxable turnover under section 7 (general tax) and section 11 (special tax): (*i*) sales which take place (*a*) in the course of the import of the goods into or export of the goods out of the territory of India or (*b*) in the course of inter-State trade or commerce. It is to be noted that these are the excluded categories of sales or purchases under Article 286 (1) (*b*) and (2) respectively. Rule 5 (2) (i) requires, as a condition of the aforesaid deductions, that the goods should be consigned by certain specified modes of transport. Clause (*v*) lays down a rule of presumption to be acted upon in the absence of evidence of actual consignment of the goods within three months of the sale, that the sale has not taken place in the course of export or of inter-State trade as the case may be. It is not necessary to refer to the provisions of the other rules.

Now, it will be seen from the provisions summarised above that the Act does not in terms exclude from its purview the sales or purchases taking place outside the State of Bombay while it does include, by Explanation (2) to the definition of "sale", the sales or purchases under which the delivery and consumption take place in Bombay which, by virtue of the Explanation to Article 286 (1) (*a*), are to be regarded as local sales or purchases. On the construction we have placed upon that Explanation, sales or purchases effected in Bombay in respect of goods in Bombay but delivered for consumption outside Bombay are *not* taxable in Bombay. Now, the respondents complain that the latter category of sales or purchases thus held not to be taxable are not expressly excluded by the Act which, therefore, contravenes Article 286 (1) (*a*). No doubt, there is no provision in the Act excluding in express terms sales of the kind referred to above, but neither is there any provision purporting to impose tax on such sales or purchases. On the other hand, the two charging sections of the Act, section 5 and section 10, purport, in express terms, to impose the tax on all sales made "within the State of Bombay", and section 18, which lays the tax on purchases, is limited in its operation to purchases of goods delivered to a buyer in the State of Bombay for consumption therein, that is to say, to purchases which unquestionably are taxable by Bombay according to both parties. The charging sections cannot, therefore, be taken to cover the class of sales or purchases which, on our construction of the Explanation, are to be regarded as taking place outside the State of Bombay. We see no force, therefore, in the argument that the Act contravenes the provisions of Article 286 (1) (*a*) by purporting to charge sales or purchases excluded by that article from State-taxation.

As regards the other two categories of sales or purchases excluded by Article 286 (1) (*b*) and (2), it is true that the Act taken by itself does not provide for their exclusion. But, as pointed out already, Rules 5 and 6, which deal respectively with deduction of certain sales in calculating the taxable turnover under sections 7 and 11 exclude these two categories in express terms, and these Rules were brought into force simultaneously with the charging sections 5 and 10 on 1st November, 1952. The position, therefore, was that, on the date when the general tax and special tax became leviable under the Act, sales or purchases of the kind described under Article 286 (1) (*b*) and (2) stood in fact excluded from

taxation, and the State of Bombay cannot be considered to have made a "law imposing or authorising the imposition of a tax" on sales or purchases excluded under the aforesaid clauses of Article 286. The Act and the Rules having been brought into operation simultaneously, there is no obvious reason why the Rules framed in exercise of the power delegated by the Legislature should not be regarded as part of the "law" made by the State. [See observations at page 862 in the *Delhi Laws Act case*[1]]. The position might be different if the Rules had come into operation sometime later than the charging sections of the Act, for, in that case, it is arguable that if the legislation, without excluding the two classes of sales or purchases, was beyond the competence of the Legislature at the date when it was passed, the exclusion subsequently effected by the Rules cannot validate such legislation. But, as already stated, that is not the position here, and the learned Judges below fell into an error by overlooking this crucial fact when they say "If the Legislature had no competence on the date the law was passed, the Rules *subsequently* framed cannot confer competence on the Legislature".

Even so, it was contended, the exclusion of the sales covered by clause (1) (*b*) and clause (2) of Article 286 was hedged round with conditions and qualifications which neither the Legislature nor the rule-making authority was competent to impose on the exclusion and, therefore, such Rules, even if read as part of the Act, could not cure the constitutional transgression. The conditions and qualifications complained of are mostly found to relate to mere matters of proof, *e.g.*, rule 5 (2) Explanation (2) which insists on the production of a certificate from an appropriate authority, before a motor vehicle, despatched to a place outside the State of Bombay by road and driven by its own power, could be exempted as an article sold in the course of inter-State trade. No objection can reasonably be raised if the taxing authority insists on certain modes of proof being adduced before a claim to exclusion can be allowed. Objection was also taken to clause (i) of sub-rule (2) of rule 5 as imposing an unauthorised limitation upon the exemption of sales and purchases allowed by rule 5 (1), that is to say, while rule 5 (1) (i) allows the deduction of the sales covered by clause (1) (*b*) and (2) of Article 286 in calculating taxable turnover, sub-rule (2) (i) of the same rule provides that, in order to claim such deduction the goods shall be consigned only through a railway, shipping or aircraft company or country boat registered for carrying cargo or public motor transport service or by registered post. It is said that there is no reason why sales of goods despatched by other modes of transport should not also be deducted from the taxable turnover, because Article 286 (2) in exempting sales in the course of inter-State trade, makes no distinction between modes of transport by which the goods are despatched. This limitation, it was claimed, was beyond the competence of the rule-making authority. The argument is not without force, and it must be held that rule 5 (2) (1) is *ultra vires* the rule-making authority and therefore void. But it is clearly severable from rule 5 (1) (i). The restriction regarding the mode of transport of the goods sold or purchased in the course of inter-State trade, to which alone sub-rule (2) (i) relates, can be ignored and the exemption under rule 5 (1) (i) may well be allowed to stand.

Finally Mr. Seervai attempted to make out that the provisions of the charging sections 5 and 10 fixing Rs. 30,000 and Rs. 5,000 as the minimum taxable turnover for general tax and special tax respectively were discriminatory and void under Article 14 read with Article 13 of the Constitution, and he gave us several tables of figures showing how the imposition of the tax actually works out in practice in hypothetical cases. It is unnecessary to go into the details of these cases which have been worked out in figures, for it must be conceded that the general effect of fixing these minimum limits must necessarily be to enable traders whose taxable

1. (1951) S.C.R. 747: (1951) S.C.J. 527.

turnover is below those limits to sell their goods at lower prices to their customers than dealers whose turnover exceeded those limits, for the latter have to add the sales-tax to the prices of their goods. But no discrimination is involved in this classification which is perfectly reasonable when it is borne in mind that the State may not consider it administratively worthwhile to tax sales by small traders who have no organisational facilities for collecting the tax from their buyers and turn it over to the Government. Each State must, in imposing a tax of this nature, fix its own limits below which it does not consider it administratively feasible or worthwhile to impose the tax. It is idle to suggest that any discrimination is involved in such classification.

Apart from the considerations set forth above which tend to support the constitutional validity of the Act, it was broadly contended before us that taxing statutes imposing tax on subjects divisible in their nature which do not exclude in express terms subjects exempted by the Constitution, should not, for that reason, be declared wholly *ultra vires* and void, for, in such cases, it is always feasible to separate taxes levied on authorised subjects from those levied on exempted subjects and to exclude the latter in the assessment of the tax. In such cases, it is claimed, the statute itself should be allowed to stand, the taxing authority being prevented by injunction from imposing the tax on subjects exempted by the Constitution. Our attention was called to certain American cases where this principle has been consistently followed (see *Bowman* v. *Continental Company*[1], where all the previous cases are collected). In the present case the tax is imposed, in ultimate analysis, on receipts from individual sales or purchases of goods effected during the accounting period, and it is therefore possible to separate at the assessment the receipts derived from exempted sales or purchases and allow the State to enforce the statute with respect to the constitutionally taxable subjects, it being assumed that the State intends naturally to keep what it could lawfully tax, even where it purports to authorize the taxation of what is constitutionally exempt. The principle, as it is tersely put in the American case, is that severability in such cases includes separability in enforcement.

Our attention was drawn to the decision of the Privy Council in *Punjab Province* v. *Daulat Singh and others*[2] as condemnatory of this principle. The case is, however, clearly distinguishable. Their Lordships were dealing with a Provincial enactment providing for the avoidance of benami transactions as therein specified and the question was whether it was *ultra vires* the Legislature as contravening section 298 (1) of the Government of India Act, 1935, which forbade the prohibition, *inter alia,* of disposition of property by an Indian subject on certain grounds which included "descent". It was found that in some cases the impugned enactment would operate as a prohibition on the ground of descent alone. The Federal Court by majority expressed the view that the Act could not, for that reason, be invalidated as a whole but that the circumstances in which its provisions would be inoperative must be limited to cases where the statute actually operated in contravention of the constitutional inhibition. Disagreeing with this view their Lordships made the following observations which were strongly relied on before us:

> "The majority of the Federal Court appear to have contemplated another form of severability, namely, by a classification of the particular cases on which the impugned Act may happen to operate, involving an inquiry into the circumstances of each individual case. There are no words in the Act capable of being so construed, and such a course would in effect involve an amendment of the Act by the Court, a course which is beyond the competency of the Court, as has long been well established."

The subject of the constitutional prohibition was single and indivisible, namely, disposition of property on grounds only of (among other things) descent and if, in

1. 256 U.S. 642: 65 L. Ed. 1130.
2. (1946) F.L.J. 41: (1946) F.C.R. 1: (1946) 1 M.L.J. 426: L.R. 76 I.A. 59 (P.C.).

its actual operation, the impugned statute was found to transgress the constitutional mandate, the whole Act had to be held void as the words used covered both what was constitutionally permissible and what was not. The same principle was applied by this Court in the *Cross Roads case*[1]. It was, indeed, applied also in *Bowman's case*[2], with respect to the licence tax imposed generally on the entire business conducted including inter-State commerce as well as domestic business, but was not applied, as stated above, with respect to excise tax which was laid on every gallon of gasolene sold and was thus divisible in its nature. It is a sound rule to extend severability to include separability in enforcement in such cases, and we are of opinion that the principle should be applied in dealing with taxing statutes in this country.

We accordingly set aside the declaration made by the Court below and quash the writ issued by it except in regard to rule 5 (2) (i). An injunction shall, however, issue restraining the appellants from imposing or authorising the imposition of a tax on sales and purchases which are exempted from taxation by Article 286 as interpreted above.

Each party will bear its own costs throughout.

Bose, J.—I have had the advantage of reading the judgments of my Lord the Chief Justice and my learned brother Bhagwati. I regret I am unable to agree with either. The range of disagreement is not large but unfortunately it vitally affects the result.

I agree with the construction which my Lord has placed upon Entry No. 54 of List II. I also agree that the object of the Explanation is to fix the *locus* of a sale or purchase by means of a fiction, but with respect I cannot agree with my brother Bhagwati that the *non-obstante* clause enunciates the general law on this point. I know of no general law which fixes the *situs* of a sale, not even the Sale of Goods Act. What the general law does is to determine the place where the property passes in the absence of a special agreement, but the place where the property passes is not necessarily the place where the sale takes place, nor has that ever been regarded as the determining factor. What, in my opinion, happened was this.

Before the passing of the Constitution, different States (or Provinces as they then were) claimed the right to tax the same transaction for a variety of reasons which have been pointed out by my Lord the Chief Justice. The result was that the price of certain commodities became inordinately high. Take, for example, the case of steel rails manufactured by the Tata Iron and Steel Works at Tatanagar and purchased by the Government of India for its railways. The Central Government found itself called upon to pay a sale or purchase tax to different States on a single transaction of purchase. I am not sure how many times over it had to pay but on the notions then current it was open to Bihar to claim the right to tax because the goods were manufactured there, to Bengal because the transaction of sale took place at Calcutta where the head offices of the Company were, to a third Province because the goods were delivered there and to a fourth because they were "found" there. It hardly matters whether all or any of this would have stood scrutiny in a Court of law because the fact remains that various States were actually taxing the one transaction of sale on the nexus theory and a real danger existed of more and more of them coming in to claim a share of the spoils. It seems to me that the Constitution makers considered this detrimental to the development and exercise of trade and commerce and so determined to put a stop to the practice but at the same time left Parliament a discretion to

1. *Romesh Thappar* v. *State of Madras*, (1950) S. C. R. 594 (S.C.). (1950) S.C.J. 418: (1950) 2 M.L.J. 300.
2. 256 U.S. 642: 65 L.Ed. 1130.

restore a part of the *status quo* if and when it should think it safe and desirable to do so.

The narrowing of the powers was accomplished by stating in Article 286 that no State can impose a tax on a sale or purchase which takes place *outside* the State, by stating that it cannot tax a sale or purchase in the course of import or export and by prohibiting taxes on sales and purchases which take place in the course of inter-State trade or commerce unless Parliament chooses to lift the ban. Reading these together in a simple and straightforward way it seems clear to me that the idea was to permit States to tax only what I might call intra-State sales and purchases, at any rate, to begin with.

But in legal enactments simplicity of language seldom evokes clarity of thought. So long as the ban imposed by clause (2) remains, there is no difficulty because when parts of a sale take place in different States the transaction is inter-State and no tax can be imposed. On the other hand, when all the ingredients are intra-State clause (2) is not attracted. Complications only arise when the ban is lifted. The Constitution-makers had before them the existing practice of the States based on the nexus theory, and so it became necessary to define just where a sale takes place in order to carry out the main theme that only intra-State sales can be taxed.

The difficulty is apparent when one begins to split a sale into its component parts and analyse them. When this is done, a sale is found to consist of a number of ingredients which can be said to be essential in the sense that if any one of them is missing there is no sale. The following are some of them: (1) the existence of goods which form the subject-matter of the sale, (2) the bargain or contract which, when executed, will result in the passing of the property in the goods for a price, (3) the payment, or promise of payment, of a price, (4) the passing of the title. When all take place in one State, there is no difficulty. The *situs* of the sale is the place in which all the ingredients are brought into being. But when one or more ingredients take place in different States, what criterion is one to employ? It is impossible to say that any of these ingredients is more essential than any other because the result is always the same the moment you take one away. There is then so sale. Therefore, one either has to adopt the ultra-logical view and hold that the only State which can tax is the one in which *all* the ingredients take place and that no State can tax when a single ingredient takes place elsewhere, or resort to the old view and hold that every State in which any single ingredient takes place can tax. The only alternative to these extremes is to make an arbitrary selection or to introduce a fiction. The Constitution chose the latter course and enacted the Explanation.

I have deemed it proper to refer to the then existing practice regarding taxation because in construing a statute it is legitimate to take into account existing laws and the manner in which they were acted upon and enforced. (See Gwyer, C.J., in In re *The Central Provinces and Berar Act No. XIV of 1938*[1] and *Croft* v. *Dunphy*[2]. I think this rule is even more appropriate in the case of the Constitution because the Constitution itself continues in force all laws which were in existence at the date when it came into being except those which are inconsistent with itself.

I am with respect unable to agree that Article 286 (2) is to be interpreted in the light of Article 304 (*a*). In my opinion, the two articles deal with different things. Article 286 is concerned with sales and purchases while Article 304 relates to goods imported from other States. The stress in the one case is on the transaction of sale or purchase; in the other, on the goods themselves and on the act of

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1. (1938-39) F.L.J. 6: (1939) 1 M.L.J. (Supp.) 1: (1939) F.C.R. 18 at 53 (F.C.).

2. L.R. (1933) A.C. 156 at 165.

import. Article 286 is related to Entry No. 54 of List II and to Entries 41 and 42 in List I: Article 304 (*a*) to Entries 26 and 27 of List II read with Entry 33 in List III and to Entries 51, 52 and 56 of List II. The distinction is, I think, clear when it is realised that (apart from the Explanation) a sale or a purchase can be taxed even though the goods are never actually delivered and even if they never reach the taxing State, for the right is to tax the sale or purchase and that is something quite independent of actual delivery. The goods might be destroyed by flood or fire before there is any chance of actual delivery. They might, as in the case of the steel rails purchased by the Government of India, be delivered in a totally different State, but the tax could still be levied if there was no Explanation to stop it. I find it difficult to see how Article 286 (2) could ever come into effective play if Article 304 is applied to sales and purchases which take place in the course of inter-State trade or commerce. I do not think the change in language, "a tax on the *sale* or *purchase* of any goods" in the one case and a tax on "*goods imported* from other States" was accidental, nor do I think we will be justified in ignoring the fact that the two are placed in different parts of the Constitution. I therefore prefer to hold that Articles 286 and 304 deal with different things and to construe Article 286 without reference to Article 304. In this I agree with my brother Bhagwati.

Coming back to the Explanation, its object is, I think, to resolve the difficulty regarding the *situs* of a sale. The Constitution having decided that the only State which can tax a sale or a purchase is the State in which the transaction takes place, and having before it the conflict of views regarding *nexus* and *situs*, resolved the problem by introducing the fiction embodied in the Explanation. The purpose of the Explanation is, in my view, to explain what is not outside the State and therefore what is inside. With respect I cannot agree that the Explanation is really an exception, and I do not think the *non-obstante* clause means that under the general law the place where the property passes was regarded as the place where the sale takes place, for that in itself would be a fiction. There is no such law. In my opinion, all it means is that there was a school of thought which regarded that as the crucial element on the nexus view and that the Constitution has negatived that idea.

I am also unable to agree that the Explanation governs clause (2) of Article 286, for it limits itself in express terms to sub-clause (*a*) of clause (1). It says that is an explanation "for the purposes of sub-clause (*a*)". In view of that I do not feel justified in carrying it over to clause (2) and holding that it governs there as well. In my judgment, the only purpose of the explanation is to explain where the *situs* of a sale is. Clause (2) has a different object. Its purpose is to prohibit taxation on sales and purchases which take place in the course of inter-State trade or commerce.

If the Explanation is carried over to clause (2) it must, in my judgment, be equally applicable to sub-clause (*b*) of clause (1). As I understand the argument, the reasoning is this. The Explanation turns an inter-State sale into an intra-State sale by means of a fiction. Having served its purpose it follows as a corollary that there is no inter-State transaction left and so clause (2) is not called into play. In my opinion, by parity of reasoning, if the sale is intra-State and cannot now be regarded as external to the State, it equally cannot be said to take place in the course of export or import in a case of that kind, for export and import predicate the movement of goods across a boundary just as surely as inter-State trade and commerce. But such a contention would militate against our decision in the *State of Travancore-Cochin and Others* v. *The Bombay Co., Ltd.*[1]

1. (1952) S.C.J. 527: (1953) 1 M.L.J. 1: (1952) S.C.R. 1112 (S.C.).

This line of reasoning does not appeal to me for another reason also. It concentrates on the *situs* of the sale and does not give sufficient weight to the words "in the course of". When we apply a fiction all we do is to assume that the situation created by the fiction is true. Therefore, the same consequences must flow from the fiction as would have flown had the facts supposed to be true been the actual facts from the start. Now even when the *situs* of a sale is in truth and in fact inside a State, with no essential ingredient taking place outside nevertheless if it takes place in the course of inter-State trade and commerce, it will be hit by clause (2) just as surely as it is hit by sub-clause (*b*) when it takes place in the course of export or import. When we examine clause (2) and sub-clause (*b*), it is not enough, in my judgment, to see where the sale took place. We have also to see whether it was in the course of inter-State trade and commerce in the one case, or in the course of export or import in the other, for the stream of inter-State trade and commerce, as also that of export and import, will catch up in its vortex all sales which take place in its course wherever the *situs* of the sale may be. All that the Explanation does is to shift the *situs* from point A or B or C in the stream to a point X, also in the stream. It does not lift the sale out of the stream in those cases where it forms part of the stream.

I have also another criticism to meet. The Explanation can only come into play when the transaction is in truth and in fact inter-State, and the argument runs that if clause (2) is to ban taxation in every such case, the Explanation becomes useless. The answer to that is two-fold. Clause (2) has a proviso. Under it the President is empowered to direct the continuation for a period of a tax which was being lawfully levied at the date of the Constitution even though the transaction is of an inter-State character; and we find that in some of the cases which have come before us that that was done the moment the Constitution came into force. Therefore, the Explanation operated from the start on that kind of case. But of course that means that the empowering can only be in favour of the State in which the goods are actually delivered for the purpose of consumption in that State as a direct result of a purchase or sale effected for that purpose. It will be noticed that the proviso is limited to cases in which the imposition of the tax would be "contrary to *this clause*", that is clause (2) and not to the Explanation to clause (1) (*a*).

In the second place, Parliament is empowered to lift the ban imposed by clause (2). So long as the ban exists there is no need for the Explanation, for the Explanation only covers sales or purchases which are inter-State. But the moment the ban is lifted, the difficulties I have mentioned above arise and have to be met. I am clear that the Constitution-makers envisaged this and resolved the doubts in the manner I have indicated; nor can I see anything inconsistent or illogical in this. The basic idea is to prohibit taxation in the case of inter-State trade and commerce unless and until the ban under clause (2) is lifted, and always in the case of exports and imports; and when the ban is lifted, the Explanation is there to settle a matter of considerable controversy regarding the *situs* of a sale. It is true it makes an arbitrary selection but then almost any selection would have to be arbitrary and this is as good as any other.

The question however arises what is to happen to clause (1) (*a*) while the ban lasts if the Explanation is to be ignored during that period? How is the *situs* of a sale to be determined in the difficult class of cases which arose before the Constitution and which, in my view, occasioned the ban. My answer is that that class of case can only arise in the course of inter-State trade and commerce, for the moment any one of the essential ingredients of a sale occurs in a State different from the taxing State and the goods are contracted to move across a boundary, you get a sale in the course of inter-State trade and commerce. Therefore, the problem about *situs* does not arise. Sales and purchases which are in truth and in fact intra-State (and the bulk of sales and purchases in the States are of that

character) can of course be taxed. The ban does not apply and there is no need to call in aid the Explanation, for I repeat that the Explanation is limited to cases which in truth and in fact take place in the *course of* inter-State trade and commerce. On the view I take the need for the Explanation only arises when the ban is lifted.

I now come to matters of greater detail. What do the words "for the purpose of consumption" mean? This is best understood by reference to a concrete case: *A*, a dealer in Bombay, actually delivers goods to *B*, a dealer in Madras, for the purpose of sale by *B*, the Madras dealer, to purchasers *C*, *D* and *E* in Madras. Can either the sale by *A* to *B* or the purchase by *B* from *A* be taxed? In my view, it cannot, for *B* is, in my judgment, as much a consumer as *C*, *D* and *E*. It is true the word can be used in a wide as well as a narrow sense but I see no reason to restrict its meaning in the present case. What after all does "consumption" mean? In its economic sense it is just the use which a purchaser chooses to make of the goods purchased for his own purposes. He does not have to destroy them nor does he have to diminish their value or utility. A man who purchases a valuable piece of sculpture or painting for preservation in a national museum does not destroy it nor does he use it himself except for the purposes of presenting it to the museum. But he is a consumer. In the same way, a man who purchases goods for use in his business so that his business can be carried on by the constant feeding of a stream uses the goods and therefore "consumes" them even though he does not keep them himself. This of course means that a dealer who purchases from another dealer outside the State is a "consumer" and can be taxed *if the ban is lifted* even if he purchases for re-export outside the State. But when he re-exports, his sale to the outside consumer cannot be taxed if the Explanation is attracted.

I cannot agree that goods cannot be "consumed" more than once. It all depends on how you view the matter. Little fishes swallow smaller fishes and are in turn eaten by fishes larger than themselves. In the end, the smallest of the series is consumed by the biggest. Consider the case of a curio dealer who collects antiques for the purposes of sale. The older they are and the more they have been used, the more valuable they become, but that would not prevent them from being "consumed" over again when a "collector" buys them for display in his house. Broadly speaking, the object here is to stop multiple taxation on any single act of sale or purchase made in the course of inter-State trade and commerce. I would therefore construe "consumption" to mean the usual use made of an article for the purposes of trade and commerce. When dealer buys from dealer that is "consumption" for the purposes of the purchaser dealer's trade; when an ultimate purchaser buys from a retailer, that is also "consumption" for his purposes. Therefore, in my judgment, neither the sale by *A* to *B* in the illustration put nor the purchase by *B* from *A* can be taxed so long as the ban under clause (2) remains. But the sales by *B* to *C*, *D* and *E* can each be taxed by the State of Madras as they are intra-State sales. If this is found to work hardship on the States in practice, then Parliament, which has been given the power to regulate inter-State trade and commerce under Entry 42 of List I, can step in and lift the ban. In that event, the Explanation comes into play and Madras can tax both transactions but Bombay cannot.

On the other hand, if *A*, the Bombay dealer, sells direct to the consumers *C*, *D* and *E* in Madras and actually delivers the goods to them for the purpose of consumption in Madras, neither State can tax unless the ban is lifted, and then Madras alone will be able to tax.

Next, what do the words "actually been delivered" mean? In the normal course, a dealer in Bombay, who sends goods either to a dealer or consumer in Madras, would put them on a train or send them by a public or a private carrier.

The cases in which a dealer would take them himself to Madras and hand them over in person or send one of his own men there would be exceptional. In the former class of case, the carrier would normally be regarded as the agent of the Madras purchaser and the result would be that delivery would in that event be deemed to be delivery in Bombay and that would give Bombay the right to tax and not Madras. See *Badische Anilin Und Soda Fabrik* v. *Basle Chemical Works, Bindschedler*[1] and *Badische Anilin Und Soda Fabrik* v. *Hickson*[2], But such a construction would make the Explanation useless. I think that is the reason why the words "actually" and "consumption" have been used. If the normal rule were to apply, there would be no need for the word "actual", as delivery to the carrier in Bombay would of course be actual in the sense that it would be physical and not notional. I think therefore that the words "actually delivered" and "as a direct result" of the sale or purchase "for the purpose of consumption in the State" have been used to signify that in such a case the carrier must be regarded as the agent of the Bombay seller.

So far as the words "in the course of" in clause (2) are concerned, the "course" we have to consider is the course of the inter-State trade and commerce. In my opinion, the inter-State character of the course ends when the goods reach the first consumer in the taxing State. When he in turn sells to the ultimate consumer in that State, a different course begins, namely, the course of intra-State trade. It is necessary to draw this distinction because inter-State trade and commerce is a matter for the Centre, intra-State for that of the States. We have therefore to determine where the inter-State course ends and the intra-State course begins. I think the point at which I have drawn the line is logical and convenient. I do not think the same considerations will apply in the next set of cases where we are dealing with the Travancore-Cochin law relating to export and import. But it is not necessary to explain why in this case.

It was contended in argument that the view I take of the ban on inter-State trade and commerce imposed by clause (2) would place the local dealer at a disadvantage. But that would only arise in one class of case and I cannot see how inequality of this kind can be avoided in every case even on my Lord the Chief Justice's view. There are bound to be some inequalities whichever view is taken.

Consider these concrete cases. We have *A*, a dealer in Bombay, *B*, a dealer in Madras and *C*, a consumer also in Madras. If *A* sells directly to *C* in such a way as to satisfy the explanation, then, assuming always that the ban is still in existence, this sale is not taxable on my view. But if *B* in Madras sells to *C* in Madras, it is. Of course, *B* is then at a disadvantage *vis-a-vis A*. But so is *A vis-a-vis B* with regard to consumers in Bombay, consequently the tendency of the consumer in one State to buy from a cheaper market in the other evens up in the long run. But that apart. What happens on my Lord the Chief Justice's view?

A very large volume of the feasibly taxable trade in this country, if not the bulk of it, at any rate in most States, is in the hands of retail dealers resident in the various States. They obtain their wares from wholesale importers or large dealers in other States. In the illustration I have put above, if *B* in Madras gets his goods from *A* in Bombay, then, on the learned Chief Justice's view, *B* pays a purchase tax on his purchase from *A* and again a sales tax on his sale to the consumer *C*. The consumer is therefore saddled with a double tax. But if *C*, still in Madras, purchases direct from *A* in Bombay, there is only one tax in the transaction on my Lord's view. That still gives *A* an advantage over *B*. Therefore, there is a large class of cases in which the local dealer is at a disadvantage even on the other view.

1. L.R. (1898) A.C. 200. 2. L.R. (1906) A.C. 419.

The only class of case in which the local dealer is not at a disadvantage on my Lord's view and is on mine, is when the goods are manufactured locally. In that event, *B*, the manufacturer in Madras, pays no initial sales tax. He only pays when he sells to the consumer *C* in Madras. If the goods can also be manufactured locally in Bombay, then the dealer *A* in Bombay does have a theoretical advantage over the dealer *B* in Madras. But if the goods cannot also be manufactured in Bombay, the advantage disappears, for *A* then pays an initial tax on his purchase from the outside State.

I do not think considerations of this kind should influence the construction of these Articles because, in the first place, some inequalities are inevitable and, in the next, the disadvantage is more theoretical than practical. For example, a wholesale importer, who also chooses to sell retail in the State of import, has a theoretical advantage over retailers who have to buy through him. But that did not prevent this Court from holding in *State of Travancore-Cochin & Others* v. *The Bombay Co., Ltd.*[1] that the sale which occasioned his import is free of tax. So here. I do not think this consideration should weigh.

But apart from this, the matter is, I think, largely theoretical save perhaps in a few exceptional cases. In this class of case, the trade usually adjusts its own differences by allowing the local dealer a discount; in fact, in the case of many commodities, local dealers have to give an undertaking not to sell below a certain price in order to maintain a steady price level over the local market and avoid cut-throat competition. That is how most of the large motor agencies work, and the same applies to radios and petrol and kerosene oil. The price the ultimate consumer pays is the same wherever he purchases in a given area. Also the type of consumer who will take the trouble to buy in a cheaper foreign market with all the annoyances of delay, transport, octroi and other import restrictions, is small. Most people prefer to pay the extra price and save themselves endless trouble.

I now come to the impugned legislation—the Bombay Sales Tax Act (No. XXIV of 1952). As mine is a dissenting view which will not affect the result, I will content myself with very briefly indicating why I consider the Act, or at any rate the relevant provisions in it, *ultra vires*, and to begin with I will ignore the Rules altogether and consider what would happen if the Rules were not there at all or had been brought into existence after the Act.

The taxing sections 5 and 10 empower a levy of tax on *all* sales made within the State of Bombay when the turnover reaches a certain figure. This would include sales made in the course of inter-State trade and commerce, sales made in the course of export and import and sales falling within the Explanation made to consumers in outside States. As I have explained above, the mere fact that a sale is made in the State of Bombay will not prevent it from being a sale effected in the course of inter-State trade or commerce or in the course of export or import. Even when the whole transaction of sale is constituted in Bombay in the sense that every essential ingredient necessary to constitute a sale takes place there, (that is to say, even when the Explanation is not called into play), the sale would, given other considerations, be in the course of export or import or in the course of inter-State trade or commerce. An illustration will make my point clear.

A, a Bombay dealer, sells goods to *B*, a dealer in Madras, for consumption in Madras. I will assume that delivery is made to *B* himself in Bombay and that he carries the goods across in person. If that is the normal way in which trade and commerce in that particular line of goods flows across the boundary, then that would, in my opinion, be a sale in the course of inter-State trade and commerce despite the facts, including delivery, mentioned above. Ordinarily,

1. (1952) S.C.J. 527 : (1953) 1 M.L.J. 1 : (1952) S.C.R. 1112 (S.C.).

goods of this nature are delivered to a carrier but that makes my point all the stronger. So long as the ban imposed by clause (2) remains the *situs* of the sale and the place of delivery are not material provided the sale is caught up in the vortex of inter-State trade and commerce. Similar considerations apply in the case of exports and imports.

On this view, the preamble to the Act and the short title which limit the ambit of the law to the levy of tax on sales and purchases of goods in the State of Bombay, do not serve to save the Act, nor do the definitions of the words "sale", "dealer" and "turnover". Actually, Explanation (2) to the definition of "sale" directly offends clause (2) of Article 286. It embodies almost word for word every provision of the Explanation to Article 286 (1) (*a*). That would be unobjectionable if the ban imposed by clause (2) had been lifted by Parliament. But as it has not been lifted, the provision is *ultra vires* on the view which I take of the Constitution.

The Act came into force on 9th October, 1952, with the exception of the taxing sections. The Rules were published in the Gazette on 29th October, 1952, and they, together with the taxing sections, came into effect simultaneously on 1st November, 1952. It was argued that the Rules save the Act in the following way. Under sections 7 and 11 a dealer is entitled to deduct from his taxable turnover sales which are from time to time declared to be tax-free under section 8 and "such other sales as may be prescribed." It is said that the Rules have excluded all sales which offend the Constitution, therefore under the "law" (by which is meant the Act and the Rules read together), which came into being on 1st November, 1952, no sale exempted by the Constitution can be taxed. It follows that the "law" which is sought to be impugned is *intra vires*.

I need not examine the Rules for this purpose. I will assume without deciding that they do exclude all sales which are exempt under the Constitution, nevertheless I am not prepared to agree that Rules can save an Act. Rules are made by a subordinate authority which is not the legislature and I cannot agree that the validity of an Act of a competent legislature can be made to depend upon what some subordinate authority chooses to do or not to do. The Rules were not passed by the legislature and in theory the particular shape they took was not even in contemplation. Say the Rules were to be amended tomorrow by striking out these saving-clauses, which would be *ultra vires*, the Act or the Rules? It would be impossible to hold that the Rules are *ultra vires* the Act, for they would not in the event I am contemplating travel one whit beyond the Act. It is the Act which would be bad. And if the Act is held to be *ultra vires* in an event like that, would it be competent to the Rule-making authority to come to the rescue of the legislature and rehabilitate the Act by re-enacting the Rules which it had deleted a few days before? It would, in my judgment, be no more competent for a Rule-making authority to do that than it would have been competent for it to validate this Act if the Rules had been brought into being even one day after sections 5 and 10 came into force.

I can understand this Court saying to a petitioner: "You are not yet hurt by this Act nor is there any immediate likelihood of your being hurt and until that happens we are not going to entertain your petition; for we are not here to examine hypothetical situations which may never arise". But that sort of objection cannot lie in this case for the reasons my Lord the Chief Justice has given. We are therefore called upon to determine the validity of the Act and in doing so we must, in my opinion, ignore the Rules.

I have now to consider two more points. One is about severability and the other is whether a taxing statute is to be treated differently from other laws.

On the question of severability, I cannot see how the good can be separated from the bad in this case even if the Explanation to section 2 (14) be expunged

unless the Constitution be read as part of the Act and we are to read into the Act some such provision as follows:

"Notwithstanding anything which is said in any part of this Act, all sales which the State is prohibited to tax under the Constitution are excluded from the scope of this Act."

But, in my opinion, Judges are not entitled to re-write an Act. Offending provisions can be struck out but if we do that the whole Act goes because the defect here is that *all* sales are permitted to be taxed provided they are within the State of Bombay; and the Rule-making authority is not restricted to taxation which is constitutionally permissible. On the contrary, section 45 says that the Government may make rules for carrying out the purposes of the Act and one of the purposes is to tax all sales which the State Government wishes to tax.

The other matter is based on the American view which treats taxing statutes differently from others and holds that in a taxing statute one looks to the individual item of taxation and not to the generality of the powers. With all respect to the American Judges who hold that view, I would prefer not to make exceptions. When the question is whether an Act of the legislature is *ultra vires*, the same principle should govern throughout. I would therefore hold that the Bombay Sales Tax Act, 1952 (Bombay Act No. XXIV of 1952) is *ultra vires* the Constitution of India.

Bhagwati, J.—I had the benefit of reading the judgment just delivered by My Lord the Chief Justice. While agreeing in the main with the conclusions reached therein I am however unable to subscribe to the reasoning as also the construction put upon the Explanation to Article 286 (1) (*a*). I wish to place on record therefore my points of disagreement and the reasons for the same.

The power given to a State Legislature to tax the sales or purchases of goods is derived from Article 246 (3) read with Entry No. 54 of List II of the Seventh Schedule of the Constitution. That power has got to be widely construed and it would embrace the power to tax the sales or purchases of goods by reason of a sufficient territorial connection between the taxing State and what it seeks to tax.

This was also the position which obtained before the Constitution and was responsible for double or multiple taxation of the same transaction by different States. The Constitution-makers therefore thought it fit to impose restrictions on the imposition by the States of taxes on the sales or purchases of goods by enacting Article 286. These restrictions were three-fold:—(1) no tax could be imposed on the sale or purchase of goods where such sale or purchase took place outside the State, (2) no tax could be imposed on the sale or purchase of goods where such sale or purchase took place in the course of the import of goods into or the export of the goods out of the territory of India, and (3) no tax could be imposed on the sale or purchase of any goods where such sale or purchase took place in the course of inter-State trade or commerce except in so far as Parliament might by law otherwise provide. These were the three categories of sales or purchases which came within the ban imposed by Article 286. The phraseology used in the Article laid particular stress on the fact that the sale or purchase should "take place" so as to fall within one or the other of these categories. The intention was that the sale or purchase should take place, *i.e.*, should be completed either outside the State or in the course of import or export or in the course of inter-State trade or commerce. Whereas before the Constitution the taxing power could be exercised by reason of a sufficient territorial connection involving either one or more of the ingredients of a sale in the shape of agreement to sell, the payment of price, transfer of ownership, delivery of goods, etc., the completion of a transaction of sale or purchase by the transfer of ownership or the passing of the property in the goods was enacted to be the sole criterion for taxability in Article 286. The sales or purchases could be divided into two broad categories—

(1) sales or purchases which take place inside the State and (2) sales or purchases which take place outside the State and those which took place outside the State were certainly outside the taxing powers of the State. In regard to the sales or purchases which took place inside the State the sales or purchases which took place in the course of import or export and in the course of inter-State trade or commerce were also brought within the ban leaving the taxing power of the State unfettered in regard to the other sales or purchases which took place inside the State. The restrictions which were thus imposed on the taxing power of the State confined themselves to sales or purchases which took place outside the State and those sales or purchases which took place inside the State but took place in the course of import or export and in the course of inter-State trade or commerce. Once the transfer of ownership or the passing of the property in the goods was accepted as the sole criterion of taxability it was not necessary at all to define what was a sale or purchase which took place inside the State. Whether a sale or purchase took place inside the State could be determined by applying the general law relating to the sale of goods and ascertaining where the transfer of ownership took place or the property in the goods passed. It was only when the transfer of ownership took place or the property in the goods passed that the sale or purchase was completed and the sale or purchase took place and the situs or the location of the sale or purchase was in the place where the transfer of ownership took place or the property in the goods passed under the general law relating to the sale of goods. (See *Badische Anilin Und Soda Fabrick* v. *Basle Chemical Works, Bind Schedler*[1] and *Badische Aniline Und Soda Fabrick* v. *Hickson*.[2] The situs or location of the sale or purchase therefore assumed an importance under Article 286 and the Constitution makers had before them not only the legislative practice prevailing in the various States before the Constitution but also the concept of sale as defined in the Indian Sale of Goods Act. They therefore incorporated in Article 286 the notion of a sale or purchase taking place, *i.e.*, being completed by the transfer of ownership or the passing of property in the goods under the general law relating to sale of goods and enacted that those sales or purchases which took place outside the State or which even though they took place inside the State took place in the course of the import or export or in the course of inter-State trade or commerce should come within the ban imposed therein.

The Constitution makers however took count of the fact that even though the property in the goods by reason of the sale or purchase passed in a particular State the goods might as a direct result of such sale or purchase be delivered in another State for the purpose of consumption in that State. They wanted to give the delivery State in that event the power to tax such sale or purchase and therefore introduced by the explanation to Article 286 (1) (*a*) a legal fiction by which the sale or purchase in that event was deemed to have taken place in the delivery State. What otherwise would have been a sale or purchase which took place outside the State within the meaning of Article 286 (1) (*a*) was thus by legal fiction deemed to have taken place inside the delivery State, thus assimilating the position to a sale or purchase which took place inside the delivery State enabling the delivery State to tax the sale or purchase in question. This legal fiction was thus introduced not for defining what was a sale or purchase which took place inside the State as distinct from a sale or purchase which took place outside the State. The purpose of the enactment of the explanation was not to provide a definition of a sale or purchase which took place inside the State. That was determined under the general law relating to the sale of goods by ascertaining where the transfer of ownership took place or the property in the goods passed, which was in another State and not the delivery State. What was a sale or purchase which took place outside the State was by reason of the explanation and the legal fiction enacted

1. (1898) A.C. 200.

2. (1906) A.C. 419.

therein deemed to be a sale or purchase which took place inside the State so as to enable the delivery State to tax the sale or purchase in question.

The sale or purchase transactions which are covered by the explanation are moreover of a limited character, *viz.*, those in which as a direct result of such sale or purchase the goods have actually been delivered in the delivery State for the purposes of consumption in that State. They do not comprise all the transactions of sale or purchase which take place inside the State because besides those there are a large number of transactions of sale or purchase which take place inside the State and in which no element of inter-State trade or commerce enters the transaction. The transactions of sale or purchase which take place between dealers and dealers and dealers and customers all within the State are really comprised in the category of transactions of sale or purchase which take place inside the State and these transactions do not at all fall within the purview of the explanation. It would be surprising to find a definition of a transaction of sale or purchase which takes place inside the State given in the manner in which it is alleged to have been done in the explanation covering only those transactions of sale or purchase in which the goods have actually been delivered in the delivery State as a direct result of such sale or purchase for the purpose of consumption in that State. A definition if at all it has any significance should cover all the transactions which come within that particular category and cannot be enacted in the form of a legal fiction in the manner it has been done in the explanation. It is no definition at all. It has no reference to facts but it merely enacts a legal fiction under which a sale which under the general law relating to sale of goods is completed outside the State by the transfer of ownership or the passing of the property in the goods in another State is deemed to have taken place inside the delivery State because of the goods having been actually delivered as a direct result of such sale or purchase for the purpose of consumption in the delivery State. What is otherwise a sale or purchase which takes place outside the State is thus deemed to have taken place inside the delivery State and that is the only purpose of the enactment of the explanation. The contention of the Attorney-General and Shri Seervai that the purpose of the enactment of the Explanation was to define what was a sale or purchase which took place inside the State is therefore unsound.

The *non-obstante* clause really takes count of the fact that under the general law relating to the sale of goods the property in the goods by reason of such sale or purchase would pass in another State and that the situs or location of the sale would accordingly be therefore in another State. Notwithstanding that fact the explanation enacts the legal fiction that the particular transaction of sale or purchase is deemed to have taken place within the delivery State. The *non-obstante* clause has not been incorporated in the explanation with a view to emphasise the particular aspect of the passing of property in the goods and negativing the same because that was one of the ingredients which had been considered as important territorial connection between the taxing State and what it sought to tax. Besides this ingredient there were various other ingredients which had been similarly considered sufficient territorial connections and to consider that the ingredient of the passing of property in the goods was the only ingredient which was considered important to be mentioned in the *non-obstante* clause is to ignore the facts and do violence to the whole conception underlying the incorporation of the *non-obstante* clause in the explanation. It would be a more natural way of reading the *non-obstante* clause to read into it an intention to state what according to the Constitution-makers was the basic idea of fixing the situs or the location of the sale or purchase in the place where the transfer of ownership took place or the property in the goods passed and to indicate that notwithstanding that fact a sale or purchase which fell within the category mentioned in the explanation was nonetheless to be deemed to have taken place inside the delivery State.

If the explanation to Article 286 (1) (a) is construed in the manner indicated above it follows that notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State the sale shall be deemed to have taken place in the delivery State and the delivery State would be entitled to tax the sale or purchase. That does not however mean that it is only the delivery State which will be entitled to tax the sale or purchase. Under the general law relating to the sale of goods the property in the goods having by reason of such sale or purchase passed in another State that State will no doubt be entitled to tax the sale or purchase as having taken place inside the State. That position will continue to obtain in spite of the fact that by the enactment of the legal fiction in the explanation such sale or purchase will be deemed to have taken place inside the delivery State. The object of the explanation is not and could not be to take away the right which the State in which the property in the goods passed had to tax the sale or purchase which took place inside that State. The object and purpose of the explanation could only be to deem such purchase or sale by reason of the legal fiction to have taken place in the delivery State so as to enable the delivery State also to tax the sale or purchase in question. The object of Article 286 is to impose restrictions on the imposition of tax on sale or purchase of goods and the only restriction which has been imposed in connection with the sales or purchases which take place in this manner is that a State shall not impose a tax on the sale or purchase of goods where such sale or purchase takes place outside the State. That is a general ban which has been imposed by Article 286 (1) (a) and what the explanation seeks to do is to lift the ban to the extent of the transactions of sale or purchase covered by the explanation and enable the delivery State also to tax such purchases or sales.

It is no doubt true that in the explanation the word 'only' has not been used nor has the word 'also' been used and we have to gather the purpose of the enactment of the explanation from the words of the explanation itself. In order to arrive at a conclusion whether the object and purpose of the explanation was to enable the delivery State to tax such sales or purchases either in addition to the State in which the property in the goods had passed or in substitution thereof one has got to bear in mind the basic idea that a State would normally be entitled to tax a sale or purchase where such sale or purchase took place inside the State except in cases covered by Article 286 (1) (b) and Article 286 (2). If that power of the State to tax the sale or purchase where such sale or purchase took place inside the State was in any manner whatever sought to be taken away it could only be taken away by an express enactment in that behalf as in Article 286 (1) (b) and Article 286 (2) and not by the backdoor as it were by enacting a legal fiction as it has been done in the explanation. The two book cases illustration which was submitted before the Court by Shri Seervai in the course of his arguments is a very specious one. Merely because a book is by a legal fiction deemed to be in the book case *'B'* it does not necessarily cease to exist in the book case *'A'*. As a matter of physical fact it is in the book case *'A'*. It continues in the book case *'A'* and the physical fact of its existence in the book case *'A'* can never be obliterated. The legal fiction only operates to treat it as if it were in the book case *'B'* and to involve all the consequences of its being in the book case *'B'*. The two positions are not mutually exclusive. They can co-exist side by side and the legal consequences of the actual fact of the book being in the book case *'A'* can be worked out simultaneously with the legal consequences of the notional existence of the book in the book case *'B'* by reason of the operation of the legal fiction. If this position is borne in mind it is clear that not only would the State in which the property in the goods passed continue to be entitled to tax the sale or purchase because of such sale or purchase having taken place inside the State, but the delivery State would also be entitled to tax such sale or purchase by reason

of the operation of the legal fiction in so far as the goods have actually been delivered as a direct result of such sale or purchase in the delivery State for the purpose of consumption in that State. According to the position as discussed above both the States would thus be entitled to tax such sales or purchases.

Before I proceed to discuss the effect of Article 286 (2) on the taxing powers of both the States it is necessary to consider what is the exact type of sale or purchase which is covered by the explanation. That sale or purchase has to be one as a direct result of which the goods have actually been delivered in the delivery State for the purpose of consumption in that State. It is not every transaction which results in the goods being delivered across the border that comes within this category. It is only a transaction of sale or purchase which directly results in the delivery of goods for the purpose of consumption in the delivery State that comes within the category of transactions covered by the explanation. A dealer in the delivery State purchasing from a dealer in the State where the property in the goods passes by reason of such sale or purchase cannot be said to have purchased the goods for the purpose of consumption in the delivery State because the obvious purpose for which he purchases the goods is for dealing with those goods in the ordinary course of trade and not for consuming the same. A dealer who deals with the goods after purchasing the same does not consume the goods. He deals with or disposes of the same in the ordinary course of trade and he is a dealer or a trader in those goods. He is not a consumer of those goods. The word "consumption" has been thus defined in Webster's New International Dictionary, Vol. I, Page 483:—

"*Consumption.*—(3) Economics.—The use of (economic) goods resulting in the diminution or destruction of their utilities; opposed to production. Consumption may consist in the active use of goods in such a manner as to accomplish their direct and immediate destruction, as in eating food, wearing clothes, or burning fuel; or it may consist in the mere keeping, and enjoying the presence or prospect of, a thing, which is destroyed only by the gradual processes of natural decay, as in the maintenance of a picture gallery. Generally, it may be said that consumption means using things, and production means adapting them for use."

In the Oxford New English Dictionary, Vol. II, page 888, consumption is defined as:

"(1) The action or fact of consuming or destroying; destruction............(7) Pol. Econ. The destructive employment or utilisation of the products of industry."

Delivery of goods for the purpose of consumption in the delivery State therefore means the delivery for the purpose of using by the consumer and it has no application to the case of a dealer purchasing the goods across the border for dealing with or disposing of the same in the ordinary course of trade. The explanation therefore covers only those cases where as a direct result of the sale or purchase goods are delivered for consumption in the delivery State by the consumer and it is only that limited class of transactions which are covered by the explanation and which are liable to tax by the delivery State. I do not accept the contention that the words "for the purpose of consumption" must be understood in a comprehensive sense as having reference both to immediate and ultimate consumption within the State and excluding only resale out of the State. In my opinion they have reference only to immediate consumption within the State and no further.

If the matters stood thus and there was no further provision to be considered the position would be that in a transaction of sale or purchase covered by the explanation construed as above both the State in which the property in the goods passed and the delivery State would be entitled to tax such sale or purchase, the former by reason of the property in the goods having passed inside that State and the latter by reason of the goods having been delivered as a direct result of such sale or purchase for the purpose of consumption in that State. We have

however got to take count of Article 286 (2). The transaction of such sale or purchase even though it be as between a dealer in the one State and the consumer in the delivery State is nonetheless a transaction in the course of inter-State trade or commerce. I do not agree with the contention of the Advocate-General of Bombay that Article 286 (2) should be interpreted as applying to the cases of transactions of sale or purchase taking place between dealers and dealers only and not as applying to the cases of transactions of sale or purchase taking place between dealers on the one hand and consumers on the other. Whether a transaction of sale or purchase takes place between a dealer on the one hand and a dealer on the other or between a dealer on the one hand and a consumer on the other in the respective States all these transactions are in the course of inter-State trade or commerce and therefore hit by Article 286 (2) and the transactions which are covered by the Explanation to Article 286 (1) (*a*) would also be accordingly hit by the ban imposed under Article 286 (2).

So far as the State in which the property in the goods has passed is concerned it could certainly not tax the sale or purchase in question because the transaction of sale or purchase so far as the particular State is concerned takes place in the course of inter-State trade or commerce and could not be subjected to the imposition of tax except in so far as Parliament might by law otherwise provide. So far however as the delivery State is concerned the explanation empowers the delivery State to tax such transaction and if Article 286 (2) be construed as imposing a ban on the taxation of such sale or purchase it will be tantamount to the giving of the right to tax by one hand and the taking away of it by another.

It was contended and rightly so by the Advocate-General of Bombay that if the transactions which are covered by the explanation to Article 286 (1) (*a*) were thus hit by Article 286 (2) in the absence of a provision otherwise enacted by Parliament the explanation to Article 286 (1) (*a*) would be rendered nugatory and the Constitution makers could not be held to have contemplated such a possibility at the very inception of the Constitution leaving it to the Parliament by having recourse to the provision contained in Article 286 (2) to remedy such a state of affairs. Such a possibility could not be contemplated and an effort should therefore be made in so far as it was reasonably possible to do so to reconcile the provisions of the explanation to Article 286 (1) (*a*) and Article 286 (2).

It is a well-known rule of the interpretation of statutes that a "particular enactment is not repealed by a general enactment in the same statute." (Beal on the Cardinal Rules of Legal Interpretation, 3rd Edition, Part VII, section IX, p. 516). Reliance is placed in support of the above proposition on the following observations of Best, C.J., in *Churchill* v. *Crease*[1]:

"The rule is, that where a general intention is expressed, and the Act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception."

To the same effect also are the observations of Quain, J., in *Dryden* v. *Overseers of Putney*[2], quoted at page 426 of the same work:—

"It may be laid down as a rule for the construction of statutes, that where a special provision and a general provision are inserted which cover the same subject-matter, a case falling within the words of the special provision must be governed thereby and not by the terms of the general provision."

(*See also* Craies on Statute Law, 5th Edition (1952) at page 205; Maxwell on the Interpretation of Statutes, 9th Edition (1946) at page 176 and Crawford on the Construction of Statutes (Interpretation of Laws) 1940 Edition, Chapter XVIII 'Construction of Statutes' at page 265, section 167). It therefore follows that the general provision which is enacted in Article 286 (2) against

1. (1828) 5 Bing. 177 at p. 180.

2. L.R. (1876) 1 Ex.D. 223 at p. 232.

the imposition of tax on the sale or purchase of goods in the course of inter-State trade or commerce should give way to the special provision which is enacted in the explanation to Article 286 (1) (*a*) enabling the delivery State to tax such sale or purchase in the limited class of cases covered by the explanation, transactions covered by the explanation being thus lifted out of the category of transactions in the course of inter-State trade or commerce covered by Article 286 (2) and assimilated to transactions of sale or purchase which take place inside the State thus acquiring an intra-State character so far as the delivery State is concerned.

It was suggested that this result could also be achieved by having resort to the principles which have been enunciated in Articles 301 and 304 of the Constitution which are included in Part XIII under the caption—Trade, Commerce and intercourse within the territory of India. Even though these provisions of the Constitution may by analogy support the conclusion that a transaction in the course of inter-State trade or commerce is thus lifted out of that category and assimilated to a transaction of sale or purchase which takes place inside the State the analogy must stop there and cannot be worked any further. One cannot construe the provisions of Article 286 with reference to the provisions of Article 304 (*a*) as is sought to be done. Article 286 and Article 304 (*a*) refer to different states of affairs. Whereas Article 286 provides restrictions on the imposition of taxes on purchase or sale of goods, Article 304 (*a*) gives the State Legislature power to impose on goods imported from other States any tax to which similar goods manufactured or produced in that State are subject so however as not to discriminate between goods so imported and goods so manufactured or produced. Whereas Article 286 refers to taxes on sales or purchases of goods, Article 304 (*a*) refers to tax on imported goods. The two concepts are thus entirely different. The only argument which was addressed before us on Articles 301 and 304 of the Constitution was by the Government Pleader of Patna who referred to these provisions in order to substantiate his point that only one State *viz.*, the delivery State should tax the sales or purchases covered by the explanation and argued what the results would be if it was held that both the States could tax or neither of them could tax such sale or purchase. This aspect was however not stressed or presented during the course of the arguments and I would prefer not to express any opinion on the scope or meaning of Article 304.

I would therefore base my construction of the explanation to Article 286 (1) (*a*) and Article 286 (2) on the rule as to the interpretation of statutes which I have referred to above, lifting the transaction of sale or purchase covered by the explanation to Article 286 (1) (*a*) out of the category of the transactions in the course of inter-State trade or commerce assimilating it to a transaction of sale or purchase which takes place inside the delivery State thus investing it with the character of an intra-State sale *qua* the delivery State.

The result therefore is that the delivery State only would be entitled to tax the transaction of sale or purchase covered by the explanation. Such transaction would be a transaction of sale or purchase where as a direct result of such sale or purchase the goods are delivered in the delivery State for the purpose of consumption in that State, *i.e.*, where the transaction is between a dealer in the State in which the property in the goods passes and a consumer in the delivery State. The State in which the property in the goods passes would not be able to tax such sale or purchase in the absence of a provision enacted by law by Parliament within the meaning of Article 286 (2). Once that ban is lifted by the appropriate legislation enacted by the Parliament the State in which the property in the goods passes would also be entitled to tax such sale or purchase but not otherwise.

Save as above I agree with the conclusions reached by My Lord the Chief Justice in the judgment just delivered. I agree that the Bombay Sales Tax Act,

1952 and the rules made thereunder except rule 5 (2) (i) do not contravene the provisions of Article 286, that the rule 5 (2) (i) is clearly severable and can be ignored, that there is no substance in the contention of Shri Seervai that there is a violation of the fundamental rights guaranteed under Article 14 and that the taxation statutes should be construed in a manner so as to allow the statute itself to stand, the taxing authority being prevented by injunction from imposing the tax on subjects excluded by the Constitution from the purview of taxation by the State.

In the result the declaration made by the Court below will be set aside, the writ issued by it will be quashed and the State of Bombay will be prohibited from imposing or authorising the imposition of a tax on sales or purchases which according to the interpretation put above on Article 286 are excluded from the purview of taxation by the State of Bombay. Each party will bear and pay its own costs throughout.

Agent for Appellants: *G. H. Rajadhyaksha.*

Agent for Respondents: *Rajinder Narain.*

Agents for Interveners: Union of India, State of Madras, State of Mysore, State of Punjab and State of Travancore-Cochin: *G. H. Rajadhyaksha.*

State of Bihar: *R. C. Prasad*; State of West Bengal: *I. N. Shroff* for *P. K. Bose*; State of Uttar Pradesh: *C. P. Lal.*

G.R.|K.S. ——— *Appeal allowed.*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT:—M. PATANJALI SASTRI, *Chief Justice*, B. K. MUKHERJEA, S. R. DAS, GHULAM HASAN AND N. H. BHAGWATI, JJ.

The Punjab National Bank, Ltd. .. *Appellant**

v.

The Employees of the Bank, represented by the All India Punjab National Bank Employees' Union and others .. *Respondents.*

Industrial Disputes Act (XIV of 1947), sections 23 (1) and 33—Scope and effect.

Where the pendency of proceedings before a Tribunal as to industrial disputes render a strike illegal under section 23 (*b*) of the Industrial Disputes Act, the dismissal of such strikers without obtaining the permission of the Tribunal as required by section 33 of the Act will also be illegal. Such dismissal cannot be said to be lawful and that in consequence the Appellate Tribunal had no jurisdiction to re-direct the reinstatement of such dismissed workmen.

On Appeal by Special Leave granted by the Supreme Court on the 16th October, 1952, from the Decision dated the 22nd September, 1952 of the Labour Appellate Tribunal of India at Calcutta in Appeals Nos. Cal. 366|51, Cal. 25|52, Cal. 69|52 and Cal. 70|52, arising out of the Award dated the 9th February, 1952, of the Chairman, Industrial Tribunal, Delhi.

M. C. Setalvad, Attorney-General for India and *N. C. Chatterjee,* Senior Advocate (*R. L. Agarwal, Advocate,* with them), for Appellant.

A. S. R. Chari and *Hardyal Hardy,* Advocates, for Respondents.

The Judgment of the Court was delivered by

Patanjali Sastri, C.J.—This is an appeal by special leave from a decision dated 22nd September, 1952, of the Labour Appellate Tribunal of India at Calcutta setting aside an award dated 9th February, 1952, made by the Industrial Tribunal constituted to adjudicate on certain disputes between the appellant, the Punjab National Bank, Ltd., Delhi (hereinafter referred to as the Bank) and its workmen, the respondents represented by their Union.

* Civil Appeal No. 181 of 1952. 10th April, 1953.

The facts leading to this appeal may be briefly stated. Several other disputes between the parties had already been referred on 21st February, 1950, to another Industrial Tribunal presided over by Sri K. S. Campbell-Puri, and during the pendency of the proceedings before the said Tribunal, the Bank alleged that the respondents along with other workmen numbering more than a thousand illegally commenced a general strike on 18th April, 1951, in connection with a fresh dispute. Thereupon, notice was issued to the strikers that unless they returned to work by 24th April, 1951, they would be deemed to have left service of their own accord. That notice having been ignored by the strikers a second notice was issued to them on 27th April, 1951, terminating their service. The Government of India thereupon intervened, and as a result of the discussions held between the Government officials and the Bank, the latter agreed to take back all the employees except 150 against whom the Bank had objections on account of their alleged subversive activities and other objectionable and unlawful conduct before and during the strike. On 2nd July, 1951, the Government of India constituted a Tribunal to decide the questions regarding the dismissals, etc., of the aforesaid 150 employees, and that Tribunal, after calling for the statements of case on behalf of the parties and hearing them, made an award on 9th February, 1951, refusing reinstatement on the sole ground that the respondents had gone on an illegal strike in contravention of section 23 (*b*) of the Industrial Disputes Act, and that the Bank was entitled to dismiss them. The Tribunal, however, granted to the respondents compensation by way of salary and allowances at half the rates from the date of dismissal to the date of the publication of the award.

The respondents appealed to the Labour Appellate Tribunal at Calcutta which, while agreeing with the Industrial Tribunal that the strike was illegal, held that it was condoned by the Bank and it was, therefore, not open to it to justify the dismissal of the respondents on the ground that they had participated in the illegal strike. The Appellate Tribunal further held that the dismissal of the respondents was wrongful because no charges were framed against any of them in respect of their alleged acts of violence or subversive activities and their explanation was not called for. The Appellate Tribunal accordingly thought that further evidence was necessary on certain specific points mentioned in its order and reserved its decision as to whether the respondents were entitled to reinstatement till after such evidence was taken.

Learned counsel for the Bank advanced a two-fold contention in support of this appeal. He challenged the correctness of the conclusion that the Bank had, in the circumstances of the case, condoned the illegal strike by the respondents, and maintained that it was open to the Bank to rely upon the illegal strike as justifying the dismissal of the respondents. On that basis learned counsel argued that there could no longer be any question of reinstating the respondents in the service of the Bank as such reinstatement would in law amount to compelling the Bank to employ these respondents afresh in its service, which the Appellate Tribunal had no jurisdiction to do. He accordingly submitted that this Court should set aside the order of the Labour Appellate Tribunal dated 22nd September, 1952, obviating the further enquiry directed by the said order.

We consider it unnecessary to express any opinion on the question of condonation or waiver of the illegal strike; for, assuming that there was no such condonation or waiver and it was open to the Bank to rely upon the illegal strike as a valid ground for dismissing the respondents, we are of opinion that section 33 of the Industrial Disputes Act, 1947, furnishes a short answer to the further contention that the Appellate Tribunal had no jurisdiction to order reinstatement of the respondents. That section provides, *inter alia,* that no employer shall, during the pendency of any proceedings before a Tribunal in respect of any industrial dispute, discharge by way of dismissal or otherwise, any workman

concerned in the dispute save with the permission in writing of the said Tribunal. Admittedly, no such permission was obtained. If the pendency of the proceedings before Sri Campbell-Puri made the strike of the respondents illegal under section 23 (*b*) of the Act, the dismissal of the respondents by the Bank without obtaining his permission as required by section 33 was also illegal. We see no force in the argument of the Attorney-General that the section has no application to the case as strikes and lock-outs are dealt with in a different chapter, Chapter VI, and as the respondents were not concerned in the disputes pending adjudication before Sri Campbell-Puri. The terms of section 33 are wide enough to cover the present case, and the fact that it finds place in Chapter VII headed "Miscellaneous" is by no means inconsistent with its general application to all cases of discharge on whatever ground it may be based. This is shown by the recent amendment of the section by Act XLVIII of 1950 which has omitted the words "except for misconduct not connected with the dispute" in the newly substituted section. It is equally clear that the respondents are concerned in the disputes pending before Sri Campbell-Puri, as it is conceded that any award made by him would bind the respondents. Section 33 being thus applicable to the case, the contention of the Bank that the dismissal of the respondents was lawful and that in consequence the Appellate Tribunal had no jurisdiction to direct their reinstatement falls to the ground.

We therefore see no reason to interfere with the order made by the Labour Appellate Tribunal and we accordingly dismiss the appeal with costs.

Agent for Appellant: *Ganpat Rai.*

Agent for Respondents: *V. P. K. Nambiar.*

G.R.|K.S. *Appeal dismissed.*

[THE SUPREME COURT OF INDIA.]

[Criminal Appellate Jurisdiction.]

PRESENT:—MEHRCHAND MAHAJAN, VIVIAN BOSE AND B. JAGANNADHA DAS, JJ.

Basir-ul-Huq and others .. *Appellants**

v.

The State of West Bengal on the complaint of Dhirendra Nath Bera .. *Respondent.*

Penal Code (XLV of 1860), sections 182 and 500—Charge of defamation against accused by person against whom false complaint was made by accused—If requires sanction of public servant under section 195, Criminal Procedure Code (V of 1898).

In respect of allegations in a false report to the police made by the accused, he could be tried of charges under sections 182 and 500, Indian Penal Code separately on same facts provided the public servant as well as the person defamed made complaints. If that is so, there is no reason why one cannot be tried independently of the other so long as the requirements of each are satisfied. Where upon the facts the commission of several offences is disclosed some of which require sanction and others do not, it is open to the complainant to proceed in respect of those only which do not require sanction. The ingredients of the offence under section 182 cannot be said to be the ingredients for the offence under section 500. Nor can it be said that the offence relating to giving false information relates to the same group of offences as that of defamation. Section 195, Criminal Procedure Code, does not bar the trial.

But the provisions of section 195, Criminal Procedure Code cannot be evaded by device of charging a person with an offence to which that section does not apply and then convicting

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* Criminal Appeal Nos. 26 and 27 of 1952. 10th April, 1953.

him of an offence to which it does, upon the ground that such latter offence is a minor offence of the same character, or by describing the offence as being one punishable under some other section of the Indian Penal Code, though in truth and substance the offence falls in the category of sections mentioned in section 195, Criminal Procedure Code. Merely by changing the garb or label of an offence which is essentially an offence covered by the provisions of section 195, prosecution for such an offence cannot be taken cognizance of by misdescribing it by putting a wrong label on it.

Appeals under Article 134 (1) (*c*) of the Constitution of India from the Order dated the 4th February, 1952, of the High Court of Judicature at Calcutta (Chakravartti and Sinha, JJ.) in Criminal Revision Nos. 102 and 103 of 1952.

Sachindra Chandra Das Gupta and A. K. Dutt, Advocates, *for Appellants.*

B. Sen, Advocate, for Respondent.

Arun Kumar Datta, Advocate for Complainant (Dhirendra Nath Bera).

The Judgment of the Court was delivered by

Mahajan, J.—These two appeals arise in the following circumstances: One Mokshadamoyee Dassi, mother of Dhirendra Nath Bera, died some time in the evening of the 3rd September, 1949. At the moment of her death Dhirendra Nath was not present at the house. On his return at about 8-30 P.M., he along with some other persons took the dead body to the cremation ground. It appears that Nurul Huda, the appellant in Criminal Appeal No. 27 of 1952, had lodged information at the police station to the effect that Dhirendra Nath had beaten and throttled his mother to death. When the funeral pyre was in flames, Nurul Huda along with the appellants in Criminal Appeal No. 26 of 1952 and accompanied by the sub-inspector of police arrived at the cremation ground. The appellants pointed out the dead body and told the sub-inspector that the complainant had killed his mother by throttling her and that there were marks of injury on the body which they could show to the sub-inspector if he caused the body to be brought down from the pyre. At their suggestion the fire was extinguished and the dead body was taken down from the pyre in spite of the protests from the complainant. On an examination of the dead body it was found that there were no marks of injury on it and the appellants were unable to point out any such marks. The body was however sent for post-mortem examination which was held on 5th September, 1949, but no injury was found on the person of the deceased. The sub-inspector after investigation reached the conclusion that a false complaint had been made against Dhirendra Nath.

On the 24th September, 1949, Dhirendra Nath filed a petition of complaint in the Court of the sub-divisional officer of Uluberia in the district of Howrah against the appellants in both the cases and one Sanwaral Huq. It was alleged in the complaint that the information given by Nurul Huda to the police was false, that Nurul Huda and the other appellants had made imputations *mala fide* out of enmity against him with the intention of harming his reputation and that to wound his religious feelings they had trespassed on the cremation ground and caused the dead body to be taken out by making false imputations.

The appellants were tried before Shri R. Ray Choudhury, magistrate 1st class, Uluberia, on charges under sections 297 and 500, Indian Penal Code. The charges framed against them were in these terms:—

"(1) That you on or about the 17th day of Bhadra 1356 B.S. at Panshila, P. S. Shyampur with the intention of wounding the religious feelings of P.W. 1, Dhirendra Nath Bera, the complainant, committed trespass upon the cremation ground where the funeral rites of the mother of the complainant were being performed and thereby committed an offence punishable under section 297, I. P. Code and within my cognizance;

(2) That you on or about the 17th day of Bhadra 1356, B.S. at Panshila, P. S. Shyampur defamed P.W. 1, Dhirendra Nath Bera, the complainant, by making imputation to the effect that he had killed his mother intending to harm, or knowing or having reason to believe that such imputation would harm the reputation of the complainant and thereby committed an offence punishable under section 500, I. P. Code, and within my cognizance."

None of these charges relates to the falsity of the report made to the police or contains facts or allegations which disclose an offence under section 182, Indian Penal Code. The charge under section 297, Indian Penal Code, was a distinct one and concerned an act of the accused committed after the giving of the report. The charge under section 500 related to defamatory and libellous allegations contained in the report itself.

It was contended on behalf of the defence that Nurul Huda had lodged information with the police under a *bona fide* belief created in his mind on the statement of one Asiram Bibi and that none of the accused persons had entered the cremation ground as alleged by the complainant.

The Magistrate held the charges proved against all the appellants and convicted each of them under sections 297 and 500, Indian Penal Code. Each of the appellants was awarded three months' rigorous imprisonment on the charge under section 297 and each of them was sentenced to a fine of Rs. 100 on the charge under section 500.

The appellants went up in appeal to the Sessions Judge of Howrah who by his order dated 31st July, 1950, set aside the convictions and sentences and acquitted them. He held that on the facts stated in the complaint the only offence that could be said to have been committed by the appellants was one under section 182 or section 211, Indian Penal Code, and that a Court was not competent to take cognizance of those offences except on a complaint by a proper authority under the provisions of section 195, Criminal Procedure Code. Against the acquittal order an application in revision was preferred to the High Court. This petition came up for hearing before a bench of the High Court (K. C. Das Gupta and P. N. Mookerjee, JJ.) The learned Judges reached the conclusion that on the facts alleged in the petition of complainant distinct offences under sections 182, 297 and 500, Indian Penal Code, had been disclosed. They however referred for the decision of the Full Bench the following question:—

"If the facts alleged in a petition of complaint, or in an information received by the Magistrate, on which a Magistrate can ordinarily take cognizance of an offence under section 190, Cr. P. Code, disclose an offence of which cognizance cannot be taken by the Magistrate because of the special provisions of section 195, or 196 or 196-A, or 197, or 199, Cr. P. Code, is the Magistrate also debarred because of this from taking cognizance of other offences disclosed by the facts alleged, which are not in any way affected by the provisions of section 195, or 196, or 196-A or 197 or 199, Cr. P. Code."

The Full Bench answered the question referred in the negative.[1] In respect of the conviction under section 297, Indian Penal Code, the learned Judges said that there was nothing in sections 195 to 199, Criminal Procedure Code, which could in any way bar the prosecution of the appellants under that section, as it could in no way be said that it arose out of the facts which would constitute an offence under section 182, or section 211, Indian Penal Code. On the other hand, it arose from an entirely different set of facts, namely, the trespass by the opposite parties in the burial ground and the removal of the corpse from the lighted funeral pyre. With regard to the offence under section 500, it was observed that though the prosecution for defamation was based on the false information given to a public officer, that circumstance, however, was no bar for the prosecution of the appellants under that section. In the result the application in revision was allowed, the order of acquittal was set aside and the Sessions Judge was directed to re-hear the appeal on the merits.

After remand the appeal was heard on the merits and was dismissed. The convictions and sentences passed by the Magistrate were confirmed. Against the order of the Sessions Judge the appellants went up in revision to the High Court but these applications were summarily dismissed. The appellants thereupon applied to the High Court for a certificate under Article 134 (1) (*c*) of the Constitution for leave to appeal to this Court. In the application the order of

1. *Dhirendra Nath Bera v. Nurul Huda*, 56 C.W.N. 1: A.I.R. 1951 Cal. 133 (F.B.).

the Full Bench dated 22nd June, 1951, was challenged. This application was opposed on behalf of the complainant on the ground that the interim order of the Full Bench not having been appealed against could not be challenged at that stage. Thus two substantial questions were argued in the leave application, namely:

1. whether it was open to the accused to question the correctness of the Full Bench decision, it not having been appealed from when it was passed, and,

2. whether the point decided by the Full Bench in itself was of sufficient importance to justify the granting of a certificate under Article 134 (1) (*c*).

As the judgment of the Full Bench did not terminate the proceedings but merely directed the appeal to be reheard, it was held that the petitioners could not appeal from it at that time and it was open to them to raise the point at this stage. The second question was considered of sufficient importance to justify the grant of leave and leave was accordingly granted.

The learned counsel for the respondent raised a preliminary objection in order to canvass the first question mentioned above, while the learned counsel for the appellants canvassed the question of the correctness of the decision of the Full Bench on its merits. He contended that the Magistrate had no jurisdiction to take cognizance of the complaint under section 500 and section 297, Indian Penal Code, as the facts disclosed constituted an offence under section 182 which offence could not be tried except on a complaint by a public servant.

Section 195, Criminal Procedure Code, on which the question raised is grounded, provides *inter alia,* that no Court shall take cognizance of an offence punishable under sections 172 to 188, Indian Penal Code, except on the complaint in writing of the public servant concerned, or some other public servant to whom he is subordinate. The statute thus requires that without a complaint in writing of the public servant concerned no prosecution for an offence under section 182 can be taken cognizance of. It does not further provide that if in the course of the commission of that offence other distinct offences are committed, the Magistrate is debarred from taking cognizance in respect of those offences as well. The allegations made in a complaint may have a double aspect, that is, on the one hand these may constitute an offence against the authority of the public servant or public justice, and on the other hand, they may also constitute the offence of defamation or some other distinct offence. The section does not *per se* bar the cognizance by the Magistrate of that offence, even if no action is taken by the public servant to whom the false report has been made. It was however argued that if on the same facts an offence of which no cognizance can be taken under the provisions of section 195 is disclosed and the same facts disclose another offence as well which is outside the purview of the section and prosecution for that other offence is taken cognizance of without the requirements of section 195 having been fulfilled, then the provisions of that section would become nugatory and if such a course was permitted those provisions will stand defeated. It was further said that it is not permissible for the prosecution to ignore the provisions of this section by describing the offence as being punishable under some other section of the Penal Code.

In our judgment, the contention raised by the learned counsel for the appellants is without any substance so far as the present case is concerned. The charge for the offence under section 297, Indian Penal Code, could in no circumstance, as pointed out by the High Court, be described as falling within the purview of section 195, Criminal Procedure Code. The act of trespass was alleged to have been committed subsequent to the making of the false report and all the ingredients of the offence that have been held to have been established on the evidence concerned the conduct of the appellants during the post-report period. In these circumstances, no serious contention could be raised that the provisions

of section 195 would stand defeated by the Magistrate having taken cognizance of the offence under that section.

As regards the charge under section 500, Indian Penal Code, it seems fairly clear both on principle and authority that where the allegations made in a false report disclose two distinct offences, one against the public servant and the other against a private individual, that other is not debarred by the provisions of section 195 from seeking redress for the offence committed against him. Section 499, Indian Penal Code, which mentions the ingredients of the offence of defamation gives within defined limits immunity to persons making depositions in Court, but it is now well settled that that immunity is a qualified one and is not absolute as it is in English law. Under section 198, Criminal Procedure Code, a complaint in respect of an offence under section 499, Indian Penal Code can only be initiated at the instance of the person defamed, in like manner as cognizance for an offence under section 182 cannot be taken except at the complaint of the public servant concerned. In view of these provisions there does not seem in principle any warrant for the proposition that a complaint under section 499 in such a situation cannot be taken cognizance of unless two persons join in making it, *i.e.*, it can only be considered if both the public servant and the person defamed join in making it, otherwise the person defamed is without any redress. The statute has prescribed distinct procedure for the making of the complaints under these two provisions of the Indian Penal Code and when the prescribed procedure has been followed, the Court is bound to take cognizance of the offence complained of.

The decided cases fully support this view and our attention has not been drawn to any case which has taken a contrary view as regards offences under section 500, Indian Penal Code. In *Satish Chandra Chakravarti* v. *Ram Dayal De*[1], five Judges of the Calcutta High Court considered this question and held that where the maker of a single statement is guilty of two distinct offences, one under section 211, Indian Penal Code, which is an offence against public justice, and the other an offence under section 499, wherein the personal element largely predominates, the offence under the latter section can be taken cognizance of without the sanction of the Court concerned, as the Criminal Procedure Code has not provided for sanction of Court for taking cognizance of that offence. It was said that the two offences being fundamentally distinct in nature, could be separately taken cognizance of. That they are distinct in character is patent from the fact that the former is made non-compoundable, while the latter remains compoundable, in one for the initiation of the proceedings the legislature requires the sanction of the Court under section 195, Criminal Procedure Code, while in the other, cognizance can be taken of the offence on the complaint of the person defamed. It could not be denied that the accused could be tried of charges under sections 182 and 500, Indian Penal Code, separately on same facts provided the public servant as well as the person defamed made complaints. If that is so, there is no reason why one cannot be tried independently of the other so long as the requirements of each are satisfied. Harries, C.J., while delivering the Full Bench decision in question examined all the earlier cases of the Calcutta High Court and observed that where upon the facts the commission of several offences is disclosed some of which require sanction and others do not, it is open to the complainant to proceed in respect of those only which do not require sanction; because to hold otherwise would amount to legislating and adding very materially to the provisions of sections 195 to 199 of the Code of Criminal Procedure. Sections 195 to 199 deal with the requisites for the prosecution of certain specified offences and the provisions of those sections must be limited to prosecutions for the offences actually indicated. If it was the intention of

1. (1920) 24 C.W.N. 982 (F.B.).

the legislature to make sanctions or complaints in a certain form necessary for the prosecution of all offences disclosed by facts which would give rise to any of the offences specifically indicated in these sections, the legislature could have said so but it did not.

Recently this matter was canvassed before a Full Bench of the Madras High Court[1] and it was held that in such cases it was open to the party defamed to take proceedings under section 499, Indian Penal Code, without the Court filing a complaint in accordance with the provisions laid down in section 195. There the question was whether the alleged defamer who had given false evidence in a Court could be prosecuted under section 499, Indian Penal Code, without a complaint by the Court before whom he gave evidence and the question was answered in the affirmative after an exhaustive review of the decided cases of the different High Courts in India. It was said that if the offence of giving false evidence in a judicial proceeding and defamation do not belong to the same genus but are distinct and separate in their characteristics and ingredients, it was difficult to perceive any serious inhibition by the Criminal Procedure Code for initiation and trial of one of these offences independently of anterior resort to fulfilling the conditions necessary to commence a prosecution for the other. These observations have apt application to the present case. The ingredients of the offence under section 182 cannot be said to be the ingredients for the offence under section 500. Nor can it be said that the offence relating to giving false information relates to the same group of offences as that of defamation.

Though, in our judgment, section 195 does not bar the trial of an accused person for a distinct offence disclosed by the same facts and which is not included within the ambit of that section, it has also to be borne in mind that the provisions of that section cannot be evaded by resorting to devices or camouflages. The test whether there is evasion of the section or not is whether the facts disclose primarily and essentially an offence for which a complaint of the Court or of the public servant is required. In other words, the provisions of the section cannot be evaded by the device of charging a person with an offence to which that section does not apply and then convicting him of an offence to which it does, upon the ground that such latter offence is a minor offence of the same character, or by describing the offence as being one punishable under some other section of the Indian Penal Code, though in truth and substance the offence falls in the category of sections mentioned in section 195, Criminal Procedure Code. Merely by changing the garb or label of an offence which is essentially an offence covered by the provisions of section 195, prosecution for such an offence cannot be taken cognizance of by misdescribing it or by putting a wrong label on it.

Before concluding, reference may also be made to the decision of the Federal Court in *Hori Ram Singh* v. *The Crown*.[2] The appellant in that case was charged with offences under sections 409 and 477-A, Indian Penal Code. The offence under section 477-A could not be taken cognizance of without the previous consent of the Governor under section 270 (1) of the Constitution Act, while the consent of the Governor was not required for the institution of the proceedings under section 409, Indian Penal Code. The charge was that the accused dishonestly misappropriated or converted to his own use certain medicines entrusted to him in his official capacity as a sub-assistant surgeon in the Punjab Provincial Subordinate Medical Service. He was further charged that being a public servant, he wilfully and with intent to defraud omitted to record certain entries in a stock book of medicines belonging to the hospital where he was employed and in his possession. The proceedings under section 477-A were quashed

1. *Narayana Aiyar* v. *Veerappa Pillai*, (1950) 2 M.L.J. 686 (F.B.).

2. (1939) F.C.R. 159: 2 F.L.J. 153: (1939) 2 M.L.J. (Supp.) 23 (F.C.).

by the Federal Court for want of jurisdiction, the consent of the Governor not having been obtained, but the case was sent back to the Sessions Judge for hearing on the merits as regards the charge under section 409, Indian Penal Code, and the order of acquittal passed by the Sessions Judge under that charge was set aside. Two distinct offences having been committed in the same transaction, one an offence of misappropriation under section 409 and the other an offence under section 477-A which required the sanction of the Governor, the circumstance that cognizance could not be taken of the latter offence without such consent was not considered a bar to the trial of the appellant with respect to the offence under section 409.

Leave to appeal under Article 134 (1) (*c*) of the Constitution was limited to the question of law referred to the Full Bench in this case, and it was distinctly said in the order disposing of the leave petition that leave would not have been granted had the scope of the appeal been limited to the merits of the case. It was observed that having regard to the findings recorded by the final court of fact, as also the evidence in the case the elements of both the offences had been fully established. The learned counsel for the appellants attempted to argue that on the facts found no offence under section 297 could be said to have been made out. This point, in our opinion, is not open at this stage, it having been held that all the ingredients of the offence had been established on the record. Even otherwise there is no substance in the contention because the prosecution evidence is sufficient to hold the offence proved against all the appellants.

For the reasons given above we hold that there is no substance in these appeals and they are accordingly dismissed.

Agent for Appellants: *Sukumar Ghose.*

Agent for Respondent: *I. N. Shroff* for *P. K. Bose.*

Agent for Complainant (Dhirendra Nath Bera): *S. C. Banerjee.*

G.R.|K.S. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK AND MR. JUSTICE KRISHNASWAMI NAYUDU.

Mothey Krishna Rao .. *Appellant**

v.

Grandhi Anjaneyulu and others .. *Respondents.*

Company Law—Removal of secretary from office in the Company—Suit for declaration that such removal is invalid—Sections 21 and 42 of the Specific Relief Act (I of 1877)—Suit not maintainable.

The plaintiff was appointed as secretary and treasurer of the Company by an amendment of the articles of association of the Company, which amendment omitted a proviso in the original articles of association requiring a resolution at an extraordinary general body meeting for removing the secretary. Subsequently the directors of the Company by a resolution first suspended and then removed the secretary. In a suit for a declaration that the plaintiff continued as secretary and treasurer,

Held: (i) that the plaintiff has no cause of action against the company as such on the basis of the articles of association and that his appointment as secretary must be regarded as one *de hors* the articles and governed by the independent contract as between him and the Company as regards which there is no other evidence apart from the articles themselves.

(ii) The suit is not maintainable under section 42 of the Specific Relief Act as the plaintiff has not sued for damages in breach of contract but only for a declaration without any consequential relief.

(iii) Though permission to amend the plaint by including a prayer for consequential relief, *viz.*, an injunction restraining the directors from interfering with the plaintiff's exercise of powers and duties as secretary and treasurer was granted, section 21 of the Specific Relief Act is a bar for obtaining the reliefs as the declaration sought by the plaintiff with the related consequential relief is tantamount to specific performance of a contract of personal service.

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* Appeal No. 166 of 1951 and C.M.P. No. 10856 of 1952. 29th October, 1952.

Appeal against the decree of the Court of the Subordinate Judge, Eluru, in O.S. No. 145 of 1950 (O.S. No. 50 of 1950, District Court, West Godavari at Eluru), etc.

V. K. Tiruvenkatachari and *M. Dwarakanath* for Appellant.

V. Thyagarajan, C. A. Vaidyalingam, T. Venkatadri and *K. Ramachandra Rao* for Respondents.

Judgment of the Court was delivered by

Mack, J.—Appellant, Mothey Krishna Rao, is the plaintiff, whose suit for a declaration that " he is the Secretary and Treasurer of Sri Krishna Jute Mills, Ltd., Eluru " has been dismissed with costs by the learned Additional Subordinate Judge of Eluru. Defendants 1 to 4 were Directors of this company when on 1st July, 1950, a meeting of the Board ended in disorder and confusion which necessitated police intervention to restore order. According to the plaint, after the regular business on the agenda had been done, defendants 1 to 4 wanted other matters brought up, which led to this fiasco. After the plaintiff left the room, defendants 1 to 4 passed a resolution co-opting the fifth defendant as director, suspending the plaintiff from the post of Secretary and Treasurer and appointing the 2nd defendant to look after the duties of Secretary and Treasurer temporarily. Plaintiff filed a petition under section 144, Criminal Procedure Code, in the Stationary Sub-Magistrate's Court and obtained an order in his favour, which was vacated by the High Court on the 24th of August, 1950. Exhibit A-5 is a letter written by the 2nd defendant as Chairman of the Board and Secretary and Treasurer to the plaintiff forwarding to him copy of the Board's resolution, which found him guilty of certain charges, suspended him from acting as Secretary and Treasurer, with a recommendation for his outright dismissal to an extraordinary general body meeting to be convened for the purpose along with the annual general body meeting to be held during the year. This course, however, was not adopted and on 25th July, 1950 the Board removed the plaintiff from the post of Secretary. This suit was filed on 1st October, 1950.

The scope of the suit is very limited and confined to the Articles of Association of the Company. Plaintiff has not sued for damages for wrongful removal or dismissal, but for a declaration that he still continues to be the Secretary and Treasurer on the ground that the Board had no power to remove him under the Articles of Association. There has been no argument before us at all on the merits of the removal of the plaintiff or as regards any alleged misconduct by him, which justified his removal. Mr. Thiruvenkatachari for the appellant took his stand on this pure question of law that under the Articles of Association the Board of Directors was not competent to remove the plaintiff, and that the only competent authority, which could remove him was the general body of shareholders by a special resolution at an extraordinary general meeting.

To appreciate this contention, it is necessary to consider the relevant articles and the genesis of the plaintiff's appointment as Secretary and Treasurer. This company was formed in 1904 and, under Article 111, plaintiff's uncle Mothey Gangarazu and Venkata Subbarao were the first Joint Secretaries and Treasurers of the Company. The Article contained an important proviso, that it shall be lawful for the company to remove them and appoint others in their place by resolution passed at an extraordinary general meeting by a majority of not less than three-fourths of the shareholders of the company. Article 114 regulated the remuneration of the Joint Secretaries, Treasurers and Manager. In 1935 at an extraordinary general meeting, new Article 114 was substituted fixing the remuneration for Secretaries and Treasurers at 9 per cent. on the net profits or Rs. 4,000 a year, whichever is higher. Under Article 114-A, the plaintiff Mothey Krishna Rao was appointed working Secretary and Treasurer entitled to draw the whole of this remuneration. Article 111 was not itself amended till 12th March, 1938, also by a resolution at an extraordinary general meeting. In its place was substituted the following :

" Mr. Mothey Krishna Rao, Zamindar, Eluru, shall be the sole Secretary and Treasurer."

At that same meeting, there was an amendment to Article 114 entitling him to remuneration of only a commission of 9 per cent. on the net profits of the company. It is noteworthy that the proviso to Article 111 that the original Joint Secretaries and Treasurers could not be removed, except by a resolution at an extraordinary general meeting was specifically deleted when the plaintiff was appointed sole Secretary and Treasurer.

The plaint case is based entirely on the legal position sought to be made out of the fact that by this combination of circumstances the appointment of the plaintiff as sole Secretary and Treasurer was in fact from 1938, Article 111. It is common-ground that plaintiff is himself a substantial shareholder and that the company did not itself run the Jute Mills from 1940 since when it had been annually leased out to the East India Commercial Company, Calcutta. There was, therefore, apparently not much day-to-day business for the sole Secretary to do.

The short point for consideration is the legal effect of the Memorandum and the Articles of Association. Under section 21 of the Indian Companies Act,

> "The memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each member, his heirs and legal representatives, to observe all the provisions of the Memorandum and of the Articles, subject to the provisions of this Act."

There is a long catena of English decisions, which have unhesitatingly laid down that not only a third party, but even a shareholder cannot sue the company on anything contained in the articles, treating the articles as a contract by the company with him, and that it is incumbent on the party suing to make out a contract outside and independently of the articles. In the earliest case *Eley* v. *Positive, etc., Assurance Co.*[1], the articles contained a clause providing that *A* should be employed for life as Solicitor for the company and should not be removed except for misconduct. He took office and later became a shareholder. The company discontinued his employment. While still a shareholder, he sued in damages for breach of contract. It was held that no action lay. The Court of Appeal disposed of the matter summarily, Lord Cairns, L.C., refusing the plaintiff relief observing that the articles were an agreement *inter socios* whereas the appointment of Eley as Solicitor for life in the articles so far as he was concerned was *res inter alios acta.* Eley had advanced a sum of £200 to be expended in the formation of the company and the company-promoter arranged that he should be appointed permanent solicitor for life. This view was followed in *Brown* v. *La Trinidad*[2], *Hickman* v. *Kent or Romney Marsh Sheep-breeders' Association*[3] and *Beattie* v. *Beattie*[4], and in a number of other decisions, which need not be specifically cited. In *Hickman* v. *Kent or Romney Marsh Sheep-breeders' Association*[3], the authorities as to whether the articles constitute a contract as between the company and its members were reviewed by Astbury, J., who decided that the result of apparently conflicting decisions and dicta was that though the articles can neither constitute a contract between the company and an outsider, nor give any individual member of the company special contractual rights beyond those of the members, generally, they do in fact constitute a contract between a company and its members in respect of their ordinary rights as members (*See* Buckley's 'Companies Act,' 11th Edn. page 35).

Palmer has at pages 30 and 31 of his 'Company Law,' 19th Edn., indicated the difficulty of reconciling the rule in these cases with section 20 of the English Act of 1948 which corresponds to section 21 of our Act. There have been a series of cases in which courts have inferred from the articles themselves implied contracts. In the case of *Swabey* v. *Port Darwen Gold Mining Co.*[5], the articles provided for the payment to each Director by way of remuneration of a specified sum per annum. The company reduced this by a special resolution, whereupon the plaintiff resigned and sued the company for three months' remuneration for services prior to the date of his resignation. The Court held that he was entitled to recover on the

1. (1876) L.R. 1 Ex. D. 20, 88.
2. (1887) L.R. 37 Ch.D. 1.
3. (1915) L.R. 1 Ch. 881.
4. L.R. (1938) Ch. 708.
5. (1889) 1 Meg. 385.

footing of an implied contract in the terms of the clause. "The articles", said Lord Esher, "do not themselves form a contract but from them you get the terms upon which the Director is serving." The articles undoubtedly constitute evidence in a wide field such as the terms of remuneration of Managing Director, Secretaries, Treasurers and so on. Palmer has observed at page 31 that the question whether an implied contract so entered into was capable of being varied by the company against the will of the other party has not been finally decided and he has cited decisions, which appear to take different views. A discussion of those decisions would not be relevant for purposes of the present appeal. We have been referred to no decision either in English or in Indian law in which a shareholder has succeeded, after removal from an office in the company, in obtaining a declaration that such removal was invalid and that despite it he continues to hold the office.

Mr. Tiruvenkatachari for the appellant has taken his stand on the basis that as the plaintiff was appointed by a special resolution at an extraordinary general body meeting, that is the only authority which can legally remove him according to the articles of association. Mr. Thyagarajan for the defendants has argued contra that the Directors of the company have full powers to remove the Secretary by virtue of Article 112, which defines the wide powers of Joint Secretaries and Treasurers, *inter alia*, to appoint, to remove or suspend Managers, Engineers, clerks and so on upon such terms and conditions as they shall think proper, subject of course to the general control of the Board of Directors. Article 99 confers on Directors all powers, which are not expressly directed to be exercised by the company in general meeting. Mr. Thyagarajan urges that the proviso to the original Article 111 having been specifically omitted, the plaintiff is bereft of any protection even under the articles, and that the Board had full powers to remove him as secretary. He also argued that Managing Agents can under section 87-B (*f*) of the Companies Act be removed only subject to approval by a resolution at a general meeting of the company and that no such statutory protection is given to a mere Secretary. As regards the contention that the plaintiff, having been appointed by a special resolution at an extraordinary general meeting can only be removed by the authority who appointed him and not by the Board of Directors, it would indeed appear that this was also the view taken by the Board itself when in their original resolution contained in the letter Ex. A-5 communicating to the plaintiff his suspension, they recommended his outright dismissal to be given effect to at a general body meeting. This recommendation however was not implemented before this suit was filed and we have instead the Board itself just suspending "him" and then removing him outright.

The plaintiff is also, by virtue of his position as Secretary, an ex-officio Director under Article 82. A Director may be removed under Article 96 only by a resolution at an extraordinary general body meeting with a three-fourths majority in accordance also with section 86-G of the Companies Act. We do not think that it is necessary for us to decide in this suit as framed whether the Board of Directors at a meeting was competent to remove the plaintiff from the post of Secretary and Treasurer and whether this can only be validly done by a special resolution at an extraordinary general body meeting. The plaintiff has sued only in his capacity as Secretary and Treasurer and as Mr. Thyagarajan has urged, his position as Director is derived from his appointment as Secretary. We find on the pure question of law, on which this appeal is pressed, that the plaintiff has no cause of action against the company as such on the basis of the articles of association and that this appointment as Secretary must be regarded as one *de hors* the articles and governed by an independent contract as between the plaintiff and the company, as regards which, there is no other evidence apart from the articles themselves.

In *Ramkumar Potdar* v. *The Sholapur Spinning and Weaving Co., Ltd.*,[1] a Bench of the Bombay High Court held that the Court does not interfere with the internal management of the affairs of a company and that, if a majority of shareholders

1. (1934) I.L.R. 59 Bom. 218.

consider that a particular contract of employment should be terminated, the Court would not ordinarily consider the matter at the instance of a minority of shareholders. It further held that the memorandum of association of a limited company does not constitute a contract between the company and the third party, who may be mentioned therein and that the Court would not make an order, the effect of which would be to enforce specifically a contract of personal service. In this suit filed for a bare declaration, there are two other hurdles in the way of a Court giving plaintiff any relief. Plaintiff has not sued for damages in breach of contract but for a declaration without any consequential relief, which is in *prima facie* violation of the proviso to section 42 of the Specific Relief Act. Section 42 gives the Court discretion to declare a person entitled to any legal character or to right as any property, with a proviso that no court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration of title omits to do so. In the present suit, the plaintiff has not asked for relief by way of damages consequent on the wrongful termination of his services as Secretary and Treasurer, which is a normal relief claimed in cases where the services of a servant or employee are wrongfully terminated. Mr. Thiruvenkatachari has sought to draw a fine distinction between the case of a person who has been removed by an authority incompetent to do so and by a person wrongfully removed by a competent authority. In the present case, however, the incompetence of the Board of Directors is sought to be inferred from the articles of association themselves, which plaintiff cannot, for this purpose, invoke so as to give him a cause of action. The learned Subordinate Judge found that the suit for a mere declaration was maintainable on the very curious ground that as the company property was in *custodia legis* of the Sub-Divisional Magistrate, Eluru, in section 145 proceedings in M. C. No. 53 of 1950, it was not in the possession of the defendants, and, therefore, it was not possible for the plaintiff to ask for consequential possession. The proviso to section 42 of the Specific Relief Act cannot be bypassed in this manner. When a dispute between two parties gives rise to proceedings under section 145, Criminal Procedure Code, the property falls only temporarily under magisterial control subject to the rights of the parties being determined by a civil Court. The pendency of those proceedings will not make this suit for mere declaration maintainable.

It is urged that there are some decisions in which Courts have granted relief by way of mere declaration in cases of removal from an office. We have been referred to the Privy Council decision in *High Commissioner for India* v. *I. M. Lall*[1], Mr. Lall, a member of the Indian Civil Service, was dismissed from service on certain charges. He filed a suit, which was tried by a Bench of the Lahore High Court in the first instance in which he asked for a declaration that his removal was *ultra vires* and invalid under section 240 of the Government of India Act and for consequential relief that he still continued to be a member of the Indian Civil Service and was entitled to all the rights and privileges attaching to the office. The High Court gave him only the declaration he sought (*see I. M. Lall* v. *Secretary of State*[2] and, on appeal, the Federal Court, while confirming the declaration that his removal was wrongful, permitted him to amend his plaint with a consequential relief for damages and remitted it to the trial Court for further disposal, the judgment being reported in *The Secretary of State for India* v. *I. M. Lall*[3]. Their Lordships of the Privy Council in an appeal against the decisions of the Federal Court merely granted a declaration that the order dismissing Mr. Lall was void and inoperative and that he continued to be a member of the Indian Civil Service. No consequential relief was given to him on the ground that a member of the Indian Civil Service, for reasons which we need not go into here, had no statutory right to institute a suit for the recovery of arrears of salary and emoluments. There were special circumstances in that case in which the Court proceeded on the presumption that the Secretary of State for India and the Government of India would abide by and act upon the Court declaration by reinstating Mr. Lall without any consequential relief by way of a specific Court order against them. We cannot take that decision

1. (1948) 2 M.L.J. 55 : L.R. 75 I.A. 225 (P.C.).
2. A.I.R. 1944 Lah. 240.
3. (1945) 2 M.L.J. 270 (F.C.).

as an authority for bypassing the proviso to section 42 of the Specific Relief Act and as general authority for Courts to make declarations where the plaintiff being able to seek further relief omits to do so. In order to meet this technical defect in the plaint, Mr. Thiruvenkatachari at the close of the arguments filed a petition for permission to amend the plaint for the following consequential relief, *viz.*, an injunction restraining the defendants from interfering with the plaintiff's exercise of powers and duties as Secretary and Treasurer of Sri Krishna Jute Mills, Ltd., Eluru. Normally, we would not hesitate to grant an amendment of this sort even at this late stage, if it is intended to overcome a mere technicality. We have decided to allow this amendment, though belated, but we find that the effect of it is really to magnify another hurdle, which confronts the plaintiff in his search for Court relief.

This is section 21 of the Specific Relief Act which sets out contracts, which cannot be specifically enforced. One such category is section 21 (*b*) which is so dependent on the personal qualifications or volition of the parties or otherwise from its nature is such that the Court cannot enforce specific performance of its material terms. The declaration sought by the plaintiff with the consequential relief he belatedly asks for is really tantamount to specific performances of a contract of personal service.

It is regrettable that the Board did not call for an extraordinary general body meeting to ratify their action in accordance with their own declared intention in Ex. A-5. It is brought to our notice that on a petition filed by the appellant, a commissioner was appointed by this Court on 2nd May, 1951, to prepare a list of all documents and registers and that he was discharged on 2nd August, 1951, by Panchapakesa Aiyar, J. In an appeal against that order, Govinda Menon, J., and Ramaswami Gounder, J., appointed a Receiver, who called a general body meeting at which six directors were re-elected. It is sufficient to say that during all this period, the 2nd defendant continued to function as Secretary and Treasurer. What happened subsequent to the suit is quite immaterial and cannot affect its merits.

For reasons given *supra*, it is quite impossible for us to give the plaintiff any relief in the plaint as framed and on the footing on which he has come to Court. We dismiss his appeal, but we consider this to be a fit case, in which the parties should be directed to bear their own costs throughout and direct accordingly.

V.P.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AIYAR.

Nallathambi *alias* Venkatachalam Chetty and others .. *Appellants**

v.

Perumal Chetty and others .. *Respondents.*

Madras Estates Land Act (I of 1908), *section* 3 (2) (d) *and explanation* 3—*Identity of grant destroyed by resumption and regrant of different portions—Not an estate—Proceedings of revenue authorities not conclusive.*

Where the identity of a village originally granted disappeared as a result of resumption of a moiety and thereafter there was a grant by the British Government of scattered bits of land in lieu of the unresumed moiety of the original grant there is neither confirmation nor recognition by the British Government of a grant of a whole village as such and the total extent of such portions cannot be held to be an inam village within the meaning of section 3 (2), clause (*d*), of the Madras Estates Land Act.

Proceedings of revenue authorities for purposes of administrative convenience cannot alter the legal position.

Appeal against the decree of the Court of the Subordinate Judge, Salem, dated 14th December, 1946, in O. S. No. 55 of 1945.

A. Srirangachari and *E. A. Viswanathan* for Appellants.

R. Desikan for Respondents.

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* Appeal No. 116 of 1948. 18th December, 1952.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This appeal arises out of a suit, O. S. No. 55 of 1945, filed in the Court of the Subordinate Judge of Salem by 22 persons who were occupying sepa rate lands in the village of Kannurpatti Agraharam for a declaration that the lands in their possession are ryoti lands in an estate within the meaning of the definitions of those terms in the Madras Estates Land Act and therefore the plaintiffs have occupancy rights therein. The learned Subordinate Judge dismissed the suit. Plaintiffs 1, 3, 6, 8 to 15 and 17 to 19 are the appellants. During the pendency of the suit itself, some of the plaintiffs compromised with the defendant landholders, and they withdrew from the suit. During the pendency of the appeal some of the appellants have also entered into compromises with the respondent landholders, and it is common ground before us that the only appellants who press this appeal are appellants 1, 3, 4 and 5.

The only question which arises in this appeal is whether the lands in suits are situated within an estate within the definition of that term in section 3 (2) (*d*) of the Madras Estates Land Act. That definition, in so far as it is material to this appeal, runs thus :

" Any inam village of which the grant has been made, confirmed or recognised by the British Government, notwithstanding that subsequent to the grant, the village has been partitioned among the grantees or the successors in title of the grantee or grantees . . . . . .

Explanation 3 : 'Where a portion of an inam village is resumed by the Government, such portion shall cease to be part of the estate, but the rest of the village shall be deemed to be an inam village for the purposes of this sub-clause. If the portion so resumed or any part thereof is subsequently regranted by the Government as an inam, such portion or part, shall, from the date of such regrant, be regarded as forming part of the inam village for the purposes of this sub-clause."

The only evidence we have which has a bearing on the question in issue is furnished by the extract from the Register of Inams prepared at the time of the Inam Settlement during 1863 to 1866. From this extract, we obtain the following information about the origin and history of the inam grant of the lands now in occupation of the appellants. Originally, about 300 years before the time of the Inam Settlement, there was a grant made by the then Palayagar, one Ramachandra Naick, it does not appear very clearly, but it may be assumed, that the original grant was of an entire village in inam. In the days of Tippu, one half of this village was resumed. After the British conquest, one Capt. Macleod appears to have granted to the descendants of the original grantees (agraharamdars) lands scattered here and there in the ryotwari village of Kannurpatti which yielded a moiety of the income of three inam villages. This was evidently in lieu of the moiety of the original village which had remained in the possession of the agraharamdars after the resumption in the days of Tippu. At the time of the inam settlement, the village was being enjoyed in 30 shares or vrittis. The vrittis varied in extent and his assessment in respect of each vritti also varied. The recommendation of the Inam Commissioner was that the total extent of the lands in possession of the several agraharamdars may be confirmed in one joint title deed, though specifying the quit rent which each vrittidar had to pay to the Government. This course was obviously adopted as a convenient method of determining the liability of the agraharamdars to the Government by way of quit rent. It is not disputed that the lands covered by the title deed did not form one whole block within defined boundaries, and down to this day, these scattered bits of land are found clubbed along with admitted ryotwari lands as part and parcel of the ryotwari village of Kannurpatti.

On these facts which are really the only facts which are material for a decision of the question in issue, there can only be one conclusion, namely, that the lands in suit are not situated within an estate within the definition of that term in section 3 (*d*) of the Act.

Mr. Srirangachariar, the learned counsel for the appellants relied upon the fact that originally the grant was of an entire village. He also relied on Explanation 3 to clause (*d*) and contended that here was a case of a portion only of an inam being resumed and therefore the rest of the grant shall be deemed to comprise

an inam village within the meaning of that explanation. That would be so if out of a whole village originally granted in inam a portion had been resumed and the remainder allowed to continue to be with the grantees. Then such remaining portion would by virtue of the terms of Explanation 3 be deemed to be an inam village for the purpose of clause (*d*). But what happened in this case is quite different. The identity of the village originally granted in inam, assuming it was so, completely disappeared when firstly there was a resumption of a moiety and thereafter there was a grant by the British Government of scattered bits of land in lieu of the unresumed moiety of the original grant. There is therefore no confirmation or recognition by the British Government of a grant of a whole village as such. All that the British Government did was to make a grant of portions of what was a ryotwari village. The total extent of such portions cannot be held to be an inam village within the meaning of clause (*d*).

Reliance was placed by the learned counsel for the appellants on proceedings of Revenue authorities which indicated that for revenue purposes the lands in possession of the agraharamdars were treated as a separate entity, separate from the ayan or ryotwari portions of the villages. This, however, cannot alter the legal position; for revenue purposes in the interests of administrative convenience, the lands held on inam tenure and covered by a joint inam patta may be dealt with separately as distinct from lands held on ryotwari tenure. This separate dealing would not make the total extent of the lands held in inam tenure a whole inam village.

Learned counsel for the appellants relied on the ruling of the Privy Council in *Krishnaswami* v. *Perumal*[1]. The facts of that case were totally different. In that case, there was originally a grant in pre-British times of a whole inam village. In 1795, a small part of that village was resumed by the Government and granted in ryotwari tenure but the rest of the village continued to be treated as an inam village. That continued for nearly 100 years, and in 1895, the Government granted on inam tenure the rest of the village which had been treated as a whole village for the past 100 years. Their Lordships held that the subject-matter of the grant of 1895 fell within the definition of estate in section 3 (2) (*d*) of the Madras Estates Land Act. The reasoning of their Lordships can be discovered in the following passage of the judgment :

> " In their Lordships' view it is irrelevant that the village so granted had once formed part of a larger village. The important fact is that the grant of 1895 comprises the whole of what was then regarded as an inam village."

We have nothing like this in the case before us. The grant made by Macleod did not comprise the whole of what was then regarded as an inam village. The grant was certainly of scattered portions of a ryotwari village.

We agree with the learned trial Judge in his conclusion that the plaintiffs have not established their case that the suit lands are situated in an estate within the meaning of that term as defined in section 3 (2) (*d*) of the Madras Estates Land Act.

The appeal is dismissed. The contesting appellants shall pay the costs of the appeal to the respondents.

V.P.S. *Appeal dismissed.*

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1. A.I.R. 1950 P.C. 105.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI NAYUDU.

Addanki Ramalingamma .. *Appellant**

v.

Bhimavarapu Venkatasubbayya .. *Respondent.*

Madras Hereditary Village Offices Act (III of 1895), *section* 13 (1) (ii) *and section* 21—*Suit for possession of lands—Claim not contested on the ground of dispute in the claim of office or any other right—Civil Court's jurisdiction not ousted.*

There is no doubt as to the classes of suits which are contemplated under section 13 (1) of the Village Offices Act (III of 1895), in respect of which alone the jurisdiction of the Civil Court is ousted by virtue of section 21 of the Act, though the latter part of section 21 may lead to the view that all suits for lands except those that are covered by proviso (11) to sub-section (1) of section 13, may be considered to be barred from the jurisdiction of the civil Court.

In the present suit for claim of possession of land which plaintiff said he was entitled to as he had been in possession as heir, the property having been village service inam land vested in the family,

Held, that it could not be said to be a suit for recovery of emoluments. If the decision of suit required examination of the right of plaintiff to the office and also the question whether suit land formed part of the office which generally arose when there was a dispute as to their respective claims to the office or dispute regarding nature of property as to whether it was service inam or private land, then it would come within the scope of the suit contemplated under section 13 of Madras Act III of 1895. On the other hand a person who instituted a suit for recovery of property on the ground that he was an office holder which entitled him to emoluments in the shape of lands would not be prevented from having his claim settled in a civil Court especially when the suit was not contested by the defendant on any ground of claim to office or even right to ownership in private right.

Narasimhulu v. *Narasimhulu*, (1906) 16 M.L.J. 514 : I.L.R. 30 Mad. 126 (F.B.) ; *Seetharam Naidu* v. *Ramu Naidu*, (1909) 20 M.L.J. 91 : I.L.R. 33 Mad. 208 and *Ramanna* v. *Ratayya*, (1909) 20 M.L.J. 94 : I.L.R. 33 Mad. 235, referred to.

Appeal against the decree of the Court of the Subordinate Judge, Bapatla, in A. S. No. 324 of 1947, preferred against the decree of the Court of the District Munsiff, Ongole, in O. S. No. 13 of 1945.

B. V. Ramanarasu for Appellant.

Neti Subramanyam and *J. V. Krishna Sarma* for Respondent.

The Court delivered the following

JUDGMENT.—This appeal is against the judgment of the Subordinate Judge of Bapatla dismissing the plaintiff's suit in appeal on the ground that civil Courts have no jurisdiction to entertain the claim. The plaintiff, who is the appellant, is the widow of one Venkatappa, who was the son of Addanki Lingadu I. Addanki Lingadu I married Venkata Ramamma. Venkatappa had a brother Ragadu, who died leaving a widow Ragi. She also died. Venkatappa and the plaintiff had a son Lingadu II. Venkatappa died about 25 years prior to suit and Lingadu II also died three months after his father's death. The plaintiff claims to be the heir entitled to possession of the suit properties, which consist of certain lands relating to washerman service inam in the Addanki village, Guntur district. The plaintiff's case in the plaint is that the land was acquired by the plaintiff's husband as a service tenure inam with hereditary rights and he was enjoying the said property by rendering the said service and he died 20 years prior to the date of the suit, that thereafter his only son Lingadu II, who was aged about 4 years also died, that the suit property passed to the plaintiff by heirship and she has been enjoying the property since then free from disputes by rendering the said service and that the defendant who had no manner of interest to the property about 5 months prior to the suit unlawfully entered into the said field and stealthily carried away the plaintiff's crop and also trespassed on a portion of the property and refused to deliver possession. The suit is for recovery of possession of the land, which is of the extent of 1 acre and 50 cents.

The main defence to the suit is that the property being washerman service inam land, a suit for recovery of possession of that land could only be heard by the

* A. A. O. No. 434 of 1949. 17th December, 1952.

revenue Court under the Madras Hereditary Village Offices Act (III of 1895) and a civil Court has no jurisdiction. On the merits, the defendant contended that he had become entitled to possession of the property under a family arrangement. His case is that his father and Addanki Lingadu I were sons of sisters and besides he is the sister's son of Venkata Ramamma, wife of Addanki Lingadu I that while he was an infant his mother died and as his father was blind Lingadu affiliated the defendant and his father into his family and vested them with rights in his properties that after the death of Venkatappa, husband of the plaintiff and Ragadu, sons of Lingadu I, the defendant had been rendering washerman service, and that Venkataramamma, widow of Lingadu I, and also the mother's sister of the defendant brought one Bapadu from another village Bommanampadu to assist this defendant in rendering-service and, in pursuance of a family arrangement then effected the defendant and the said Bapadu had been ejoying the property of Lingadu with equal rights and the arrangement was approved of and acquiesced in by Venkataramamma as well as by the plaintiff and Ragi, the widow of Ragadu.

A number of issues were raised in that suit and apart from the issue relating to the jurisdiction of the civil Courts, there were issues as to whether the family arrangement pleaded by the defendant was true and whether the trespass alleged by the plaintiff was true. The learned District Munsiff, who heard the suit granted a decree holding in favour of the plaintiff on all the issues finding that there was absolutely no evidence to prove the family arrangement, that the defendant had trespassed into the land held by the plaintiff and removed the crop raised by her. In appeal the learned Subordinate Judge of Bapatla, without considering the other issues on which findings were given by the first Court, dealt with the issue relating to jurisdiction and held that the suit came within the scope of sections 13 and 21 of Act III of 1895, which barred the jurisdiction of the civil Court, to entertain such a suit.

The only question therefore for determination in this appeal is whether the conclusion of the learned Subordinate Judge that the civil Court has no jurisdiction is correct. Under section 13 (1) of Act III of 1895,

"any person may sue before the Collector for any of the village Offices specified in section 3 (which includes the office of the village washerman) or for the recovery of the emoluments of any such office, on the ground that he is entitled under sub-section (2) or (3) of section 10 of the Madras Proprietary Estates Village Service Act, 1894, or under sub-section (2) or (3) of section 10 or sub-section (2) or (3) of section 11 or section 12 of this Act, as the case may be, to hold such office and enjoy such emoluments."

Sub-sections (2) and (3) of section 10 of the Act relate to the devolution of the service inams when a vacancy arises. Sub-section (2) recites that the succession shall devolve on a single heir according to the general custom and rule of primogeniture governing succession to impartible zamindaries in southern India. Sub-section (3) gives the power to the Collector where the next heir is not qualified under sub-section (1) of section 10, to appoint the person next in order of succession who is so qualified.

The suits contemplated under section 13 as being entertainable by the Collector are suits relating to the succession to the office to hold such office and to enjoy such emoluments. There is no doubt that 'emoluments" in section 13 include also a nds. Section 21, which restricts the jurisdiction of civil Courts, is as follows :

"No civil Court shall have authority to take into consideration or decide any claim to succeed to any of the offices specified in section 3 or any question as to the rate or amount of the emoluments of any such office or except as provided in proviso (ii) to sub-section (1) of section 13, any claim to recover the emoluments of any such office."

The matters therefore that are exempted from the cognizance of the civil Courts under section 21 are (1) claims to succeed to any of the offices specified in section 3 ; (2) claims to any question as to the rate or amount of the emoluments of any such office ; and (3) claims to recover the emoluments of any such office excepting the emoluments that are referred to in proviso (ii) to sub-section (1) of section 13. Proviso (ii) of sub-section (1) exempts certain suits to recover the land itself from being filed before the Collector. Proviso (ii) is as follows :

"When one of the facts in issue in a suit is whether the emoluments of the office consist of land or of an assignment of revenue payable in respect of land, the Collector shall decide the claim on the assumption that only the said assignment constitutes the emoluments; but such decision shall not bar the rights of the claimant to institute a suit in a civil Court for recovery of the land itself."

The present suit is not a suit coming under any of the three categories mentioned in section 21. It cannot be said to be a suit for establishing the plaintiff's rights to the office. There is no question as to the rate or amount of the emoluments that is in dispute. Nor is the plaintiff seeking to recover the emoluments of the office, though the lands happen to be emoluments of the office itself.

Reliance is placed on the Full Bench decision of this Court in *Narasimhulu* v. *Narasimhulu*[1], which is a judgment of Arnold White, C.J., Benson and Miller, JJ., where it is held that the jurisdiction of civil Courts is excluded by section 21 of the Madras Hereditary Village Offices Act in cases in which the plaintiff sues for lands as emoluments of his office and the defendant resists the claim on the ground that the land is not the emoluments of the office. There the plaintiff, who was a karnam, on his land being attached in execution sued to recover the same on the ground that it was service inam, the defence being that it was not service inam, but the plaintiff's private property. In second appeal, there was a difference of opinion between Subrahmania Aiyar, J., and Moore, J., Subrahmania Aiyar, J., holding in favour of vesting jurisdiction in civil Courts, Moore, J., holding to the contrary. The Bench agreed with Moore, J., and held that the suit which was the subject-matter of appeal, was one in which the civil Court had no jurisdiction. The reason for the decision is found in the judgment of Miller, J., where the learned Judge after referring to the relevant provisions of the Act, namely, sections 13 and 21 observes that the plaintiff could succeed only by showing that he is the karnam of the village entitled as such to enjoy the emoluments and that the land is the emolument of his office, those being the grounds of suit which give him his right of action before the Collector under section 13 (1). The suit was therefore held to be a suit for recovery of the emoluments of the office, where it would be necessary for the plaintiff to establish that the lands which were the subject-matter of the suit were the emoluments, that he was the office holder and that he was the person doing service in respect of the land. Where therefore it becomes necessary to decide whether the land which is the subject-matter of the suit is emoluments of the office, which would again depend upon whether it was granted as emoluments to the office and whether the plaintiff is the office holder it is reasonable to hold as was held in *Narasimhulu* v. *Narasimhulu*[1], that it is a suit cognizable by the revenue Court and not by a civil Court.

This Full Bench decision was referred to in two other decisions reported in *Seetharam Naidu* v. *Ramu Naidu*[2], and *Ramanna* v. *Ratayya*[3]. It may be mentioned here that Benson, J., one of the judges in *Seetharam Naidu* v. *Ramu Naidu*[2], was a party to the Full Bench decision in *Narasimhulu* v. *Narasimhulu*[1]. In *Seetharam Naidu* v. *Ramu Naidu*[2], Benson, C.J., and Krishnaswami Aiyar, J., referred to the Full Bench decision and held that in the case they were considering, the jurisdiction of the civil Courts was not barred. That was a suit where a village officer's inam land was granted on lease by the village officer to the defendant and after the expiry of the lease period, he instituted a suit for recovery of possession. A defence as to jurisdiction was raised and it was held that such a suit was cognisable by the civil Court. The learned Judges observed as follows:

"The Subordinate Judge relies on the decision in *Narasimhulu* v. *Narasimhulu*[1], Far from supporting his view the observations in that case of Miller, J., at page 131 are in favour of the plaintiff and the other learned Judges do not dissent from his remarks. Indeed it may be said that the *ratio decidendi* of that case supports the appellant's argument. Both the learned Chief Justice and Mr. Justice Miller say that sections 13 and 21 of Act III of 1895 should be read together. Section 13 confers jurisdiction on the revenue Court and defines the class of suits of which a revenue Court may take cognizance. Section 21 specifies the class of suits of which the civil Courts shall not take

1. (1906) 16 M.L.J. 514 : I.L.R. 30 Mad. 126 (F.B.).
2. (1909) 20 M.L.J. 91 : I.L.R. 33 Mad. 208.
3. (1909) 20 M.L.J. 94 : I.L.R. 33 Mad. 235.

cognizance. It is reasonable to hold notwithstanding the apparent generality of the language of section 21 that the jurisdiction of the civil Court is taken away in those cases in which it is conferred on the revenue Court by section 13."

In the other case, *Ramamma* v. *Rattayya*[1], Arnold White, C.J., and Krishnaswami Aiyar, J., referred to the Full Bench decision in *Narasimhulu* v. *Narasimhulu*[2], and distinguished it on the particular facts of the case which the learned Judges were considering. It was held in that decision that

"a suit in the civil Courts for land, not based on the ground that such land constituted part of the emoluments of any of the offices described in section 13 of the Madras Act III of 1895, is not barred by section 21 of the Act."

The learned Judges, while holding that section 21 would not apply to that case, observe at page 237 as follows :

"It does not raise a question as to the rate or amount of the emoluments of any such office. If it did, every claim to recover lands would be outside the jurisdiction of the civil Courts, which is opposed to the words 'but such decision shall not bar the right of the claimant to institute a suit in a civil Court for recovery of the land itself,' the last sentence in proviso (ii) to section 13 (1) of the Act. A claim to recover lands, in our judgment, does not raise a question as to the rate or amount of the emoluments of the office."

The present suit is a simple suit to claim possession of the land which the plaintiff was entitled and has been in possession as heir, the property being village service inam land vested in the family. It cannot be said to be a suit for recovery of emoluments. If the decision of the suit requires an examination of the right of the plaintiff to the office and also the question as to whether the land forms part of the office, which generally arises when there is a contest between the parties as to their respective claims to the office or dispute regarding the nature of the property as to whether it is service inam or private land then it would be reasonable to hold that it would come within the scope of the suits contemplated under section 13 (1) of the Act III of 1895. I am unable to see how a suit which is instituted by a person who happens to be an office holder of property to recover property which is the emolument of the office from a person who does not claim any right to the office and who does not even contest that it is his private property or that it is not service inam, could be said to be a suit which the civil Courts are barred from entertaining. Excepting an allegation in the plaint that the land is washerman service inam and that the plaintiff is doing service, her claim is not based on any of these averments but on the fact that she is the rightful heir of the property and the other fact, which she had to establish is that the defendant is a trespasser.

In *Veeramma* v. *Veerappa*[3], where the office which was service inam was sought to be recovered from a trespasser, Pandrang Row, J., held that where the claim is not based on the right to the office or to anything on the ground that it forms the emoluments of an office but is merely for the possession of property on which there was a trespass, the civil Court's jurisdiction is not ousted.

I do not think there is any doubt as to the classes of suits which are contemplated under section 13 (1) in respect of which alone the jurisdiction of the civil Court is ousted by virtue of section 21 of the Act, though the latter part of section 21 may lead to the view that all suits for lands except those that are covered by proviso (ii) to sub-section 1 of section 13 may be considered to be barred from the jurisdiction of the civil Court. As observed by the learned Judges in *Narasimhulu* v. *Narasimhulu*[2] both sections 13 and 21 must be read together and the classes of suits that are not cognizable by the civil Courts are only those which are mentioned in section 13 (1) and which are to be filed in the revenue Court.

The learned Subordinate Judge has erred in coming to the conclusion that the civil Court has no jurisdiction. The Civil Miscellaneous Appeal is allowed and the appeal is remanded to the lower Court for being disposed of according to law. Costs of the Civil Miscellaneous Appeal will abide the result of the appeal.

K.C. —————— *Appeal allowed.*

1. (1909) 20 M.L.J. 91 : I.L.R. 33 Mad. 235. (F.B.).
2. (1906) 16 M.L.J. 514 : I.L.R. 30 Mad. 126
3. A.I.R. 1937 Mad. 282.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

V. Bayamma and others .. *Petitioners**

Penal Code (XLV of 1860), section 193—Scope of.

A complaint under section 193 of the Penal Code will lie only when the Court specifically and clearly finds that the statements made in Court are false and not when a doubt exists in the mind of the Court as to the falsity of the statement.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the District Magistrate of Nandyal dated 20th October, 1952, in Criminal Appeal Nos. 28, 29, 30 and 31 of 1952, preferred against the order of the Court of the Stationery Sub-Magistrate of Proddattur in M. C. No. 9 of 1952.

P. Basi Reddi and *K. V. Raghunatha Reddi* for Petitioners.

The Assistant Public Prosecutor (*A. C. Muthanna*) on behalf of the State.

The Court made the following

ORDER.—This revision is filed against an order directing a complaint to be filed against the petitioners for an offence under section 193 of the Indian Penal Code. The facts which led up to this complaint are these : On 3rd November, 1950, at about mid-night one Bayamma who is now sought to be prosecuted as the first accused was stabbed on her buttocks. Her son-in-law who is now sought to be prosecuted as the second accused was sleeping nearby and he rushed to the place on hearing her cries. The other two accused, the servants of Bayamma were said to have been sleeping near her. It is stated that she saw 5 persons at the time of the occurrence and mentioned the names of 4 persons and the 5th one could not be identified by her. P.W. 2, the son-in-law, gave information to the Police at about 2 A.M., implicating the 4 names which she mentioned and also mentioning that there was another person concerned in the offence. The woman was taken to the Pulivendla hospital and on account of her serious condition, the Sub-Magistrate came and took a dying declaration from her. In this dying declaration she reiterated the names of the 4 persons whom she mentioned to P. W. 2 and whose names were given to the Police at 2 A.M. by P.W. 2 and that another person whom she could not identify was also present. Statements under section 164 of the Criminal Procedure Code were also recorded from the two servants Gangadu and David who, as already stated, were said to have been sleeping near her. They supported her story that the 4 persons mentioned by her in her dying declaration and mentioned by P.W. 2 in the information to the Police along with another were concerned in the attack. After investigation a charge sheet was filed against the 4 persons mentioned in the first information and in the dying declaration. At the time when the enquiry started, Bayamma was examined as P.W. 1, her son-in-law as P.W. 2 and the two servants as P.Ws. 3 and 4. All of them went back on their earlier statements and stated that they could not identify the assailants. The accused in the case were, therefore, discharged. The committing Magistrate thereupon filed a complaint against the petitioners therein, for an offence under section 195 read with section 199 of the Indian Penal Code against Bayamma, under section 211, para 2 of the Indian Penal Code, against P.W. 2, her son-in-law, and under section 195 of the Indian Penal Code, against the servants P.Ws. 3 and 4.

Against the order of the committing Court, an appeal was preferred to the District Magistrate. The District Magistrate, after going into the whole matter fully, finds as follows in paragraph 33 of his order :

"I am satisfied therefore that these witnesses stated the truth in the early stages of this case and that they intentionally gave false evidence in the preliminary enquiry."

If the District Magistrate has stopped there, I would not have interfered with his order. But he proceeds further and states as follows :

* C. R. C. No. 11 of 1953. 18th February, 1953.
(Crl. R.P. No. 11 of 1953).

"At any rate there is reasonable doubt as to which of these two contradictory statements is false. In any event, an offence punishable under section 193 of the Indian Penal Code appears to have been committed by each of these appellants."

He then directed a complaint to be filed against all of them under section 193 of the Indian Penal Code.

In revision it is contended by Mr. Basi Reddi appearing for the petitioners relying on *Emperor* v. *Ningappa Ramappa*[1], that in such circumstances as here where the Magistrate is not quite sure as to which of the statements is false, no prosecution should be launched. At any rate without finding specifically that the statement made before the Court is false, prosecution should not be launched against these petitioners. In the judgment above referred to Beaumont, C.J., follows a decision of a Special Bench of the Calcutta High Court in *Emperor* v. *Tripura Shankar Sarkar*[2] wherein the Chief Justice Sir Lawrence Jenkins observed as follows :

"This, then, is how matters stand. The Court is convinced that of the contradictory statements now under consideration those made in this Court were true, but those before the Magistrate were false; and on a careful consideration of the events leading up to the examination before the committing Magistrate, and of the conditions under which that examination was conducted, we are clearly of opinion that the sanction sought should not be given. Had Tripura repeated here the false story he told before the Magistrate, no such application as the present would have been made; is it to be granted because he had told the truth here? Certainly not."

After quoting the above observations, Beaumont, C.J., observed that in his opinion that reasoning applies, not only when the Court is satisfied that it is the earlier statement, which is false, but also when the Court is not satisfied to the contrary.

In this case the District Magistrate, though he finds in the earlier portion in paragraph 33 of his judgment that the statement made in Court is false, states later on that there is reasonable doubt as to which of the two contradictory statements is false. There is a doubt in the mind of the District Magistrate whether the statements made in Court are false or whether the earlier statements are false. Unless he specifically and clearly finds that the statement made in Court is false, he should not order prosecution for the offence. In view of the doubt expressed as to which of the statements is true and which is false, I am compelled to set aside his order directing a complaint to be filed against these petitioners for an offence under section 193 of the Indian Penal Code.

The next question is whether these petitioners should be prosecuted for any offence at all. So far as Gangadu and David are concerned, they are only servants of Bayamma and in my opinion, interests of justice do not require that they should be prosecuted for any offence at all and no complaint shall be laid against those two persons for any offence. But so far as Bayamma is concerned, she undoubtedly gave a statement to the Magistrate in what is called a dying declaration implicating four persons by name. According to her evidence in Court this must be false and she knew it to be false and still she made that statement to him. I think that will fall under section 211 of the Indian Penal Code and the interests of justice requires that persons who give such false information should not be allowed to go scot-free. A complaint by the proper authority as required by the provisions of section 195 of the Criminal Procedure Code will be laid against her for an offence under section 211 of the Indian Penal Code. Similarly, the son-in-law after telling the police that his mother-in-law Bayamma told her about the 4 names, now tells in Court that the mother in-law did not say so. He has undoubtedly then falsely moved the police for the purpose of taking proceedings against those persons. His act will fall under section 182 of the Indian Penal Code. Under section 195 (1) of the Criminal Procedure Code the Police Officer will have to file a complaint against him for an offence under section 182 of the Indian Penal Code. In this order I am only indicating broadly for what offences they might be prosecuted. It is open to the police to examine more carefully the various provisions under which Bayamma and her son-in-law who was examined as P.W. 2, should be properly prosecuted. They need not be bound merely by what is stated in this

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1. I.L.R. (1942) Bom. 26.
2. (1910) I.L.R. 37 Cal. 618 (S.B.).

judgment that Bayamma should be prosecuted under section 211 of the Indian Penal Code and P.W. 2 under section 182 of the Indian Penal Code. For such offences as appears to them (except section 193 or 195 or 199 of the Indian Penal Code) to have been committed by these two persons, the authorities will examine carefully and file a complaint against both of them, as, in my opinion, it is necessary to check such false complaints which are frequently filed.

With these observations, the petition is allowed and the orders of the lower Courts are set aside.

V.P.S. — *Petition allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE VENKATARAMA AYYAR.

Abdul Rahman Sahib .. *Petitioner**

v.

Muhammad Siddiq and another .. *Respondents.*

Arbitration Act (X of 1940), section 47, proviso—Scope and effect—Award on reference without intervention of Court in pending suit—If can be given effect to as a compromise or adjustment under Order 23, rule 3 of the Code of Civil Procedure (V of 1908).

Under the proviso to section 47 of the Arbitration Act (X of 1940), an arbitration award obtained otherwise than in proceedings taken in accordance with the Act cannot without more be recognised as a compromise or adjustment of the suit ; no decree could be passed therein under the provisions of Order 23, rule 3 of the Code of Civil Procedure ; *Arumugha Mudaliar* v. *Balasubramania Mudaliar*, (1945) 1 M.L.J. 463 : I.L.R. (1946) Mad. 39, *overruled.*

But if after an award is made, the parties thereto agree to accept it, that will be a compromise and a decree based thereon could be passed under Order 23, rule 3. When parties to a suit refer their disputes to arbitration without the intervention of the Court and that results in an award a decree cannot be passed under Order 23, rule 3, in terms of the award, treating it as an adjustment or compromise of the suit.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court, Tiruchirapalli, dated 26th July, 1949, in A. A. O. No. 43 of 1946, preferred against the order of the Court of the District Munsiff, Tiruchirapalli, in I. A. No. 364 of 1946 in O. S. No. 154 of 1945.

K. S. Desikan for Petitioner.

K. G. Srinivasa Aiyar for Respondents.

The Order of Reference to the Full Bench was made on 30th November, 1952 by

Venkatarama Aiyar, J.—The facts leading up to these revisions are these: The petitioner filed O. S. No. 154 of 1945, on the file of the Court of the District Munsiff of Tiruchirapalli to recover possession of immoveable property. He also claimed mesne profits. There was also a prayer for injunction. The defendants contested the claim. While the suit was pending the parties agreed to refer the matters in dispute between them in the suit and various other matters as well to arbitration and on 14th October, 1945, they executed a muchilika in favour of five named arbitrators containing *inter alia* the following statement:

"We two parties shall accept the decision of the panchayatdars regarding the said suits and assets, etc."

In pursuance of this reference the panchayatdars pronounced an award on 18th November, 1945, Exhibit P-2 and applied under section 14 (2) of the Indian Arbitration Act to file the same into Court, I.A. No. 1627 of 1945. The plaintiff being dissatisfied with the award applied to set it aside under sections 30 and 33 of the Act, I.A. No. 51 of 1946, on the ground that there was no proper enquiry and that the arbitrators were guilty of misconduct. The plaintiff also contended that as the reference related to matters pending in a suit and as there was no order of reference through Court under section 23 the award was void. The defendants filed I.A. No. 364 of 1946 for recording the award as a compromise under Order 23,

* C. R. P. Nos. 1783 to 1785 of 1949. 6th March, 1953.

rule 3, Civil Procedure Code. All these applications were heard together by the learned District Munsif. He held that as there was no order of reference through Court the award could not be upheld as such and he accordingly dismissed I.A. No. 1627 of 1945. He further held that the charges of misconduct against the arbitrators had not been established and he, therefore, dismissed I.A. No. 51 of 1946. He, however, held that the award could be treated as a compromise under Order 23, rule 3, Civil Procedure Code and ordered I.A. No. 364 of 1946. In the result the suit was decreed in terms of the award treating it as a compromise.

The plaintiff took up the matter in appeal to the District Court. In C.M.A. No. 12 of 1947 the District Judge confirmed the order in I.A. No. 1627 of 1945, on the ground that the reference not having been through Court, the award could not as such be upheld. In C.M.A. No. 13 of 1947 the learned District Judge agreed with the learned District Munsif that the charges of misconduct against the arbitrators were not made out and he confirmed the order of dismissal of I.A. No. 51 of 1946. In C.M.A. No. 43 of 1946 he agreed with the order of the learned District Munsif in I.A. No. 364 of 1946 that the award though not valid as such could be upheld as a compromise under Order 23, rule 3, Civil Procedure Code. In the result the decisions of the lower Court were confirmed. The plaintiff has preferred the above civil revision petitions against the orders in C.M.A. Nos. 12 of 1947, 13 of 1947 and 43 of 1946. Before me no attempt was made to attack the finding that the award is not vitiated by the misconduct of the arbitrators, nor has the award been sought to be supported on the ground that it would be valid as such notwithstanding that there is no order of reference through Court. It would follow that C.R.P. Nos. 1783 and 1784 of 1949 must be dismissed.

In C.R.P. No. 1785 of 1949 which is against the order directing the award to be recorded as adjustment under Order 23, rule 3, Civil Procedure Code, the petitioner contends that an award which is not valid qua award could be treated as a compromise only under section 47 of the Arbitration Act which is in these terms:

"Subject to the provisions of section 46 and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder; provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending."

He argues that as the petitioner consented only to a reference to an arbitration and not to the award itself, it could not be taken into consideration as a compromise under Order 23, rule 3, Civil Procedure Code. In *Subbaraju* v. *Venkataramaraju*[1], a Full Bench of this Court held that when the parties agreed to refer the matter pending in a suit, to a private arbitrator and to abide by his award, the award when pronounced could be treated as an agreement under Order 23, rule 3. That, however, was a case of reference under Schedule II of the Civil Procedure Code in which there was no provision corresponding to section 47 and it was observed that Schedule II was not mandatory and that it does not say that there should be no arbitration other than that which is dealt with by that schedule. After the enactment of the Arbitration Act the question was raised in the case in *Arumuga Mudaliar* v. *Balasubramania Mudaliar*[2]. There the learned Judges were called upon to decide whether the law was governed by the Arbitration Act having regard to the enactment of section 47. In holding that the Arbitration Act had not made any difference in the law the Court observed as follows:

"We are merely concerned with the proviso in section 47 which plainly indicates that an arbitration award obtained otherwise than under the Act may with the consent of the parties interested in it be regarded as a compromise of a pending suit. There is nothing in the proviso which precludes antecedent consent. Order 23, rule 3 says that where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by a lawful agreement or compromise or where the defendant satisfies the plaintiff in respect of the whole or a part of the subject-matter of the suit, the Court shall order the agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit. The proviso to section 47 leaves this provision of law untouched. In fact it would appear to be likely that it was inserted by the legislature in order to allow the Court unfettered action under Order 23, rule 3."

1. (1928) 55 M.L.J. 429: I.L.R. 51 Mad. 800. 2. (1945) 1 M.L.J. 463: I.L.R. (1946) Mad. 39.

In the result it was held that the decision in *Subbaraju* v. *Venkataramaraju*[1], remained good law under the Arbitration Act and that the consent given for reference might be treated as consent to the award to be pronounced on the reference and that it would fall within Order 23, rule 3. In *Palaniandi Chetti* v. *Kandappa Goundan*[2], the question again came up for consideration and in following the decision in *Arumugha Mudaliar* v. *Balasubramania Mudaliar*[3], as he was was bound to sitting as single Judge, Viswanatha Sastri, J. observed as follows :

"Sitting singly I am bound by this decision though I consider that it is probable that the leg islature intended that a private reference to arbitration in a pending suit without the knowledge of the Court and without its direction which results in an award should not be made a rule of Court unless all the parties interested in the suit consent to the award being filed into Court as a compromise or adjustment of the suit. Indeed the Calcutta High Court had consistently taken that view before the Arbitration Act of 1940 and the proviso to section 47 appears to confirm that view."

My attention has also been drawn to a case reported in *Pagammal* v. *Kasi Goundan*[4], where Raghava Rao, J. sitting singly followed the decision in *Arumugha Mudaliar* v. *Balasubramania Mudaliar*[3]. The Orissa High Court had recently occasion to go into this question fully and after an elaborate review of the case law it held that a consent to the reference was not sufficient to make the award an adjustment within the meaning of Order 23, rule 3, Civil Procedure Code and that unless there is agreement to the award after it is pronounced it could not be regarded as a compromise under Order 23, rule 3. Vide *Indramoni* v. *Nilamoni*[5]. The decision in *Arumugha Mudaliar* v. *Balasubramania Mudaliar*[3], is expressly dissented from. In C.M.A. No. 623 of 1946, a Bench of this Court consisting of Happell and Govindarajachari, JJ. referred to a Full Bench the question whether an award not agreed to could be regarded as compromise under Order 23, rule 3 and whether *Arumugha Mudaliar* v. *Balasubramania Mudaliar*[3] was correctly decided. But the appeal, however, was not prosecuted and the question was not determined. It appears to me that the question is one of considerable importance and having regard to the divergence of judicial opinion there ought to be an authoritative pronouncement on the question. The papers will accordingly be placed before His Lordship the Chief Justice for orders as to the posting of the case before a Bench or Full Bench.

In pursuance of the above Order this petition came on for further hearing before the Full Bench.

K. S. Desikan for Petitioner.

K. G. Srinivasa Aiyar for Respondent.

The Judgment of the Court was delivered by

Venkatarama Ayyar, J.†—The facts leading up to this reference have been fully stated in the order of reference and there is no need to recapitulate them. The question that arises for determination, is, whether when parties to a suit refer their disputes to arbitration without the intervention of the Court and that results in an award, a decree can be passed under Order 23, rule 3, Civil Procedure Code, in terms of the award, treating it as an adjustment or compromise of the suit. The answer to it depends on the construction of the proviso to section 47 of the Arbitration Act X of 1940. To begin with, it will be useful to examine what the law on the subject was before the enactment of section 47. That was contained in two statutes. The Indian Arbitration Act IX of 1899 and the Second Schedule to the Code of Civil Procedure, Act V of 1908. Leaving out the former enactment as not material to the present discussion the latter contained provisions for three classes of arbitration : (1) where in a pending suit the parties thereto agree to refer the matter to arbitration through Court, that is provided in paragraphs 1 to 16 of the Second Schedule corresponding to sections 506 to 522 of Act XIV of 1882 and sections

† 6th March, 1953.

1. (1928) 55 M.L.J. 429 : I.L.R. 51 Mad. 800.
2. (1950) 2 M.L.J. 372.
3. (1945) 1 M.L.J. 463 : I.L.R. (1946) Mad. p. 39.
4. (1950) 2 M.L.J. 632.
5. A.I.R. 1950 Orissa 169.

312 to 325 of Act VIII of 1859; (2) where in pursuance of an agreement to refer, the parties move the Court to refer the matters in dispute to arbitration that is provided in paragraphs 17 to 19 in the Second Schedule corresponding to sections 523 and 524 of Act XIV of 1882 and section 326 of Act VIII of 1859; and (3) where there is a private reference and an award and the parties apply to the Court for filing the award—provision for this is made in paragraphs 20 and 21 of the Second Schedule corresponding to sections 525 and 526 of Act XIV of 1882 and section 327 of Act VIII of 1859. There were provisions in all these three classes of arbitration for the Court enquiring into the validity of the award and passing suitable orders, either passing a decree in terms of it or setting it aside or remitting it for reconsideration. None of these provisions had any application where in a pending action the parties referred their disputes to the decision of an arbitrator not through Court but privately and there was an award passed on such reference. In the absence of an express provision in the Code as to how such an award was to be dealt with, the question frequently came up for determination whether it could be regarded as a compromise under Order 23, rule 3, Civil Procedure Code, even when one of the parties refused to accept the same; and on that there was a sharp difference of opinion among the several High Courts. That it could be recorded as an adjustment of the suit under Order 23, rule 3, notwithstanding that one of the parties refused to accept it, was the view taken by a Full Bench of this Court in *Subbaraju* v. *Venkataramaraju*[1]; of the Bombay High Court in *Chanbasappa* v. *Basalingayya*[2] and of the Allahabad High Court in *Gajendra Singh* v. *Durgakunwar*[3]. The contrary view that such an award could not be given effect to as a compromise or adjustment under Order 23, rule 3 was maintained by the Calcutta High Court in a number of cases. Vide *Dekari Tea Co., Ltd.* v. *Indian General Steam Navigation Co., Ltd.*[4], *Amarchand* v. *Banwarilal*[5], *Girimoni Dasi* v. *Tarini Charan*[6], *Rohini Kanta* v. *Rajani Kanta*[7], and *Mahammad Miya* v. *Osman Ali*[8], by the Lahore High Court in *Hari Parsad* v. *Seogni Devi*[9], *Nihal Singh* v. *Ashtawakar*[10] and *Sitaram* v. *Harbana Lal*[11]; by the Patna High Court in *Bhimraj Nanai Lal Firm* v. *Munnia Sethani*[12], by a Full Bench of the Rangoon High Court in *Maung Hlay* v. *U. Ge*,[13]; and by the Nagpur High Court in *Ramdayal* v. *Sheodayal*[14].

This was the state of the law when the Arbitration Act was passed. Section 47 which deals with this question runs as follows:

> "Section 47: Subject to the provisions of section 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder;
>
> Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending."

Now, the point for determination is whether under the proviso to this section an award passed on a private reference in pending suits can be enforced as a compromise of the suit even when one of the parties refuses to accept it. This question came up for decision before this Court in *Arumugha Mudaliar* v. *Balasubramania Mudaliar*[15]. There the parties to an action which was pending referred their disputes for the decision of an arbitrator not through Court but privately and that resulted in an award. Some of the parties having refused to be bound by it, an application was taken out by the other parties to record it as a compromise under Order 23, rule 3. That was resisted on the ground that by reason of the proviso to section 47, the decision in *Subbaraju* v. *Venkataramaraju*[1], was no longer good law and that under that section unless there was a consent to the award it

1. (1928) 55 M.L.J. 429: I.L.R. 51 Mad. 800.
2. (1927) I.L.R. 51 Bom. 908.
3. (1925) I.L.R. 47 All. 637.
4. (1920) 61 I.C. 919.
5. (1921) 49 Cal. 608.
6. (1927) I.L.R. 55 Cal. 538.
7. A.I.R. 1934 Cal. 643.
8. (1934) I.L.R. 62 Cal. 229.
9. (1920) 3 L.L.J. 162.
10. A.I.R. 1930 Lah. 860.
11. A.I.R. 1936 Lah. 374.
12. (1935) I.L.R. 14 Pat. 799.
13. A.I.R. 1939 Rang. 300 (F.B.).
14. I.L.R. (1939) Nag. 250.
15. (1945) 1 M.L.J. 463: I.L.R. (1946) Mad. 39 at pp. 42 and 43.

could not be filed as an adjustment of a suit under Order 23, rule 3. In rejecting this contention, Leach, C.J. observed :

"We are merely concerned with the proviso in section 47, which plainly indicates that an arbitration award obtained otherwise than under the Act may with the consent of the parties interested in it be regarded as a compromise of a pending suit. There is nothing in the proviso which precludes antecedent consent . . . . . The proviso to section 47 leaves this provision of law (Order 23, rule 3), untouched. In fact it would appear to be likely that it was inserted by the Legislature in order to allow the Court unfettered action under Order 23, rule 3."

After referring to certain observations in *Subbaraju* v. *Venkataramaraju*[1], the learned Judge concludes :

"There is here clear indication that an agreement to accept a future award can be treated as a compromise in the suit and, in our judgment, the Arbitration Act of 1940 in no way alters the position."

If this reasoning is correct, then it must be held that in enacting the proviso to section 47, the Legislature adopted the views held by the High Courts of Madras, Bombay and Allahabad in preference to those held by the other High Courts.

Examining first the language of the proviso to section 47, it enacts that an "arbitration award' may be taken into consideration as a compromise or adjustment of a suit only "with the consent of all the parties interested". The consent here referred to must be something other than the consent to refer the dispute for arbitration because without such a consent there can be no arbitration proceedings and in requiring that an arbitration award may be taken into account only with the consent of the parties, the plain intendment of the enactment is that, to do so, there must be something more than a consent to refer to arbitration, that it must be a consent to the arbitration award itself. If this is the correct interpretation of the proviso, the result is that where there is a private reference in respect of a matter pending in the suit, the award which is given thereon cannot as such be filed as an adjustment under Order 23, rule 3. But if subsequent to the award the parties agree to accept it, that could be recorded as a compromise under Order 23, rule 3. That was the view taken by Rankin, J. in *Dekari Tea Co., Ltd.* v. *Indian General Steam Navigation, Co., Ltd.*[2] and *Amarchand* v. *Banwarilal*[3], and followed in later decisions of the Calcutta High Court. The view expressed in *Arumugha Mudaliar* v. *Balasubramania Mudaliar*[4] that the proviso to section 47 does not alter the law as laid down in *Subbaraju* v. *Venkataramaraju*[1] does not, with all respect, give sufficient weight to the words "with the consent of all the parties interested." It does not answer the question to state that the proviso does not preclude antecedent consent. If the consent required by the proviso is to the arbitration award which is to be filed as compromise under Order 23, rule 3, it is difficult to see how there can be such a consent when there is no award in existence. In reason, a party can be said to agree only to something which is put before him and not to something which is non-existent. The decision in *Subbaraju* v. *Venkataramaraju*[1], proceeds on the view that when once the parties agree to refer their disputes to arbitration, that amounts to an agreement to accept the award as an adjustment of the claim and that, therefore, the award could be filed under the provisions of Order 23, rule 3. If it was the intention of the Legislature to adopt this view, it would have been sufficient to say that any arbitration award might be taken into account as an adjustment or compromise. The further condition that there should be consent of the parties would be redundant and meaningless. The Calcutta High Court had held in *Girimoni Dasi* v. *Tarin Charan*[5] and *Rohini Kanta* v. *Rajani Kanta*[6], that though the award passed on a private reference in a pending action could not by itself be regarded as a compromise under Order 23, rule 3, it could be so treated if subsequent to the award the parties agreed to accept it. In enacting the proviso to section 47 the Legislature would clearly appear to have adopted this view.

The decision in *Subbaraju* v. *Venkataramaraju*[1] it may be noted, was to a large extent based on the view that the provisions relating to arbitration contained in the

1. (1928) 55 M.L.J. 429: I.L.R. 51 Mad. 800.
2. (1920) 61 I.C. 919.
3. (1921) 49 Cal. 608.
4. (1945) 1 M.L.J. 463 : I.L.R. (1946) Mad. 39.
5. (1927) I.L.R. 55 Cal. 538.
6. A.I.R. 1934 Cal. 643.

Second Schedule to the Civil Procedure Code were not exhaustive. Phillips, J. observed:

"The Second schedule, Civil Procedure Code, is not mandatory, but provides for reference to arbitrators at the will of the parties and also provides that certain procedure must be followed if they take action under that schedule. It does not, however, say that there shall be no arbitration other than what is dealt with by the second schedule, and if parties to the suit choose to refer to arbitration it is open to them to adopt the provisions of the second schedule or not as they please."

This reasoning would be inapplicable to the Arbitration Act, 1940, because its scope is statedly "to consolidate and amend the law relating to Arbitration in British India." Section 89 of the Civil Procedure Code provides that

"save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the Second schedule."

and in *Subbaraju* v. *Venkataramaraju*[1], it was held that Order 23, rule 3 was "other law for the time being in force" which was saved by section 89, Civil Procedure Code. In the Arbitration Act of 1940, section 47 which corresponds to section 89 of the Code enacts that

"save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder."

That the "other law for the time being in force" in this section cannot take in Order 23, rule 3 is clear from the proviso, which makes provision for "an arbitration award otherwise obtained" being treated as a compromise—a provision which would have been wholly unnecessary, if "any law for the time being in force". comprehended Order 23, rule 3, and which in its scope and tenor is different from, if not inconsistent with, the terms of Order 23, rule 3.

It should be remembered that under the Arbitration Act there is no machinery provided for going into the question of validity of awards passed in private references in pending suits. Section 47 renders the provisions of the Act as such inapplicable to them. What then happens if the award is attacked on the ground of legal misconduct? It was observed in *Arumugha Mudaliar* v. *Balasubramania Mudaliar*[2],

"Of course, a party cannot be compelled to accept an award which is unlawful. The agreement to accept an award, yet to be made pre-supposes that it will be a lawful award."

But the question is whether the binding character of the award could be gone into in proceedings under Order 23, rule 3. It is no doubt laid down therein that the compromise should be lawful. Does that contemplate an enquiry into the validity of the award when it is challenged on the ground of misconduct of arbitrator? There is ample authority for the position that the word "lawful" in Order 23, rule 3 has reference to the terms of the agreement and not to its binding character. Vide *Kuppuswami* v. *Pavanambal*[3] and *Surappa Raju* v. *Venkataratnam*[4]. Enquiry into legal misconduct would, on this principle, be outside the scope of Order 23, rule 3. There is also no provision for the Court remitting an award for reconsideration; it can only either record it as an adjustment or reject it. The parties to such an award, therefore, have not the same rights with reference thereto as parties to the awards in arbitration proceedings which fall within the scope of the Act; and the successful party to such an award would be in a better position, and the unsuccessful party in a worse position than if the award had been made in a reference through Court. It is difficult to believe that all this was intended by the Legislature.

It is also significant that the proviso requires the consent of the "parties interested". If the consent contemplated by the proviso is merely to the agreement to refer to arbitration, then the words "consent of parties" simply would have been sufficient and appropriate. If the consent required is for the award itself, then the use of the words "parties interested" becomes apt and intelligible.

Turning next to the authorities bearing on the question, disagreement with the decision in *Arumugha Mudaliar* v. *Balasubramania Mudaliar*[2] was expressed by Happell

1. (1928) 55 M.L.J. 429 : I.L.R. 51 Mad. 800.
2. (1945) 1 M.L.J. 463 : I.L.R. (1946) Mad. 39 at 43.
3. (1950) 1 M.L.J. 524.
4. (1935) 70 M.L.J. 471.

and Govindarajachari, JJ. in their referring judgment in C.M.A. No. 623 of 1946, by Viswanatha Sastri, J. in *Palaniandi Chetti* v. *Kandappa Goundan*[1] and by Mack, J. in C.M.A. No. 15 of 1950. The Orissa High Court in *Indramoni* v. *Nilamoni*[2], and the Patna High Court in *Raghunandan Rai* v. *Sukhlal Rai*[3], have held that having regard to the proviso to section 47, an award in a private reference in a pending action cannot be regarded as a compromise under Order 23, rule 3; and the decisions in *Arumugha* v. *Balasubramania*[4] was dissented from. A single Judge of the High Court of Allahabad held in *Shiam Kishore* v. *Ramnarain Singh*[5], that an award passed in an arbitration with reference to a matter pending in succession certificate proceedings could, by reason of section 46 of the Act, be regarded as an adjustment under Order 23, rule 3, Civil Procedure Code and reliance was placed on the decision in *Dular Koeri* v. *Payag Koeri*[6] as supporting that position. But then the award in question in that case had been made before the enactment of the Arbitration Act, and the learned Judges merely observed:

> "We need not go into the merits of the dispute because it is sufficient for us to say that for all future practical purposes the difficulty has now been removed by section 47 of the new Arbitration Act of 1940, which not only repeals section 89 of the Code, but replaces it by a new section which makes the matter quite clear."

Then they refer to the decision of the Full Bench in *Gajendra Singh* v. *Durga Kunwar*[7] and followed it on the principle of *stare decisis* again observing that "the matter is not one of practical importance for the future." We do not read these observations as meaning that under section 47 an award in a private reference in a pending suit could be regarded as a compromise or adjustment.

We are accordingly of opinion that under the proviso to section 47, an arbitration award obtained otherwise than in proceedings taken in accordance with the Act cannot without more be recognised as a compromise or adjustment of the suit; that no decree can be passed thereon under the provisions of Order 23, rule 3; and that the decision in *Arumugha* v. *Balasubramania*[4], should be overruled. But if, after an award is made, the parties thereto agree to accept it, that will be a compromise and a decree based thereon could be passed under Order 23, rule 3.

In the result, C.R.P. No. 1785 of 1949 will be allowed; the order made in I.A. No. 364 of 1946 passing a compromise decree under Order 23, rule 3 in terms of the award is set aside and the suit O.S. No. 154 of 1945 on the file of the Court of the District Munsif, Tiruchirapalli, directed to be heard in accordance with law. The parties will bear their costs throughout.

K.S. — *C. R. P. No.* 1785 *of* 1949, *allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNASWAMI NAYUDU.

E. S. Raghavendra Rao and others .. *Appellants**

v.

Venkammal and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rules 11 to 14 and 16.—Petition by transferee from person entitled to decree by operation of law—If should be accompanied by succession certificate.

Once it is shown that an execution petition by a transferee decree-holder complies with the requirements of Order 21, rules 11 to 14 and 16 of Civil Procedure Code, the effect or otherwise of a succession certificate not having been produced along with the execution, would not be of consequence, since it is nowhere said in the rules referred to, that a transferee decree-holder's application should also be accompanied by the succession certificate when the transfer is by persons who have become entitled to the decree by operation of law. The want of a succession certificate may deprive the assignee decree-holder of the remedy or the relief which he seeks in the execution petition. But it certainly cannot vitiate the petition itself as there is nothing which says that a succession certificate should be filed along with such an application.

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1. (1950) 2 M.L.J. 372.
2. A.I.R. 1950 Orissa 169.
3. A.I.R. 1952 Pat. 258.
4. (1945) 1 M.L.J. 463: I.L.R. (1946) Mad. 39.
5. I.L.R. 1947 All. 211.
6. I.L.R. 1942 All. 357.
7. (1925) I.L.R. 47 All. 637.

*A. A. O. No. 68 of 1947. 6th February, 1953.

Appeal against the order of the District Court, Coimbatore, dated 8th August, 1946, in C.A. No. 336 of 1945 (E.P. No. 792 of 1943 in O.S. No. 64 of 1936, District Munsif's Court, Erode).

C. A. Vaidyalingam for Appellants.

K. S. Desikan for Respondents.

The Court delivered the following

JUDGMENT.—The question that arises for determination in this appeal is as to whether an application by a transferee-decree-holder for execution which was dismissed for want of production of a succession certificate is an application filed in accordance with law to the proper court for execution.

In O.S. No. 64 of 1936 on the file of the District Munsif of Erode a money decree was passed against the defendants on the 25th July, 1936. The decree-holder died some time after the passing of the decree leaving behind him, as his heirs, three grandsons by his daughter who were minors. The father of these minors acting as their guardian assigned the decree to one Rama Rao. Rama Rao, the assignee-decree-holder, filed E.P. No. 1172 of 1939 on the 18th July, 1939 and asked for recognition of himself as the assignee-plaintiff under Order 21, rule 16, Civil Procedure Code ; for a declaration that as the original plaintiff was dead, his minor grandsons may be impleaded as his heirs under Order 21, rule 3, Civil Procedure Code and that the immoveable properties which belonged to the defendants may be attached under Order 21, rule 54, Civil Procedure Code and that a sale proclamation may be issued under Order 21, rule 21, Civil Procedure Code. The said execution petition was adjourned from time to time and the transferee decree-holder-petitioner was directed to produce the succession certificate. He was taking time to produce the same. He had already filed a petition, O.P. No. 62 of 1939, for that purpose but it eventually transpired that he was unable to furnish the security required for obtaining the succession certificate. On the 11th December, 1939, his advocate endorsed on the execution petition that the petitioner was unable to furnish security in O.P. No. 62 of 1939, that the execution petition was filed to save limitation and that if it was rejected without being filed it may not save limitation and that the petitioner will renew his application for a succession certificate after getting the proper security and that this petition may be disposed of without prejudice to the petitioner renewing it after getting the certificate reserving his right to renew the same. On the 12th December, 1939, by an order of the District Munsif the petition was dismissed for non-production of the succession certificate.

On the 10th December, 1942, the transferee-decree-holder filed his next execution petition, E.P. No. 33 of 1943, for similar reliefs as those contained in the earlier execution petition and that petition was also returned for the production of the succession certificate. Subsequently, notice was ordered in the petition but the judgment-debtors applied for scaling down the decree and for stay of execution. Execution was stayed on 23rd March, 1943. E.P. No. 33 of 1943 was also dismissed by an order of Court of that date.

The present execution petition, out of which this appeal arises was filed on the 26th October, 1943. In between, and by the date of that petition, the transferee-decree-holder had obtained the succession certificate. Objection was raised in this execution petition that it was barred by limitation as the order dated 12th December, 1939 in E.P. No. 1172 of 1939 was not a final order in an application presented in accordance with law to the proper court for execution under Article 182 (5) of the Limitation Act. E.P. No. 1172 of 1939 was presented under Order 21, rule 16 of the Civil Procedure Code by the transferee-decree-holder who relied on the assignment deed in his favour. There is no dispute that the assignment deed was filed in court along with E.P. No. 1172 of 1939. This was also verified and found to be correct by the learned District Judge while hearing the appeal. The only ground therefore for not ordering execution is that the succession certificate was not issued to the decree-holder by the date of the order of 12th December, 1939. It is not suggested that the E.P. No. 1172 of 1939 did not contain the particulars that are required to be shown in an execution petition under rules 11 to 14 of Order

21 of the Civil Procedure Code. It was an application by a person who was claiming to be a transferee-decree-holder under Order 21, rule 16, Civil Procedure Code. He relied for the transfer upon an assignment deed which he had also produced with the petition. Therefore, *prima facie* there is no reason to hold that E.P. No. 1172 of 1939 was not a petition presented in accordance with law.

The procedure that governs the presentation of applications in the case of a transferee-decree-holder is that which is contained in Order 21, rules 11 to 14 and 16 of the Code. There is compliance of the said provisions of the Code and it cannot be said that it is not an application presented in accordance with law. Support for this proposition is found in some of the decisions cited at the Bar. In *Sreepada Brahmayya Pantulu* v. *Parasuramayya*[1], a Bench of this Court held that a person who becomes entitled under a decree to realise the amount due under another decree, is a transferee under section 232, Civil Procedure Code and is the only person who could have applied for execution of the latter decree. Such application is one in accordance with law though the transferee is subsequently held to have no title and the application has the legal effect of saving the bar and enures in favour of all persons entitled to execute the decree. This decision was cited with approval in *Uduman Haji* v. *Mammi Kutti*[2], where it was held that failure to prove the validity of the assignment does not show that the application for execution was not in acordance with law. In *Rajithagiripathy* v. *Bhavani Sankaran*[3], it was held that the application by the transferee-decree-holders for recognition of their transfer and for execution was a step in aid of execution of the decree, even though the right of the transferees had been negatived in subsequent proceedings. This decision again quotes with approval the view taken in *Sreepada Brahmayya Pantulu* v. *Parasuramayya*[1].

But it is contended by Mr. Vaidyalingam on behalf of the appellants that the decision in *Sreepada Brahmayya Pantulu* v. *Parasuramayya*[1], was based on the old Code. But it must be noted that section 232 of the old Code is in no way substantially different from the present Order 21, rule 16, Civil Procedure Code and the fact that it is a decision under the old Code is not of much consequence. Section 232 is practically in terms of Order 21, rule 16, Civil Procedure Code under which the application that is now in question has been filed. The Patna High Court had also taken a similar view as could be seen from the decision reported in *Mt. Bibi Aisha* v. *Mahabir Prasad*[4]. It was held therein that an execution application is in accordance with law within Article 182 (5) if the particulars required by rules 11 to 14 of Order 21 are mentioned in the application and that where an application contains these particulars, the fact that it was presented without a succession certificate makes no difference, as an application without a succession certificate is perfectly in order; only no relief can be granted until the succession certificate is produced. Reliance was placed on behalf of the appellants on *Kailasa Pandaram* v. *Ramanuja Naidu*[5], where it was held that the decree-holder having failed to obtain recognition of his right in the prior application, his prior application was by a person not entitled to make it and cannot save the present application from the bar of limitation. It must be noted that in that case the decree was in favour of three minor brothers represented by a guardian. The guardian applied for and obtained an order for sale. One of the minors then attained majority and acting for himself and as guardian of his minor brothers, he assigned the decree to the respondent. The respondent put in an execution petition for executing the whole decree which was however dismissed on the ground that the assignment was invalid to the extent of the minors' shares as leave of the Court was not obtained and execution was wholly disallowed as the petition did not purport to be one by a joint decree-holder. It was therefore held that the court could not treat the order dismissing it as one recognising the validity of the assignment, or in view of that order, which became final, assume that his assigment was valid. That was a case where the assignment was held to be invalid and in view of that finding it cannot be said that the assignee

1. (1902) 12 M.L.J. 348.
2. (1909) 7 M.L.T. 247 (1).
3. (1924) 47 M.L.J. 4 : I.L.R. 47 Mad. 641.
4. (1926) I.L.R. 6 Pat. 440: A.I.R. 1927 Pat. 324.
5. (1917) 6 L.W. 19.

was the proper person to maintain the application and obviously the petition was not one in accordance with law.

I am of the opinion that E.P. No. 1172 of 1939 was presented by the proper person in accordance with law and the order of the 12th December, 1939, was the final order in such an application which could save limitation. Once it is shown that the petition complied with the requirements of Order 21, rules 11 to 14 and 16 of the Code, the application for execution in this case being one by a transferee-decree-holder, the effect or otherwise of a succession certificate not having been produced along with the execution petition, would not be of consequence, since it is nowhere said in the rules referred to, much less in rule 16 of Order 21, that a transferee-decree-holder's application should also be accompanied by the succession certificate when the transfer is by persons who have become entitled to the decree by operation of law. The want of a succession certificate may deprive the assignee-decree-holder of the remedy or the relief which he seeks in the execution petition. But it certainly cannot vitiate the petition itself as there is nothing which says that a succession certificate should be filed along with such an application.

In the result I find that the order of the lower appellate court is correct. The appeal is dismissed with costs. No leave.

R.M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

A. Koyan and another .. *Petitioners**

v.

Rajammal and another .. *Respondents.*

Court Fees Act (*VII of* 1870), *Schedule* 1, *Article* 1—*Scope of*—*When applies.*

A written statement pleading a set-off whether legal or equitable, must bear Court-fee whether the set-off is tantamount to an extinguishment of the plaint claim or to a partial reduction of the plaint claim. Where the written statement on its allegations refers to the payments which will have the effect of either extinguishing or reducing the suit claim as payments which in law must be held to be in the nature of *payments to the plaintiff himself*, the defendant is not under an obligation to pay any Court-fee on that amount although when he fails to prove the legal effect of the payments in question to be that of payments to the plaintiff himself, the plea of the credit claimed by the defendant on the foot of payments may have to fail.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Palghat, dated 28th March, 1952, in S.C.S. No. 363 of 1951.

C. K. Viswanatha Aiyar for Petitioners.

C. S. Swaminathan for Respondents.

The Court delivered the following

JUDGMENT.—After the lengthy arguments I have heard in this case the principles that to my mind appear to emerge for consideration and application in this case are these : (1) A written statement pleading a set-off, whether legal or equitable, must bear Court-fee whether the set-off is tantamount to an extinguishment of the plaint claim or to a partial reduction of the plaint claim; (2) where the written statement on its allegations refers to the payments which will have the effect of either extinguishing or reducing the suit claim as payments which in law must be held to be in the nature of *payments to the plaintiff himself*, the defendant is not under an obligation to pay any Court-fee on that amount although when he fails to prove the legal effect of the payments in question to be that of payments to the plaintiff himself the plea of the credit claimed by the defendant on the foot of payments may have to fail. This latter principle is really a corollary to the larger principle applicable to plaints that the payment of Court-fee on the plaint must be judged with reference

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* C. R. P. No. 1054 of 1952. 30th January, 1953.

to the allegations in the plaint. I have carefully examined the present written statement with the aid of counsel and I have come to the distinct conclusion that there is nothing which involves the defendant on the allegations therein in the position that he is pleading a set-off legal or equitable. He is pleading two items of credit with reference to what would be in the nature of an advance payment of rent or payments under the Madras Tenants and Ryots Protection Act (Madras Act XVII of 1946). The defendants here are only resisting the plaintiffs' claim on a very legitimate ground with reference to which on first principles it will be rather difficult to say that the defendants have to pay any amount of court-fee at all. But there is a provision in the Court-Fees Act, Schedule I, Article 1, which says that a written statement pleading a set-off must be stamped in the same manner in which a plaint might have to be stamped *ad valorem*. Notwithstanding this, I do not see any reason on principle, why, if the written statement does not claim any particular amounts either in reduction or in extinction of the suit claim on the basis of what he describes as a set-off, the defendant should be called upon to pay any Court-fee merely because in the ultimate result after the items have been examined it turns out that what is asked for by the defendant is a set-off. For the reasons given above I am of opinion that the written statement in this case is not hit at by the provisions of Schedule I, rule 1 of the Court-Fees Act. I reverse the decision of the Court below and direct it to accept the written statement as properly stamped and proceed with the trial of the suit hereafter. The petitioners will have costs from the respondents in this Court.

R.M. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Pulimarathinkeel Katheesa and another .. *Appellants**

v.

Puthiapurayil Assema (died) and another .. *Respondents.*

Registration Act (XVI of 1908), section 17 (vi)—Amendment Act (XXI of 1929)—If has retrospective effect—Compromise decree affecting immoveable property prior to 1929—If requires registration.

Section 17 (*vi*) of the Indian Registration Act amended by Act XXI of 1929, has no retrospective effect. Also a decree affecting immoveable property, which is the subject-matter of a compromise and which is also the subject-matter of the suit, need not be registered. Hence a pre-1929 compromise which has been ' recorded ' and which covers immoveable property need not be registered.

Appeal against the decree of the District Court of North Malabar in A.S. No. 58 of 1948, preferred against the decree of the Court of the District Munsif of Cannanore in O.S. No. 521 of 1946.

M. C. Sridharan for Appellants.

V. P. Gopalan Nambiar for Respondents.

The Court delivered the following

JUDGMENT.—The short point for determination in this second appeal is whether with regard to a pre-1929 compromise which has been " recorded " and which covered the property involved in the suit, the compromise should have been registered. In my opinion, there are two good reasons why it need not be registered. First of all, the compromise itself is of the year 1927. Section 17 (*vi*) of the Indian Registration Act was amended by Act XXI of 1929 and for the words " and any award " the following words " except a decree or order expressed to be made on a compromise and comprising immoveable property other than that which is the subject-matter of the suit or proceeding " were substituted. This amendment has no retrospective effect. Secondly, I have just mentioned that the property which is the subject-matter of the compromise is also the subject-matter of the suit. It has been held by this Court in *Alla Annapurnamma* v. *P. L. Swami*[1], relying on a prior decision in *Ranganayaki Ammal* v. *Sampathkumaran*[2], that a decree affecting

* S. A. No. 1102 of 1949. 9th March, 1953.

1. (1948) 2 M.L.J. 475. 2. (1940) 2 M.L.J. 319.

immoveable property, which is the subject-matter of the compromise and which is also the subject-matter of the suit, need not be registered. It is on the foot of this distinction that this Court has issued H. C. P. Dis. 612 of 1936 which has been incorporated at pages 122 and 123 of the Civil Rules of Practice and Circular Orders, Vol. I, (second edition, 1940), and framed question No. 2 (*f*) in the Notes of Inspection of Subordinate Courts, Form No. 15 (see *ibid.*, Appendix III-L, page 345, Vol. II). The Circular Order states:

"It has come to the notice of the High Court that in drafting a decree passed in terms of a compromise entered into between the parties the procedure prescribed in Order 23, rule 3, and Order 20, rule 9 of the Civil Procedure Code is not followed in some Courts, and that where a compromise includes matters which do not form part of the subject-matter of the suit it has been the practice to include all the terms of the compromise in the operative portion of the decree. This practice, besides being opposed to the above-mentioned provisions of the Civil Procedure Code, is said to present some difficulty to the Registration Department in ascertaining whether property not forming part of the subject-matter of the suit has or has not been included in the compromise decree.

The High Court directs that, in drafting compromise decrees, courts should strictly observe the provisions of Order 23, rule 3, and Order 20, rule 9 of the Civil Procedure Code, and that the second of the two methods indicated by their Lordships of the Judicial Committee in *Hemantha Kumari Devi* v. *Midnapore Zamindari Co.*[1], be adopted. After reciting that the compromise set out in the schedule refers to not only the subject-matter of the suit but also to certain properties extraneous to it, the decree should in the operative portion deal only with the subject-matter of the suit, which will be clearly and fully described as is done in the plaint schedule or schedules. The compromise itself should be introduced as a schedule to the decree."

The point of law has therefore been correctly decided by both the Courts below and the second appeal has got to be and is hereby dismissed with costs. No leave.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAGHAVA RAO.

V. M. Chockalingam Chettiar .. *Petitioner**

v.

T. A. S. V. Alagammai Achi and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 8-A, rule 8—Applicability—Directions of Court—Scope of.

While where a person against whom third-party procedure is sought to be availed of is not already a party to the record he has to be impleaded on an application to be made for that purpose, it does not follow that the third-party procedure cannot be availed of as against a person already on record.

The considerations governing the application of the third-party procedure to any particular case are substantially similar to those considerations which influence the discretion of the Court in impleading parties under Order 1, rule 10, Civil Procedure Code.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Devakottai, dated 20th June, 1952, in I. A. No. 274 of 1952, in O. S. No. 155 of 1951.

P. S. Chandrasekhara Ayyar and *P. S. Ramachandran* for Petitioner.

T. R. Srinivasan and *T. Ramalingam* for Respondents.

The Court delivered the following

JUDGMENT.—In a suit for recovery of certain money of the plaintiff alleged to have been deposited with the first defendant, the first defendant pleaded in his written statement that the money deposited with him was really the second defendant's money and not the plaintiff's and that as the money had been deposited on the understanding that the money was to be payable to the second defendant's order, the first defendant had already obtained full discharge in respect of the obligation which the plaintiff sought to enforce by the adjustment of the said money between the second defendant and himself towards the debts due by the second defendant to the first defendant. There was thereafter an application made to the Court below to enable the first defendant to avail himself of the third-party procedure provided under Order 8-A of the Civil Procedure Code. The

1. (1919) 37 M.L.J. 525 : L.R. 46 I.A. 240 : I.L.R. 47 Cal. 485 at pp. 495 and 496 (P.C.).

* C.R.P. No. 1279 of 1952. 3rd February, 1953.

application having been rejected by the Court below, the first defendant has come up in revision to this Court.

Mr. P. S. Chandrasekhara Ayyar, learned advocate for the petitioner, has contended in the first instance that the main reason given by the Court below for its order under revision is that the second defendant was already a party to the record and therefore the procedure prescribed by Order 8-A did not apply to the case. This, it is common ground before me, proceeds upon a mistake about what Order 8-A of the Civil Procedure Code provides; for, while where a person against whom a third-party procedure is sought to be availed of is not already a party to the record he has to be impleaded on an application to be made for that purpose, it does not, in my opinion, follow that the third-party procedure cannot be availed of as against a person already on record. This ground given by the learned Subordinate Judge in fact has not been supported or rather seriously supported by Mr. T. R. Srinivasan, learned advocate for the respondent, in view of Order 8-A, rule 8, of the Civil Procedure Code. The point pressed by Mr. Srinivasan, however, is that the application of the third-party procedure to the circumstances of this case is calculated to involve his client as well as the Court in embarrassment for the reason that that would result in the joinder of what substantially would be two suits between two different parties in one and the same trial and that it would also have the effect of prolonging the disposal of his own suit as against the first defendant which would without this application of the third-party procedure be a simple suit for recovery of money deposited with the first defendant in the name of his client. Learned counsel points out that the third-party procedure ought not to be applied by a Court ordinarily in cases where its application would have this effect. As pointed out by Venkataramana Rao, J., in *Venkatakrishna Naidu* v. *Narayanaswami Iyer*[1], the considerations governing the application of the third-party procedure to any particular case are substantially similar to those considerations which influence the discretion of the Court in impleading parties under Order 1, rule 10, Civil Procedure Code. Agreeing with this view of the matter which I myself expressed in the course of arguments, I am of opinion that what I have to see is whether the joinder of the claims in question, that is to say, between the first defendant and the second defendant on the one hand and the plaintiff and the first defendant on the other, would be so far improper if really they were claims litigated in two different suits separately instituted. Applying this test, as in my opinion a proper test applicable to the class of case before me, I am of opinion that this was pre-eminently a case in which the Court below ought to have exercised its discretion in favour of allowing the application of the first defendant. As pointed out by the learned advocate for the petitioner before me, there is at least one common question which would arise as between the two claims which would get combined for trial if Order 8-A of the Civil Procedure Code were to be applied to the present case, *viz.*, whether the moneys in question originally deposited by the second defendant belonged to the plaintiff or belonged to the second defendant or were merely placed in the name of the plaintiff with the first defendant. Were the suit of the respondent before me a suit on a negotiable instrument, different considerations might possibly arise. But all that Mr. Srinivasan, learned advocate for the respondent, has urged is that his simple suit for recovery of money on deposit with the first defendant would get enlarged in its scope by the addition to the record of the pleadings as between the first defendant and the second defendant and by the issues that might be consequential upon those pleadings. As I have already stated, that, in my opinoin, is not a ground for refusal of the application of Order 8-A of the Civil Procedure Code to a case otherwise appropriate.

For the reasons given by me, it follows that this revision must be allowed. In the circumstances of the case, there will be no order as to costs so far as this Court is concerned.

R.M. —————— *Revision allowed.*

1. (1938) 2 M.L.J. 886 : I.L.R. (1939) Mad. 259.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Chittirala Mahalakshmamma .. *Appellant**

v.

Senisetti Hanumayya and another .. *Respondents.*

Code of Civil Procedure (V of 1908), section 47—Scope of—Application in execution—Parties against whom no relief is claimed in the suit itself—If their rights could be agitated in execution under section 47—Practice.

In order to bring the applications in execution within the scope of section 47 two conditions must be satisfied. First is that it must be a question arising between the parties to the suit in which the decree was passed. The second is that it must relate to the execution, discharge or satisfaction of the decree. The word 'and' in this connection in section 47 (1) appears to be highly significant. It would be opening an avenue of abuse if a plaintiff were to include as defendants in a suit quite improperly, persons who are really unnecessary, and while not being able to have any issue decided as between him and them in the suit itself, be permitted to pursue remedies against them in execution under section 47, Civil Procedure Code and have them determined without the payment of any court-fee. No doubt, it is always open to the executing Court to treat any proceedings under section 47 as a suit and, if necessary, order payment of any additional court-fee.

Appeal against the order of the Court of the Subordinate Judge, 2nd Additional, of Guntur, dated 24th August, 1949, in A. S. No. 17 of 1949, preferred against the order in E. A. No. 331 of 1948 in O. S. No. 188 of 1944, District Munsif Court of Narasaraopet.

P. V. Chalapathi Rao for Appellant.

B. V. Ramanarasu for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal against the order by the learned Additional Subordinate Judge of Guntur remanding E. A. No. 331 of 1948 for fresh disposal by the District Munsif of Narasaraopet.

The appellant is a widow one Mahalakshmamma who was impleaded as the 2nd defendant in a suit filed by the respondent decree-holder on a pronote executed by her deceased father-in-law Ramakotayya, whose widow was impleaded as the first defendant. In the suit, the appellant was exonerated, with costs, by the learned District Munsif, and the decree-holder obtained a decree against the assets of Ramakotayya in the hands of his widow. In execution he attached immoveable property to which the appellant laid claim in a petition under Order 21, rule 58, and sections 47 and 151, Civil Procedure Code. She claimed the attached property as being her own by virtue of a purchase in execution of a decree which she obtained against her own father-in-law, who had, it was alleged, taken possession of valuable moveable property belonging to her, while she was a ward of Court, and furnished security for a substantial amount. The learned District Munsif held that the appellant had *prima facie* title and possession and allowed her claim petition. In appeal, the learned Subordinate Judge taking the view that she was a party to the suit the decree of which was under execution remanded the claim petition for disposal on its merits under section 47, Civil Procedure Code, negativing the view of the District Munsif that the decree-holder's remedy was in this case by way of a separate suit to set aside the summary order on the claim petition.

I have no doubt that the view taken by the learned District Munsif is correct. There were two views taken in decisions of this Court as regards the application of the explanation to section 47, Civil Procedure Code, according to which, for the purpose of that section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit. The earlier narrow view taken in *Sethu Konar* v. *Ramaswami Konar*[1], was that the ground on which a party is exonerated from the suit can never determine whether he continues or

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* A.A.O. No. 659 of 1949. 13th February, 1953.

1. (1925) 50 M.L.J. 205 : I.L.R. 49 Mad. 494.

ceases to be a party, but it will depend entirely upon whether his name has been struck off from or retained on the record. This view was negatived by a Full Bench decision in *Abdul Sac* v. *Sundara Mudaliar*[1], which followed the earlier view, taken in *Krishnappa* v. *Periasami*[2], by Ayling and Kumaraswami Sastriar, JJ. The learned Subordinate Judge considered the decision in *Abdul Sac* v. *Sundara Mudaliar*[1], but took the view that it did not apply to the facts of the present case, as there it was a case of a party claiming a title paramount in a mortgage suit. The learned Subordinate Judge failed to observe that this was a case where the appellant claimed a paramount title to this property as against the deceased executant of the pronote on which the decree-holder obtained his decree. The Full Bench decision is clearly in point and governs the present case. The view taken there was also followed in *Jujishti Panda* v. *Lakshmana*[3] and *Thangachami* v. *Veerappa*[4]. In *Jujishti Panda* v. *Lakshmana*[3], Beasley, C.J., who also delivered the judgment of the Full Bench in *Abdul Sac* v. *Sundara Mudaliar*[1], expressed the view that on the exoneration or the striking out of the names of persons on the ground of misjoinder, they cease to be parties to the suit and that such defendants must be treated as persons who had been dismissed from the suit and not as person against whom the suit had been dismissed. This view was also followed in *Thangachami* v. *Veerappa*[4], in which it was held that a defendant who was not a necessary party would not be a party to the suit, within the meaning of section 47, if he is exonerated without his claim being adjudicated upon. There can be no doubt following this line of decisions that this is a case which is not governed by section 47, Civil Procedure Code, but by Order 21, rule 58.

There is a further aspect of section 47 which requires two conditions to be satisfied, in order to bring applications in execution within its scope. The first condition is that it must be a question arising between the parties to the suit in which the decree was passed. The second condition is that it must relate to the execution, discharge or satisfaction of the decree. The word " and " in this connection in section 47 (1) appears to me to be highly significant. In the present case, the question raised as between the plaintiff decree-holder and the present appellant could not have been adjudicated upon in the suit on the pronote. I entirely fail to see how an issue as between the parties which could not in any event have been decided in the suit itself and does not arise between the parties can be decided in execution proceedings by way of an application under section 47, Civil Procedure Code. This is an aspect of section 47, Civil Procedure Code, which has not been specifically adverted to in the decisions to which I have been referred. It would be opening an avenue of abuse if a plaintiff were to include as defendants in a suit, quite improperly, persons who are really unnecessary and while not being able to have any issues decided as between him and them in the suit itself, be permitted to pursue remedies against them in execution under section 47, Civil Procedure Code and have them determined without the payment of any court-fee. No doubt, it is always open to the executing Court to treat any proceedings under section 47 as a suit and, if necessary, order payment of any additional court-fee. In this case, however, it is of considerable importance as to who should be the plaintiff in the suit to be filed whether it is the appellant whose property has been attached, or whether it should be the decree-holder, who has *prima facie* failed to show that the property attached belonged to his original debtor. I have no hesitation on the facts of this case, in restoring the order of the learned District Munsiff and referring the decree-holder to a suit, if so advised. The appeal is allowed with costs throughout. Leave refused.

R.M. *Appeal allowed.*

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1. (1930) 59 M.L.J. 932 : I.L.R. 54 Mad. 964. 81 (F.B.).
2. (1916) 32 M.L.J. 532 : I.L.R. 40 Mad.
3. A.I.R. 1933 Mad. 435.
4. A.I.R. 1937 Mad. 266.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AYYAR.

The Royal Calcutta Turf Club .. *Appellant**

v.

V.K.T. Raman Menon and another .. *Respondents.*

Letters Patent (Madras), clause 15—Judgment—Order refusing or allowing inspection of documents under the Original Side Rules, Madras High Court—If a judgment—Whether an appeal lies.

An order refusing to allow inspection of certain accounts which were disclosed in the affidavit of documents of a party to a suit on the Original Side of the High Court is not a judgment within the meaning of clause 15 of the Letters Patent and therefore no appeal lies from it. On principle there is no difference even if the order allows inspection.

D. K. Asher v. *V. C. Gopalaratnam*, (1926) 52 M.L.J. 192 and *Tuljaram Row* v. *Alagappa Chettiar*, (1910) 21 M.L.J. 1 : I.L.R. 35 Mad. 1 (F.B.), followed.

On appeal from the order of the High Court dated 11th December, 1952, in the exercise of the Ordinary Original Civil Jurisdiction in Application No. 4622 of 1952, in C. S. No. 255 of 1952.

Messrs. King and Partridge, K. Veeraswami, G. John Arthur and *C. K. Vedachalam* for Appellant.

S. Gopalaratnam for Respondents.

The Judgment of the Court was delivered by

Rajamannar, C.J.—This is an appeal under clause 15 of the Letters Patent against an order made by Panchapakesa Ayyar, J., on 11th December, 1952, on an application by the plaintiff in C. S. No. 255 of 1952. By this order, the learned Judge directed the 2nd defendant in the suit to grant copies of certain original statements to the plaintiff on or before 22nd January, 1953, and that till the copies are granted the advocate for the plaintiff was free to have inspection and discovery of true copies in the two files by applying to the learned counsel for the 2nd defendant. The 2nd defendant is the appellant.

A preliminary objection was taken on behalf of the respondent that no appeal lies, because the order of the learned Judge does not amount to a judgment within the meaning of that term in clause 15 of the Letters Patent. We are of opinion that the preliminary objection is well founded. It is sufficient for us to refer to the decision in *D. K. Asher* v. *V. C. Gopalaratnam*[1], wherein it was held that an order refusing to allow inspection of certain accounts which were disclosed in the affidavit of documents of a party to a suit on the Original Side of the High Court was not a "judgment" within the meaning of clause 15, and therefore no appeal lay from it. In this case, the order allowed the inspection. We see no difference in principle which would prevent the application of the rule laid down in this decision to the present case.

Mr. O. T. G. Nambiar, learned counsel for the appellant, relied upon the test which was laid down by White, C.J., in the leading case of *Tuljaram Row* v. *Alagappa Chettiar*[2]. The learned Chief Justice laid down the following test :—

> "The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause."

It is contended that if the order under appeal is not complied with there is the danger of the defence of the appellant being struck off on an application by the plaintiff under Order 11, rule 21, Civil Procedure Code. That rule says :

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* O.S. Appeal No. 10 of 1953. 13th February, 1953.

1. (1926) 52 M.L.J. 192.
2. (1910) 21 M.L.J. 1 : I.L.R. 35 Mad. 1 (F.B.).

"Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the court for an order to that effect, and an order may be made accordingly."

It is obvious that the order now under appeal is not an order passed under this rule. If and when the appellant fails to comply with the order under appeal, then it is open to the plaintiff to apply under the above rule to have the defence struck out, and on that application, the Court may, it may not, make an order striking out the defence. It is, therefore, clear that the order now under appeal, if not complied with, does not by itself put an end to the suit or to the defence of the appellant. The test laid down by the learned Chief Justice in the above case, is, therefore, not fulfilled in this case.

Following the decision of the Division Bench in *D. K. Asher* v. *V. C. Gopalaratnam*[1] and the principle of the decision in *Tuljaram Row* v. *Alagappa Chettiar*[2], we hold that the appeal is not maintainable.

The appeal is, therefore, dismissed with costs.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice.*

Pottimurthi Sadasivayya .. *Appellant**

v.

Tadepalli Venkata Narayana and Co., Head Office, Narasaraopet.. *Respondent.*

Contract—Damages for breach of—Contract illegal and unenforceable—Subsequent promise to pay damages—How far enforceable.

Damages for breach of a void and illegal contract cannot form the consideration for promise to pay them. Where a forward contract in groundnut oil is prohibited in the Vegetable Oils and Oil-cakes (Forward Contracts Prohibition) Order, 1944, a contract in contravention of such a prohibition is illegal and unenforceable and any subsequent promise to pay damages for breach of such illegal contract cannot certainly be enforced.

Appeal against the decree of the Court of the Subordinate Judge, Guntur, in A. S. No. 156 of 1948, preferred against the decree of the Court of the District Munsiff, Narasaraopet in O. S. No. 130 of 1947.

Ch. Suryanarayana Rao for Appellant.

K. Kotayya for Respondent.

The Court delivered the following

JUDGMENT.—There is no substance whatever in this second appeal. There was a forward contract for the sale and purchase of 310 tins of groundnut oil entered into on 6th October, 1944, on which date the Vegetable Oils and Oil-cakes (Forward Contracts Prohibition) Order, 1944, was in force, which prohibited all forward contracts in groundnuts and groundnut oil. The plaintiff who was the purchaser, evidently to evade the provisions of this order, prevailed upon the defendant to agree to pay Rs. 504-6-6 towards compensation and this arrangement was embodied in another contract, dated 13th December, 1944, under which the plaintiff was described as the seller and the defendant as the buyer. The price was fixed at a higher rate than the price fixed by the original contract. On the back of this document, there was the following endorsement:

"The contract whereby the seller herein bought from the buyer herein 301 tins at the rate of Rs. 6 is settled hereby without any need for delivery of the commodity relative to this contract (thus) :—

Settled that the difference in price of the said 301 tins (413 maunds, *viz.*, Rs. 504-6-6 at the rate of Rs. 1-3-6 per tin) is to be paid to Pottimurti Sadasivayya Garu (plaintiff) by Tadepalli Venkatanarayana (defendant) before 31st December, 1944. If it is not paid within the due date, it is to be paid with interest at the rate of annas eight per rupee one hundred per month."

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1. (1926) 52 M.L.J. 192.
2. (1910) 21 M.L.J. 1 : I.L.R. 35 Mad. 1 (F.B.).

* S.A. No. 1266 of 1949. 6th February, 1953

The result of this arrangement is set out in paragraph 4 of the plaint as a compromise between the parties that the defendant should pay to the plaintiff Rs. 504-6-6 towards compensation for the loss incurred by the plaintiff. The suit was brought for the recovery of this amount with interest. One of the defences was that the contract was illegal and unenforceable by reason of the provisions of the Vegetable Oils and Oil-cakes (Forward Contracts Prohibition) Order, 1944. Both the Courts have upheld this plea and dismissed the suit. Hence this second appeal.

Obviously, the Courts below were right. The contract dated 6th October, 1944, was clearly an illegal and void contract. The promise to pay Rs. 504-6-6 as damages for breach of this contract which was itself an illegal contract cannot certainly be enforced. It is clear that the object of the parties was to evade the provision of law which prohibited forward contracts.

Two points were raised before me by learned counsel for the appellant. One was that the suit contract was exempted under a subsequent notification of the Central Government. That notification exempted forward contracts which were not transferable to third parties. It surely cannot be contended that the suit contract was such a contract. It is an ordinary contract of a sale of goods and was transferable.

The second point is that though the original contract of sale was illegal, nevertheless the subsequent promise to pay Rs. 504-6-6 was enforceable because according to the defendant he did not know that the contract was prohibited by law. No authority was cited in support of this extraordinary contention. Learned counsel wanted to cite cases in which it has been held that even if a party enters into an obligation in ignorance of his rights, nevertheless such a promise will be binding on him. We are not concerned with ignorance of rights ; we are concerned here with an illegal contract. Damages for breach of a void and illegal contract cannot form the consideration for a promise to pay them.

There are no merits in this second appeal which is dismissed with costs.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BALAKRISHNA AYYAR.

Ananthoth Gopalan .. *Appellant**

v.

Eram Veettil Kanaran and another .. *Respondents.*

Transfer of Property Act (IV of 1882), section 53-A, Proviso—Scope of protection afforded under—Notice—What amounts to—Manner of getting notice—If material—Payment of money—When sufficient to constitute part performance.

The Proviso to section 53-A of the Transfer of Property Act is intended to protect persons who in actual truth and in fact have no notice of the interests of a contracting party. But when actually as a matter of fact they have such notice (for instance in the course of casual conversation) the informality of the manner in which they acquired that notice or information does not appear to be material. The main thing is that the transferee should know. It does not matter how he knows it. So long as it is credible information, which a person of ordinary prudence will take notice of, he will be bound by it. Payment of money may also be sufficient to constitute part performance and will be sufficient compliance with the requirements of section 53-A of the Transfer of Property Act and such payment can be treated as an act in furtherance of the contract when it is proved that such money had been paid under the contract. *Maddison* v. *Alderson*, (1883) L.R. 8 A.C. 467, considered.

Appeal against the decree of the Court of the Subordinate Judge, Tellicherry, in A. S. No. 105 of 1947 preferred against the decree of the Court of the District Munsiff, Nadapuram, in O. S. No. 932 of 1944.

M. K. Nambiar for Appellant.

D. A. Krishna Variar and *M. Sekhara Menon* for Respondents.

The Court delivered the following.

JUDGMENT.—The jenmam right in the suit properties belongs to the second defendant. In May 1943, he put the first defendant in possession of the properties

* S.A. No. 1029 of 1949. 5th February, 1953.

under an oral lease. The lease was apparently for a period of one year. On 30th June, 1944, the second defendant executed a kanom kuzhikanom in favour of the first defendant. *See* Ex. D-1. The document refers to the oral demise of the 9th May, 1943, admits receipt of the kanom amount of Re. 1 and demise fee of Rs. 125 and proceeds to confer kanom kuzhikanom right for a period of 12 years. But this document was not registered. On 24th July, 1944, the second defendant executed a registered kanom kuzhikanom deed in favour of the plaintiff (Ex. P-1). On the strength of Ex. P-1 the plaintiff sued to recover possession of the suit property. The District Munsiff of Nadapuram dismissed the suit. His appeal to the Subordinate Judge of Tellicherry having failed, he has come up to this Court.

One of the defences, which the first defendant set up, was that he is entitled to the protection conferred by section 53-A of the Transfer of Property Act. This plea was accepted by the learned Subordinate Judge. Mr. Nambiar, the learned counsel for the appellants, argued that the learned Subordinate Judge was wrong in having done so. He raised in the main two points. One was that before the first defendant can be given the protection conferred by section 53-A of the Transfer of Property Act, it must be shown that the plaintiff had notice of the contract in favour of the first defendant. Dealing with the finding of the Courts below that the plaintiff had such notice, Mr. Nambiar stated that the finding was based upon a misapprehension of the evidence. The evidence of the first defendant was that some time after Ex. D-1 had been executed he was travelling in a bus with the plaintiff and the plaintiff's father and that during the course of the journey, he informed the plaintiff about the execution of Ex. D-1 and also about the payment of money. This is what he stated in chief:

> " Two months before the auction of the shops the plaintiff's father Chathukutty, the plaintiff and I went together by bus to Badagara. We were going to see some shop renters to arrive at an agreement to prevent high bids due to competition. When we went on that occasion, Ex. D-1 had already been signed. Plaintiff asked me whether I had taken a written lease. I told him that money had been paid and documents executed but not registered."

But in cross-examination he deposed :

> " I do not remember the date on which Chathukutty, the plaintiff and I went to Muttangal to try to see that there was no competition in bidding . . . . . . On our way to Muttangal I spoke to them about my having taken a lease of the plaint property. I cannot say whether any one else heard it. He knew only of my having taken an oral entrustment of the property and not a written lease."

Mr. Nambiar laid emphasis on this last sentence appearing in this series of answers and argued that assuming the story of the first defendant that he had a conversation with the plaintiff and his father during the course of their journey by bus to Badagara or Muttangal is true, what he told them must have been about the oral lease of 1943 and not about Ex. D-1. I am inclined to think that this series of answers in cross-examination are the result of a certain amount of confusion either in the mind of the cross-examining counsel or in the mind of the witness or of both, because immediately afterwards the witness stated :

> " When Chathukutty came to my shop I had told him about my having taken an oral lease. That was three or four months before we went to Muttangal."

Apparently there were two distinct talks and there was some confusion about them. This however is not a matter which I need pursue further because the question whether the story of the first defendant that he told the plaintiff and his father about Ex. B-1 is true is a plain question of fact and on this point both the Courts have found the evidence to be acceptable. In second appeal, I cannot go behind it.

Mr. Nambiar next argued that even assuming this evidence is true, the talk was necessarily of a casual nature ; so casual in fact that nobody need have taken notice of it. According to him, a casual talk is not sufficient to constitute the sort of notice that section 53-A of the Transfer of Property Act requires. In support of this argument of his, he referred to the decision Re *Tichener*[1]. I do not read that decision as laying down a general rule that in no case will information given in the

1. (1865) 55 E.R. 918.

course of what he called a casual conversation be sufficient to constitute notice. Of course, the informality attending a conversation may be such that no man of ordinary prudence would take any notice of it. If the information had been made available in such circumstances, it may be legitimate to say " I heard it so casually that I took no notice of it." But that cannot be said in this case. It is true the conversation was informal but the information given was such that anybody in the position of the plaintiff was bound to have remembered it. The proviso to section 53-A of the Transfer of Property Act is intended to protect persons who in actual truth and fact have no notice of the interests of the defendants; but when actually and as a matter of fact they have such notice, the informality of the manner in which they acquired that notice or information does not appear to be material. The main thing is that the transferee should know; it does not matter how he knows it. So long as it is credible information, which a person of ordinary prudence will take notice of, he will be bound by it.

The second contention of Mr. Nambiar was that the payment of Rs. 125 which Ex. D-1 recites, is not sufficient part performance within the meaning of section 53-A of the Transfer of Property Act. The second paragraph of section 53-A requires that the transferee should have done some act in furtherance of the contract. Mere payment of money he said would not be an act in furtherance of the contract. In support of his argument he referred to the decision in *Maddison* v. *Alderson*[1]. At pages 478 and 479 the following passage occurs:

> " And it may be taken as now settled that part payment of purchase money is not enough; and judges of high authority have said the same even of payment in full."

The reason for the rule was explained immediately afterwards:

> " The best explanation of it seems to be that the payment of money is an equivocal act not (in itself) until the connection is established by parol testimony, indicative of a contract concerning land . . . . All the authorities show that the acts relied upon as part performance must be unequivocally and in their own nature referable to some such agreement as that alleged."

In this particular case, there can be no doubt whatsoever as to why the sum of Rs. 125 was paid. The document Ex. D-1 expressly states that the demise fee of Rs. 125 has been recovered in respect of the document and there is oral evidence, which was accepted by the Courts below, that the first defendant told the plaintiff and his father that money had already been paid under the document. That seems to be sufficient compliance with the requirements of section 53-A of the Transfer of Property Act and I am not prepared to say that no payment of money can be treated as an act in furtherance of the contract. If the Legislature had intended to lay down a rule that no payment of money was to be treated as an act in furtherance of the contract, I would have expected it to insert the words " not being a payment of money " before the expression " in furtherance of the contract " in paragraph 2 of the section. Both the points taken before me have failed.

In the result, the appeal fails and is dismissed with costs.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice.*

Deva Venkatakrishna Reddi and others .. *Appellants**

v.

Govindaraja Mudaliar .. *Respondent.*

Landlord and tenant—Suit for rent—Joint owner or a co-sharer—If could sue for proportionate rent—Agreement to pay and receive proportionate rent—Exception to rule—How proved.

It must be taken as well established that a joint owner or a co-sharer is not entitled as such to sue for proportionate rent; but it has been held that though this is undoubtedly the established rule,

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1. (1883) L.R. 8 A.C. 467.

* Second Appeals Nos. 1005 to 1009 of 1949 and (C.M.P. Nos. 1138 to 1142 of 1953.) 13th February, 1953.

nevertheless, if the parties, namely, the landholders and the tenant agree to accept and pay proportionate rent according to shares, there is nothing illegal in such an arrangement. There can be an exception to the general rule where there is an agreement between the parties and presumably this agreement can be proved in one or other of the ways known to law.

Raju Goundan v. *Kuppu Goundan*, A.I.R. 1936 Mad. 402, followed.

Appeals against the decrees of the District Court of Chittoor in A. S. Nos. 166, etc., of 1948, respectively, preferred against the decrees of the Court of the Special Dy. Collector, Chandragiri, in R. S. No. 749 of 1946, etc., respectively.

Kasturi Seshagiri Rao and *Kasturi Sivaprasada Rao* for Appellants.

A. K. Muthuswami Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—These second appeals arise out of a batch of suits filed by one of the landholders of Sri Vilasapuram in Tiruttani Division in the Chittoor District against the tenants of the village for the recovery of his share of the rent for faslis 1353 to 1355. The main dispute between the parties in the Courts below and before us was in respect of two matters: (1) whether the plaintiff who was only one of the co-sharers was entitled to sue for his share of the rent due, and (2) what is the proper rate of rent, whether it was payable cropwar or in cash. The Special Deputy Collector of Chandragiri as well as the learned District Judge of Chittoor decided against the tenants-defendants on both the points. They are the appellants before me.

The first contention of the learned counsel for the appellants was that as the plaintiff was admittedly only entitled to 29/40 in a portion of the village which remains undivided between the five sharers including him, he cannot maintain the suit for recovery of a proportionate rent without making the other co-sharers parties. He relied on the decision in *Ethiraja Mudaliar* v. *Murugesa Mudaliar*[1] in support of his contention. That decision, however, does not directly govern the present case. There an elder brother in a divided family commenced proceedings under sections 111 and 112 of the Madras Estates Land Act against the tenants in the village belonging to the family without making his minor younger brother a party to the proceedings. He wanted to bring the entire holding to sale for the arrears of rent due. It was held that it was not competent for him to initiate such proceedings without making the other co-sharers parties. The principle laid down in that decision is to be found in the following passage:

> "If there is more than one landholder . . . . . it would not be competent for one landholder to exercise the power of sale or initiate proceedings in regard thereto without the other landholder or landholders being made parties to such proceedings."

In the present case, the plaintiff is not seeking to do any such thing. He is only seeking to recover his share of the rent due.

It must be taken as well established that a joint owner or a co-sharer is not entitled as such to sue for proportionate rent, but it has been held by a Division Bench in *Srinivasa Varadachariar* v. *Sami Reddi*[2], that though this is undoubtedly the established rule, nevertheless if the parties, namely, the landholders and the tenant agree to accept and pay proportionate rent according to shares, there was nothing illegal in such an arrangement. In that case, the agreement between the parties was evidenced by the execution of pattas and muchilikas in respect of the particular share of the plaintiff landholder. There are no such pattas and muchilikas in the present case. But I consider that the *ratio decidendi* of this decision is that there can be an exception to the general rule where there is an agreement between the parties, and presumably this agreement can be proved in one or other of the ways known to law. Execution of pattas and muchilikas would, of course, be very good evidence, but it may be possible for a court to find such an agreement even on other evidence, as for instance, continued practice and usage. The view I take of the decision in *Srinivasa Varadachariar* v. *Sami Reddi*[2] is also the view taken in *Raju Goundan* v. *Kuppu Goundan*[3]. The learned Judge there observed as follows:

1. (1941) 2 M.L.J. 1088.
2. (1912) 23 M.L.J. 161.
3. A.I.R. 1936 Mad. 402.

" In *Srinivasa Varadachariar* v. *Sami Reddi*[1] it was held that though a joint owner is not entitled to sue for proportionate rent, if parties agree to accept and pay proportionate rent according to shares, there is nothing illegal in it and that an owner of 5 1/8 share in a shrotriem village was held entitled to tender a patta for his 5 1/8 share. This decision therefore seems to assume that it is open by agreement between the several joint holders and the ryot to apportion the rent payable to each landholder and that in respect of each landholder there can be a tender of pattas and muchilikas with reference to that share."

The question is whether there is proof of such an agreement in this case. No doubt the Courts below have discussed this question in dealing with the issue of non-joinder. But I am not satisfied that they have appreciated the correct legal position in dealing with this question. Even the parties did not approach the question in the proper way. It is, therefore, necessary that there should be a fresh finding on this point, after giving an opportunity to both the parties to adduce such evidence as they choose to on the question. I do not think it necessary to remand the case to the trial Court. It is sufficient if it is remanded to the appellate Court with a direction that the learned District Judge may admit such additional evidence as the parties may choose to adduce on this question. To make the position clear, I once more repeat the question which arises for decision, namely, whether in this case there is an agreement between the several co-sharers and the ryots to apportion the rent payable to each landholder by each ryot.

It was next contended on behalf of the appellants that the finding of both the Courts that the prevailing rents in respect of the suit lands is the cropwar rate should be set aside, as it is not supported by the evidence. I do not think in second appeal it is open to me to reject the concurrent finding of the Courts below on what is really a question of fact. It cannot be said that there is no evidence whatever to support the finding of the Courts below. I therefore overrule this contention on behalf of the appellants.

The second appeals are allowed. There will be an order of remand of the appeals to the Court of the District Judge of Chittoor for final disposal of the appeals after deciding the question mentioned earlier on in the judgment as to the maintainability of the suits. The appellant will be entitled to a refund of the Court-fee paid on the memoranda of second appeals. The costs of the second appeals will abide and follow the result.

C. M. P. Nos. 1138 *to* 1142 *of* 1953 :- These applications filed under the provisions of Madras Act XXVI of 1948 shall be transmitted to the Court of the District Judge for disposal.

R.M. *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Moidin Kunhi Beavy and another .. *Appellants**

v.

K. Gopalakrishna Mallayya, minor and another .. *Respondents.*

Easements—Natural rights and easements—Distinction—Right to light and air—When an easementary right—Right to enforce against trespassers.

The right to light and air may be either a natural right forming one of the incidents of property or it may be an easement. Natural rights are by law annexed to, and are inherent in, land *ex jure naturae* and exist *prima facie* in all cases as between a landowner and his neighbour; they are rights *in rem* and enforceable against all who may violate them. Natural rights though resembling easements in some respects are clearly distinguishable from them. The essential distinction appears to lie in this that easements are acquired restrictions of the complete rights of property or to put it in another way, acquired rights abstracted from the ownership of one man and added to the ownership of another; whereas natural rights are themselves part of the complete rights of ownership, belong to the ordinary incidents of property and are *ipso facto* enforceable in law. Natural rights are themselves subject to restriction at the instance of easements. In the case of an easementary right there is no distinction in case of interference with light and air about the adjoining occupier being either a trespasser or an owner.

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1. (1912) 23 M.L.J. 161.

*Second Appeal No. 215 of 1948. 4th February, 1953.

Appeal against the decree of the Court of the Subordinate Judge, South Kanara, in A. S. No. 203 of 1946, preferred against the decree of the District Munsiff Court, Kasargod, in O. S. No. 503 of 1944.

B. Pocker and P.A.Q. Meeran for Appellants.

K. Vittal Rao for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal preferred against the decree and judgment of the learned Subordinate Judge of South Kanara, in A. S. No. 203 of 1946, confirming the decree and judgment of the learned District Munsiff of Kasargod in O. S. No. 503 of 1944.

The established facts are : The plaintiffs have constructed a shop and a building in 1930 and adjoining their premises there was vacant poromboke land. Defendants have occupied this poromboke land and have put up a building, a portion of which they are using as a coffee hotel. There is no dispute that this was long subsequent to the construction of shop and building by the plaintiffs. In putting up that building, the defendants who are trespassers upon the poromboke property have done the following things. They have interfered with the walls of the plaintiff's shop and building in order to raise their roof. In addition they have so put up their roof that they have practically cut off light and free air which used to enter the plaintiff's upstairs through the windows U and R ; they have also constructed an oven in room L-2 and the smoke and offensive smell emanating therefrom gets through these windows into the upstairs of the plaintiffs' shop making the upstairs uninhabitable and constituted an unmitigated nuisance. Therefore they came to Court with this suit for mandatory and permanent injunction in regard to the obstruction of light and air. The contention of the defendants was that the plaintiffs have not acquired an easementary right for light and air and that they were within their rights in doing what they had done. Both the Courts have found that the plaintiffs' version regarding the facts set out above is true and that the plaintiffs interfered with, in their natural right of enjoying the light and air and are entitled to the injunction asked for. Hence the appeal by the defeated defendants.

The sole point for determination before me is whether in order to maintain the suit the plaintiffs should have proved that they had acquired an easementary right to light and air.

In my opinion, the plaintiffs are not bound to show that they have acquired an easementary right in order to obtain the reliefs asked for by them and which has been granted. Here are my reasons.

The right to light and air as pointed out by Peacock in the law relating to easements in British India (3rd Edn.) may be either a natural right forming one of the incidents of property or it may be an easement. It is unnecessary for the purpose of this appeal to go into the question whether the popular amalgamation of both these rights in the phrase " light and air " is accurate or inaccurate. It is enough to point out as mentioned in Combe's Law of Light, page 15, that that phrase is misleading and these two easements though very similar are acquired under different circumstances. That both of them constitute an adjunct to and are inherent in land *ex jure naturae* and exist *prima facie* in all cases as between the landowner and his neighbour and secondly that they can be acquired as an easementary right cannot be disputed.

The distinction between natural rights and easements is drawn by Peacock on Easements (3rd Edn.), at page 24, as follows :

" Natural rights are by law annexed to, and are inherent in land *ex jure naturae*, of natural right, and exist *prima facie* in all cases as between a landowner and his neighbour, otherwise, as Mr. Goddard says in his work on Easements (7th Edn., page 3) ' no man would be assured that his land would not at any moment be rendered useless by a neighbour's act otherwise lawful, or a neighbour might

deprive a landowner of the benefit of certain things which in the course of nature have been provided for the common good of mankind.

Further, natural rights are rights *in rem*, that is, enforceable against all who may violate them, and they are either affirmative, as rights to do something or negative, as rights which every owner of immoveable property has, that his neighbour shall not disturb the natural conditions under which he enjoys his property.

Natural right though resembling easements in some respects, are clearly distinguishable from them.

The essential distinction between easements and natural rights appears to lie in this that easements are acquired restrictions of the complete rights of property, or, to put it in another way, acquired rights abstracted from the ownership of one man and added to the ownership of another, whereas natural rights are themselves part of the complete rights of ownership, belong to the ordinary incidents of property and are *ipso facto* enforceable in law. Natural rights are themselves subject to restriction at the instance of easements."

The basis for both these rights has been set out in *Aldred's case*[1], (page 70 of Peacock on Easement) where it was set out that

"in a house four things are desired,—the habitation of man, the pleasure of the inhabitant, the light and wholesome air, and for nuisance done to the habitation of a man, for that is the principal end of a house, an action lies and so for the hindrance of light and air for both are necessary."

The natural corollary of these natural rights is that they are subject to the rights of adjoining owners who for the benefit of the community have and must have rights in relation to the use and enjoyment of their property that qualify and interfere with those of their neighbours' rights to use their property in the various ways in which property is commonly and lawfully used (per Bramwell, L.J. in *Bryant* v. *Lefever*[2]. These principles were known and recognised in (1) Hindu Law (*see* Halhed's Gentoo Law, page 162); (2) Muslim Law (*see* Hedaya, Hamilton's edition, page 132) and judgment of Norman, J. in *Begaram* v. *K. Karformah*[3] and Anglo Indian law preceding Indian Enactments relating to easements (Peacock on Easements, pages 40 and 604).

There is however a fundamental feature in regard to the exercise of natural right to lateral flow of air and light. If the owner of a property who is entitled to ancient lights the lateral passage of adequate light and unpolluted free air, finds himself obstructed to an appreciable and sensible extent by an adjoining trespasser then he can come forward and seek abatement of this private nuisance. If the person who is obstructing the light and air happens to be the owner of the property, then there can be no cause of action, the simple distinction being that that owner would also be entitled to build right up to the edge of his own property and exercise the same right as the complaining owner *cujus est solum ejusest usque ad coelum et ad inferos*. *Byrant* v. *Lefever*[4] ; *Sarojini* v. *Krishnan*[5].

But if a owner of the property acquires an easementary right in regard to air and light laterally coming to him—every owner of land or building has a natural right to light and air vertically coming to his property and this need not be acquired as an easementary right (Indian Easements Act, section 7, *Illustration* (*d*))—and makes the adjoining tenement a servient one on which the burden is cast of not doing anything which would prevent the exercise of that easementary right he can come forward with a suit claiming his right to easement whenever that right is sought to be interfered with. But if a owner of a property happens to sleep over his rights for a period of 20 years and allows the adjoining owner or even the trespasser acquiring an easementary right to obstruct lateral light and air coming to him he would have been held to have acquiesced in it and he cannot turn round at the end of the period of 20 years and ask for his rights which have become extinguished by the acquisition of easementary rights by the other party to be protected by Court (such rights may also arise under contract express or implied : *Campbell* v. *Peddington Corporation*[6].)

In other words, the distinction between these two sets of rights, *viz.*, natural right and easementary right is this. In the case of an easementary right there is

1. (1738) 9 Rep. 57-b.
2. (1879) L.R. 4 C.P.D. 172 at page 176.
3. (1869) 3 B.L.R. O.C.J. 18 at page 46.
4. (1879) L.R. 4 C.P.D. 172.
5. (1922) 36 C.L.J. 406.
6. L.R. (1911) 1 K.B. 869.

no distinction in case of interference with light and air about the adjoining occupier being either a trespasser or an owner. In either case if the complaining person had allowed the other person to obstruct for over a period of 20 years his right to relief becomes extinguished. In *Bliss* v. *Hall*[1], "twenty years" user" said Hart, J. "would legalise (private) nuisance." There can be no prescription to make a public nuisance (Gale on Easements, 12th Edn., page 404). On the other hand, in the case of the natural right to light and air which is rested on the foot of the principles laid down in *Aldred's case*[1-a] if even within the period of 20 years an owner finds himself cut off from light and air by an adjoining occupier who is a owner he is not entitled to any relief. On the other hand, if the adjoining owner is a wrong doer and is shutting light and air and causing a private nuisance interfering materially with the physical comfort of the plaintiff (*Framji* v. *Framji*[2], *M. Dey* v. *B. Dey*[3], it is certainly open to this owner of the property suffering from that private nuisance to come forward and ask for proper relief which may be similar to the relief which would be granted in the case of easementary right namely injunction or damages for actual injury sustained.

This has been laid down in series of decisions to which I will make a brief reference.

In *Achanna* v. *Venkamma*[4], it has been held by this Court as follows :

"The District Judge has found that the strip of land on which defendant has been attempting to build a wall (as in the instant case) is a piece of Government poromboke between plaintiff's house and the public street and that it does not belong to defendant still. Such being the case we think the Judge was right in holding that it was not necessary for plaintiff to establish prescriptive rights of easement against a wrong-doer and that the mere fact of plaintiff's enjoyment is sufficient to entitle him to an injunction. See *Jeffries* v. *Williams*[5]."

The next case is that of *Bibby* v. *Carter*[6], where it was laid down that the

"law has been distinctly laid down in the case of *Jeffries* v. *Williams*[5] and it would be mischievous to dusturb it. We ought not to leave matters at large where there have been decided cases but abide by them."

In *Dhuman Khan* v. *Muhammad Khan*[7], it was held that the owner of a house, the light coming to which way obstructed by an erection made upon adjoining land by a person who, *qua* such adjoining land is a trespasser, may possibly have an action against the person causing obstruction, even though he has not obtained by prescription an easement of light, but where the person causing such obstruction is the rightful owner of the adjoining land or acting with the permission of the owner, no such action as aforesaid will lie against him unless the plaintiff has acquired an easement. *Jeffries* v. *Williams*[5] and *Achanna* v. *Venkamma*[4], distinguished. It will be noticed that in this case the question whether the adjoining owner was a trespasser or an owner was gone into and that is why the distinction mentioned above was made.

The decision in *Kondappa Rajam Naidu* v. *Devara Konda Suryanarayana*[8] follows *Achanna* v. *Venkamma*[4]. There also plaintiffs had not acquired an easement of prescription in regard to the water course. The defendants who had no manner of right to the water course or the land over which it flowed obstructed the plaintiff's user. It was held that the plaintiff was entitled to an injunction.

In *Mahaboob Khan* v. *Govindarajulu*[9], the proposition was laid down very widely that the law does not know of any natural right apart from a right of easement with reference to a right of passage or right to light and air and in that no one can claim any natural right against another unless he establishes an easement to that effect. The learned Judge has not given any reason for stating this proposition and what is more as the proposition stands it is certainly opposed to the many decisions cited

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1. (1838) 6 Scott 500 : 4 Bing. N.C. 183 : 132 E.R. 758.
1-a (1738) 9 Rep. 57-b.
2. (1905) 7 Bom. L.R. 352.
3. (1875) 15 B.L.R. 361.
4. (1894) 5 M.L.J. 24.
5. L.R. 5 Ex. 792 Goddard, 4th Edn. 467.
6. (1859) 4 H and N. 153 : 157 E.R. 795.
7. (1896) 19 All. 153.
8. (1910) 20 M.L.J. 803 : I.L.R. 34 Mad. 173.
9. A.I.R. 1936 Mad. 142.

above and to the principles laid down in well-known commentaries upon easements to which a reference will be made now.

I have already referred to Peacock on the Law relating to Easements in British India which begins the discussion regarding the Easements of Light and Air with the following striking sentence reproduced above, *viz.*, the right to light and air may be either a natural right forming one of the incidents of property or it may be an easement. Then the learned author starts with the proposition that the owner of land can take and use for his own property as much light and air as come within the boundaries of his land. It is apparent that the quantity of light and air available for his use is in a large measure dependent upon the acts of his neighbour. Then he proceeds to show that this " neighbour " may fall within two classes of perons, *viz.*, owners of property and trespassers. In the case of owners no complaint can be made on the ground of obstruction unless easementary right by exercise for over a period of 20 years has been acquired. Otherwise an owner-neighbour will be at liberty to build up to the edge of his property. Quite different will be the case if obstruction complained of is by a trespasser. If the obstructing trespasser has acquired an easementary right, the adjoining owner will have no remedy. But if the trespasser has not acquired such an easementary right action will lie against him. At page 607 Peacock points out :-

"Similarly the obstruction of light and air before the acquisition of the prescriptive right may be actionable if caused by a trespasser."

Again at page 70 Peacock observes :

" Though the acquisition of these rights in British India by enjoyment for a period of 20 years falls within the provisions of the Indian Limitation Act and Indian Easements Act, yet, if, as may be the case, these rights were to arise independently of those two acts, similar considerations would present themselves as to the manner of their origin, as under the English common law prior to the English Prescription Act which has no force in British India."

In Goddard on the Law of Easements (8th Edn.), page 472, it is stated thus :

"It may be taken, then, as settled law, that an owner of buildings cannot maintain any action for removal of support against the owner of the adjacent or subjacent soil, until he has acquired a right to support for his buildings. This, however, is not the case if a wrongdoer—a person who has no right in the soil—interfers with it, and by removing the support causes the building to fall, for, in such case, an action will lie against him at the suit of the owner of the damaged building, even though the latter has not acquired any right to support."

Then coming to Gale on Easements (12th Edn.), chapter III, page 295, it is pointed out that,

" By the laws of all countries, and by the English law at a very early period, it appears that an action would lie for the obstructing of ancient lights."

Then at page 393 it is pointed out how notwithstanding the fact that right of easement has not been acquired, if the obstruction constitutes, a nuisance, certainly a claim for that abatement in the shape of injunction or damages will lie. It need not be pointed out that what constitutes nuisance would be a question of fact in each case. Per Lord Loreburn in *Polsue and Alfeini, Ltd.* v. *Rushmer*[1], quoting Lord Halsbury in *Colls* v. *Home and Colonial Stores*[2]. It must be an inconvenience materially interfering with the ordinary comfort physically of human existence. In other words the law would not favour the modes of the dainty and would only support the plain sober and simple notions among the people. *Lex non favet delicatorum votis.*

Then coming to Combe's Law of Light, as already mentioned, it distinguishes between the easement to air and light. Even Combe's discussion shows nothing more than that as between two owners, a land owner has no natural right to the continuance of the flow of air unobstructed by his neighbour's building and he cannot acquire a general right but only acquire a right to the continuance of the passage of air through a strictly defined channel as otherwise legal easement would be too burdensome or indefinite to admit of its recognition in a court of law (*See*

1. L.R. (1907) A.C. 122. 2. (1904) 73 L.J. Ch. 484 : L.R. (1904) A.C. 179.

Bryant v. *Lefever*[1]; *Hall* v. *Lichfield Brewery*[2]; *Roberts* v. *Macord*[3]; *Potts* v. *Smith*[4]; *Harris* v. *De Pinna*[5]. It will be noticed that even here it is not stated that as against a trespasser there can be no action in regard to nuisance being caused by acts of his shutting light and air which has been found to be in the instant case.

Therefore both the lower courts have rightly appreciated the evidence and applied the correct principles of law and gave the plaintiffs the proper reliefs asked for by them.

There are no grounds to interfere in the second appeal and it is dismissed with costs. No leave.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Messrs. Kothari & Sons .. *Appellant**

v.

V. Krishna Rao .. *Respondent.*

Limitation Act (IX of 1908), section 24 and Article 90—Period of limitation—Computation—How made.

The third column in Article 90 of the Limitation Act must be read with the modification contained in section 24 of the Act. Under that section the period of limitation should be computed from the date when the injury resulted. The time from which period begins to run under the third column of Article 90 of the Limitation Act can be extended by invoking the provisions of section 24 of the Limitation Act.

Govind Narayan v. *Rangnath*, (1929) I.L.R. 54 Bom. 226, *Kedarnath* v. *Hargovind*, (1926) 24 A.L.J 550 and *Jagannath Marwari* v. *Kalidas*, (1929) I.L.R. 8 Pat. 776. followed.

Rangaswami Aiyangar v. *Srinivasa Aiyangar*, (1910) 21 M.L.J. 453, dissented from.

Appeal against the decree of the Court of the Subordinate Judge, Vellore, in A. S. No. 139 of 1947, preferred against the decree of the Court of the District Munsiff, Vellore, in O. S. No. 399 of 1945.

R. Narasimhachariar for Appellant.

P. C. Parthasarathi Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—The defendants, a firm of stock brokers and commission agents, Madras, are the appellants in this second appeal. They were sued by the respondent to recover a sum of Rs. 1,064-14-0 for damages caused by their negligence in effecting a sale of 40 shares of the Travancore National and Quilon Bank, Ltd., hereinafter called the Bank. The shares were of the paid up value of Rs. 25 each, the face value of which was Rs. 50. The plaintiff, with a view to have the shares sold, requisitioned the services of the defendants and on 9th May, 1938, by Ex. P-1 the shares were handed over to the defendants. The bank went into liquidation in 1938 and on 10th March, 1939, a demand was made on the plaintiff by the liquidators of the bank for payment of the unpaid call money. He thereupon came to know from the defendants by their letter of 20th April, 1939, that the shares were in fact sold to the bank. The plaintiff made an unsuccessful attempt in the High Court by an application to have the share register rectified by excluding his name from the list of contributories. The application was dismissed on 19th December, 1941. The plaintiff was thereafter obliged to pay from time to time the balance calls amounting in all to Rs. 1,000 and odd. The first payment was made on 13th March, 1944, and the last was on the 20th April, 1945. On 1st October, 1945, the present suit was instituted by the plaintiff to recover the sum as damages on the ground that the defendants, by their negligence brought about an

1. (1879) L.R. 4 C.P.D. 172.
2. (1890) 49 L.J. Ch. 655.
3. (1832) 1 M. and R. 230: 174 E.R. 78.
4. (1868) L.R. 6 Eq. 311.
5. (1836) L.R. 33 Ch.D. 238.

* Second Appeal No. 784 of 1949. 3rd February, 1953.

invalid sale as they should have known that the bank could not buy its own shares by reason of the prohibition contained in section 55 of the Indian Companies Act. The suit was instituted in the District Munsiff's Court, Vellore.

The suit was resisted by the defendants on three principal grounds: firstly that it was barred by limitation under Article 90 of the Limitation Act; secondly that the Court had no territorial jurisdiction to try the suit as the cause of action did not arises within its jurisdiction; and lastly that there was no negligence on their part. Both the Courts below disallowed the objections of the defendants and granted a decree in favour of the plaintiff. Hence this second appeal.

The same grounds have been repeated before me. Grounds Nos. 2 and 3 may be disposed of easily. Regarding want of jurisdiction in the Court which tried the suit, the defendants were not able to establish any prejudice which affected the merits of the case to entitle a reversal of the decree on the ground of want of jurisdiction assuming that the Court had no jurisdiction. The question of negligence is one of fact and the Courts below arrived at a concurrent finding that the plaintiff was able to establish negligence on the part of defendants as they did not take the simple precaution of not selling the shares to the bank itself. There is no ground to interfere with the finding of fact.

There remains the question of limitation. Under Art. 90 of the Indian Limitation Act for "other suits by principals against agents for neglect or misconduct" a period of three years is provided for and time begins to run from "when the neglect or misconduct becomes known to the plaintiff." It was argued on behalf of the appellant that on the facts as stated above, the plaintiff had definite knowledge that the shares were sold to the bank at least on the 20th April, 1939 and as the suit was filed more than three years from the date it was barred by limitation. But it must be mentioned that by that date no damage in fact had accrued to the plaintiff. The plaintiff was later called upon to pay the calls and it was not until 20th April, 1945, that the last of the payments was made, the first of such payments having been made on the 13th March, 1944. If the period of limitation is to be counted from those dates, undoubtedly the suit is in time. But unfortunately, that is not the language of the third column of Art. 90 of the Limitation Act. In answer to the contention of the learned counsel for the appellant, the respondent's learned counsel relied upon section 24 of the Limitation Act, which provided that:

> "in the case of a suit for compensation for an act which does not give rise to a cause of action unless some specific injury actually results therefrom, the period of limitation shall be computed from the time when the injury results."

I at first thought that this section would have application only to suits based on a cause of action in which the claim for damage is an essential part as in the case of actions for slander. But such a doubt is dispelled by the illustration to the section and also by the decisions which have applied that section to different articles of the Limitation Act. *Govind Narayana* v. *Ranghath Gopal*[1], is a case of misfeasance summons against directors for loss occasioned by their negligence. It was held that the application was governed by Art. 120 of the Limitation Act, and the cause of action to make the application arose, within the meaning of section 24 of the Indian Limitation Act, when the actual damages had resulted. It is an instance, therefore, where the time from which period begins to run under the third column of the Limitation Act was extended by invoking the provisions of section 24 of the Limitation Act. Similarly in *Kedarnath* v. *Hargovind*[2], section 24 of the Limitation Act was invoked to a case to which Art. 116 applied. In *Jagannath Marwari* v. *Kalidas*[3], the suit was for damages for malfeasance based on an implied covenant that the surface owner had an inherent right of support from the owner of underground mines. It was held that such a suit was governed by Article 115 of the Limitation Act and under section 24 of the Limitation Act the cause of action arose

1. (1929) I.L.R. 54 Bom. 226.
2. (1926) 24 A.L.J. 550.
3. (1929) I.L.R. 8 Pat. 776.

from the date when the injury had resulted to the plaintiff and not from the date of malfeasance or misfeasance provided for in the Article.

In the light of these decisions, in my opinion, the third column in Article 90 must be read with the modification contained in section 24 of the Limitation Act, as the present is an action in which no cause of action could have been complete to the plaintiff unless and until the specific injury had actually resulted. Under the section, the period of limitation should be computed from the date when the injury resulted. So, reading the Article and the section together, the present suit which was instituted within three years from the date when the injury actually resulted to the plaintiff, *i.e.*, the date when he made the payments is clearly within time.

The appellant's advocate drew my attention to a decision of a single Judge of this Court in *Rangaswami Iyengar* v. *Srinivasa Iyengar*[1], in which Article 90 was applied and the suit was held to be barred by limitation but section 24 was not considered by the learned Judge. With great respect, I am unable to follow the decision in that case. The other decisions relied on by the learned advocate for the appellant, *Annamalai Chettiar* v. *Cowasji*[2], *Janki Koer* v. *Mahabir Prasad*[3], and *Saw Hla Pru* v. *S. S. Halkar*[4], do not at all throw any light upon the question which arises for consideration in the present case where the date of knowledge is different from the date when the damage actually accrued or resulted. In cases where the two dates coincide, there is no difficulty in applying Article 90 as in that event the period of limitation begins to run from the date of knowledge, which is also the date when the damage has resulted. These decisions did not consider—and perhaps there was no necessity for considering—the applicability of section 24 of the Indian Limitation Act.

I am therefore of opinion that the view taken by the Courts below that the suit was not barred by limitation is correct and the second appeal is dismissed with costs. No leave.

R.M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATARAMA AIYAR.

Voruganti Seshireddi .. *Appellant**

v.

Vanka Venkata Subbayya and others .. *Respondents.*

Negotiable Instruments Act (XXVI of 1881), section 51—Negotiation by several payees at intervals—Validity—Delivery of instrument in such cases to constitute negotiation—Section 48—Compliance.

Section 51 of the Negotiable Instruments Act requires that where there are several payees of a negotiable instrument all of them should endorse the instrument in order to negotiate the same. The section, however, does not require that all of them should endorse at the same time.

Muhammad Khumrali v. *Rangarao*, (1901) I.L.R. 24 Mad. 654 and *Annamalai Chetti* v. *Muthiah Chetti*, (1922) M.W.N. 263, followed.

[Sufficiency of delivery in such cases to constitute negotiation of instrument considered.]

Appeal against the decree of the Court of the Subordinate Judge, Guntur, in A. S. No. 133 of 1948, preferred against the decree of the Court of the Principal District Munsiff, Narasaraopet, in O. S. No. 103 of 1946.

P. Babulu Reddy for Appellant.

K. Kotayya for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal raises a question under section 51 of the Negotiable Instruments Act. The first defendant is the appellant. On 23rd October, 1943, he executed a promissory note for Rs. 2,500 (Ex. P-1) in favour of the fourth defendant Ilhuri Yallamanda Reddi and his three sons, defendants 5 and 6,

1. (1910) 21 M.L.J. 453.
2. A.I.R. 1938 Rang. 258.
3. (1914) 25 I.C. 706.
4. (1931) I.L.R. 9 Rang. 575.

*Second Appeal No. 1159 of 1949. 29th January, 1953.

and one Koti Reddi since deceased. The plaintiff sued as endorsee of this promissory note, to recover the balance of the amount due thereunder. The appellant resisted the suit on various grounds. But the only defence that is now material is that there was no proper endorsement or negotiation of the promissory note in favour of the plaintiff and that in consequence, no action is maintainable thereon. This contention is based on the fact that on 17th April, 1944, the 4th defendant alone made the endorsement (Ex. P-3) and delivered the promissory note to the plaintiff and that the other payees Koti Reddi and defendants 5 and 6 endorsed (Ex. P-4) and redelivered the promissory note to the plaintiff on 29th December, 1945. The contention is that under section 51 of the Negotiable Instruments Act where there are several payees, all of them should endorse and deliver the instrument and there having been one endorsement and delivery by the 4th defendant on 17th April, 1944, and another by his sons on 29th December, 1945, the requirements of the section have not been complied with.

Section 51 of the Negotiable Instruments Act runs as follows:

"Every sole maker, drawer, payee or indorsee or all of several joint makers, drawers, payees or indorsees, of a negotiable instrument may, if the negotiability of such instrument has not been restricted or excluded as mentioned in section 50, indorse and negotiate the same."

This section requires that where there are several payees, all of them should endorse the instrument. Here, there is an endorsement by all the payees, though on different dates. The section, however, does not require that all of them should endorse at the same time. In *Muhammad Khumarali* v. *Rangarao*[1], the defendant had executed a promissory note in favour of the plaintiff and one Maligiri Rao. The latter endorsed it to the plaintiff who sued to recover the amount due on the note. It was held that to operate as a valid endorsement under section 51, it must have been by all the payees and that the plaintiff could not recover as the endorsee of the instrument. Bhashyam Aiyangar, J., went on to observe:

"If, in the present case, the plaintiff also had signed the endorsement in his favour at the time of the endorsement or even prior to the institution of the suit, the action would have been maintainable by him as endorsee."

These observations were followed in *Annamalai Chetti* v. *Muthiah Chetti*[2]. In that case the first defendant had executed a promissory note in favour of the second defendant who had endorsed it to defendants 3, 4 and 5. The third defendant then endorsed the note in blank and delivered it to defendants 4 and 5 who subsequently endorsed and delivered it to the plaintiff. The suit was contested by the maker on the ground that as defendants 3 to 5 had endorsed the promissory note on two different dates, the same was not valid, under section 51 of the Negotiable Instruments Act and conferred no title on the plaintiff as endorsee. Following the observations in *Muhammad Khumarali* v. *Rangarao*[1], Kumaraswami Sastri and Devadoss, JJ., held that there was a valid endorsement. It must, therefore, be held that the endorsement on the suit promissory note under Ex. P-3 and P-4 on 17th April, 1944, and 29th December, 1945, is valid and entitles the plaintiff to sue as endorsee of the instrument.

It was next contended that in any event there was no valid negotiation of the promissory note in favour of the plaintiff, as there was no delivery of the instrument by defendants 5 and 6 and Koti Reddi on 29th December, 1945. Section 48, of the Negotiable Instruments Act is as follows:

"Subject to the provisions of section 58, a promissory note, bill of exchange or cheque payable to order, is negotiable by the holder by indorsement and delivery thereof."

That section requires both endorsement and delivery for a valid negotiation and what is argued is that as the promissory note had been delivered by the fourth defendant to the plaintiff on 17th April, 1944, there was on 29th December, 1945, only an endorsement by defendants 5, 6 and Koti Reddi and no delivery by them and that therefore, there was no valid negotiation. The decision in *Annamalai Chetti* v. *Muthiah Chetti*[2], on which the respondent relied was distinguished on the

1. (1901) I.L.R. 24 Mad. 654. 2. (1922) M.W.N. 263.

ground that the delivery of the promissory note by the third defendant in that case was not to the plaintiff but to his joint endorsees defendants 4 and 5 and that when the latter endorsed and delivered the note to the plaintiff, the requirements of sections 48 and 51 of the Negotiable Instruments Act were complied with whereas in the present case there was a delivery to the plaintiff by the 4th defendant on 17th April, 1944, without a valid endorsement as required by law and an endorsement in favour of the plaintiff on 29th December, 1945, by defendants 5, 6 and Koti Reddi without delivery of the instrument. The plaintiff did not therefore acquire a valid title as endorsee. That is the contention. But the delivery of the promissory note on 17th April, 1944, by the 4th defendant cannot be held to be a delivery constituting negotiation of the instrument as that could be done only if there was a valid endorsement. If on 17th April, 1944, there was no valid endorsement—and there was no valid endorsement because it was only by the 4th defendant—the delivery of the promissory note by the latter to the plaintiff could not be regarded as delivery vesting in him the title to the promissory note as a negotiable instrument. Such delivery being ineffectual to operate as a negotiation of the promissory note, it was open to the payees at any time thereafter to make a fresh and valid endorsement and negotiation. When the other payees decided on 29th December, 1945, to join in the endorsement and the promissory note was handed over by the plaintiff to them for that purpose, they had the right to make an endorsement in accordance with section 51 of the Act and deliver the promissory note to the plaintiff. Therefore, when defendants 5, 6 and Koti Reddi made the endorsement on 29th December, 1945 and then delivered the promissory note to the plaintiff, there was a valid endorsement and negotiation of the promissory note to the plaintiff so as to vest the title in him as holder. There is the further fact found in this case that the endorsement dated 29th December, 1945, was made by defendants 5, 6 and Koti Reddi under the directions of the fourth defendant. It must therefore be held that the requirements of the statute as to endorsement and delivery have been satisfied and that the plaintiff is entitled to recover as an endorsee of the promissory note. In this view, it is unnecessary to discuss the question whether the endorsements could operate as assignment of choses in action.

In the result, the second appeal fails and is dismissed with costs. No leave.

R.M. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRA REDDY.

James Manickam .. *Petitioner**

v.

Jaya Narayan Daga .. *Respondent.*

Civil Procedure Code (V of 1908)—Order 37, rule 2 and Schedule B, Form No. 4—Summary suit—Leave to defend—Application out of time—If Court can extend the time—Limitation Act (IX of 1908), section 5—Applicability.

When a period has been fixed for the purpose of doing an act or taking a proceeding under the statute of Limitations or under any other enactment, Courts do not possess the power to extend the time unless and until such a power is specifically conferred on them.

Order 37, Civil Procedure Code, does not contain any provision for extending the time prescribed in the summons in Form No. 4, Schedule B of the Code. Nor has section 5 of the Limitation Act been extended to this Chapter of the Civil Procedure Code. The City Civil Court, to which Order 37, Civil Procedure Code, applies, has no power to condone the delay in filing and obtaining leave to defend suits filed under Rule 2 of Order 37, Civil Procedure Code.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Principal Judge, City Civil Court, Madras, dated 9th July, 1952, in I. A. No. 1153 of 1952 in O. S. No. 37 of 1952.

Subramaniam for *Messrs. Jan and San* for Petitioner.

V. Krishnaswami for Respondent.

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* C.R.P. No. 1686 of 1952. 5th March, 1953.

The Court delivered the following

JUDGMENT.—This revision petition is filed by the defendant against the order of the Principal Judge, City Civil Court, refusing to extend time for leave to appear and defend the suit instituted by the respondent under the summary provisions of Order 37 of the Civil Procedure Code. The suit was laid for the recovery of Rs. 1905 due on a promissory note executed by the defendant for Rs. 6000 on 4th June, 1951. The suit amount was claimed after giving credit for Rs. 4,700 paid by the defendant on various dates subsequent to the execution of the promissory note. Summons was issued in form No. 4 in Appendix B of the Civil Procedure Code, and the defendant was called upon to obtain leave to appear and defend within ten days from the service of the summons, if need be. Although the defendant filed a Vakalat on the 29th January, 1952, he did not make an application for leave to appear and defend the suit. He merely filed a written statement on the 13th March, 1952.

When the suit came on for hearing on that date, the plaintiff asked for a decree as the defendant had not applied for leave to defend the suit. Thereupon the defendant filed an application for permission to defend the suit and also for excusing the delay in doing so.

This was opposed by the plaintiff. It was contended on behalf of the plaintiffs that the Court had no jurisdiction to enlarge the time for application for leave to defend and secondly the affidavit in support of the petition to excuse delay, did not disclose sufficient cause to condone the delay. The reason given by the defendant in the application to excuse delay was that he mislaid the summons and focussed all his attention on a garnishee summons and never noticed the circumstance that the suit had been filed under Order 37, rule 5, Civil Procedure Code.

The trial Court while overruling the objection as to the jurisdiction, dismissed the petition holding that he did not believe the defendant's story that the summons was mislaid and that the neglect was so culpable as to disentitle the defendant to all relief. The aggrieved defendant has filed this revision petition.

Mr. Subramaniam urged that the reasons given by the learned City Civil Judge for dismissing the petition are untenable. On the other hand Mr. Krishnaswami maintained that the view of the trial Court that it had jurisdiction to extend time and to condone delay is erroneous, and there is no basis for this under the provisions of Order 37, and it is not necessary to canvass the finding on the merits.

So the main point for consideration is, whether it was competent for the trial Court to extend time for filing an application, for leave to defend. In support of the view that the Court has got power to enlarge time in such cases, reliance was placed on the ruling of Mack, J., in *Murahari Rao* v. *Bapayya*[1]. In that case a suit was filed on a promissory note under under Order 37, rule 2, Civil Procedure Code. Summons was issued to the defendant calling upon him to apply within ten days for leave to defend if he should choose to do so. On the 11th day after service of notice, the defendant appeared and asked for leave to defend. The District Munsiff in whose Court, the suit was instituted granted him leave, asked for disagreeing with the objection raised on behalf of the defendant that there was no provision in Order 37 of the Civil Procedure Code to excuse delay or to extend time beyond the ten days prescribed in the summons. It may be stated here, incidentally, that the ten days time mentioned in the summons in Form No. 4 is prescribed by Article 159 of the Limitation Act.

In a revision petition against the order of the District Munsiff, Mack, J., laid down that if under Order 37, rule 4, a Court could set aside a decree under special circumstances, it can *a fortiori* have power to give the defendant leave to defend although the time mentioned in the summons had expired. I must express my respectful disagreement with this view of the learned Judge.

There can be no controversy that Order 37, does not contain any provision for extending the time prescribed in the summons in Form No. 4, Schedule B. Nor has

1. (1949) 1 M.L.J. 514.

section 5 of the Limitation Act been extended to this chapter of the Civil Procedure Code. It does not follow that a Court has power to extend time or condone delay in filing an application for leave to defend within the prescribed time, merely because the Court is invested with power to set aside decrees under special circumstances under Order 37, rule 4.

When a period has been fixed for the purpose of doing an act or taking a proceeding under the statute of Limitations or under any other enactment, Courts do not possess the power to extend the time unless and until such a power is specifically conferred upon them. In this case, the Courts have not been invested with such a power. That being so, in my opinion, it is not competent for a Court acting under Order 37, Civil Procedure Code, to excuse delay in filing an application for leave to appear and defend in a suit under the summary chapter.

This view gains support from the observations of the learned Chief Justice who delivered the judgment on behalf of the Bench in *Kamalamma* v. *Ismail*[1]. The point for consideration in that case was whether the provisions of Order 37, rule 4 was applicable to suits filed on the Original Side of this Court. An argument was advanced on behalf of the defendant that that rule was applicable to suits on the Original Side, because Order 7 of the Original Side Rules which deals with the procedure for suits to be filed under that order was silent on the subject and also for the reason that the applicability of Order 37, rule 4 had not been specifically excluded. The learned Chief Justice has remarked that although Order 7 of the Original Side Rules deals with the procedure for summary suits like Order 37, Civil Procedure Code, it differs in material particulars from Order 37, rule 4, of the Code. One of such differences, the learned Chief Justice has pointed out is that while there was no provision under Order 37, of the Code for enlargement of time over and above ten days for applying and obtaining leave to defend, there is a provision under Order 7 of the Original Side Rules for extension of time.

I am clearly of opinion that the City Civil Court to which the provisions of Order 37, Civil Procedure Code, apply, has no power to condone the delay in filing and obtaining leave to defend suits filed under rule 2 of Order 37, of the Civil Procedure Code. It follows that the order under revision has to be confirmed though for different reasons.

In the result, the civil revision petition is dismissed without costs.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Chellammal and another .. *Appellants**

v.

K. T. A. Abdul Rahiman Rowther and others .. *Respondents.*

Court-fees and Jurisdiction—Suit for partition of lands, in Dharmasanam village and for declaration of joint right in certain impartible items—Mode of valuation—Jurisdiction.

In a suit for partition of the plaintiff's share in a Dharmasanam village, the value for purpose of court-fee and jurisdiction must be ascertained with reference to the plaintiff's share of the items. This is on the analogy of partition suits in which the share of the plaintiff is held to matter. Where the plaintiff has also prayed for declaration of his joint right in certain porambokes incapable of partition, his relief is not capable of valuation as in the case of temple or such other trust properties. Where the land itself being impartible and communal property not capable of valuation, the existence of trees on the land, and which has a particular money value, cannot affect the question of valuation of the suit.

Kalander v. *Kunhipakki*, (1947) 1 M.L.J. 112 ; *Rajagopala Naidu* v. *Ramasubramania Aiyar*, (1923) 45 M.L.J. 274 ; I.L.R. 46 Mad. 782 (F.B.) and *Manickam Pillai* v. *Nagasami Aiyar*, (1934) 67 M.L.J. 688, referred to.

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1. (1951) 1 M.L.J. 676.

* C.R.P. No. 229 of 1951. 5th February, 1953.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Ramnad, at Mathurai, dated 29th June, 1950, in C. M. A. No. 6 of 1950, preferred against the order of the Court of the District Munsiff of Paramakudi in O. S. No. 335 of 1945.

R. Kesava Aiyangar and *K. Parasaran* for Appellant.

The Government Pleader (*P. Satyanarayana Raju*) and *U. Somasundaram* for Respondents.

The Court delivered the following

JUDGMENT.—The question in this case is one of court-fee and jurisdiction. The Court of first instance returned the plaint for presentation to the proper Court finding that it exceeded its pecuniary jurisdiction. The Court of appeal having affirmed the order of return of plaint the plaintiff in the case comes up here in revision.

The petitioner is interested in a 2/13th share of Dharmasanam village. Items 1 to 5 are the Dharmasanam items and items 6 to 8 are certain porambokes. He sought partition and delivery of 2/13th share in respect of items 1 to 5, because they were partible in character and sought a declaration of a joint right in respect of the impartible items 6 to 8. A Commissioner appointed in this suit valued items 6 to 8 with reference to the trees that stood thereon as at Rs. 2,700. It is on the basis of this valuation and on the basis of the supposition that the plaintiff's right in respect of the items in suit was in respect of the whole in each one of them and not a share only that the Courts below held this suit is beyond the pecuniary jurisdiction of the trial Court.

It is contended by Mr. Kesava Aiyangar that the jurisdictional value must be ascertained with reference to the plaintiffs' 2/13th share in respect of the Dharmasanam half of the plaint items. It is also contended that so far as items 6 to 8 are concerned, they are not capable of partition and that therefore the value put by the plaintiffs on the relief sought in respect of them is final.

I am of opinion that the contentions for the petitioners are well-founded and must prevail. The first contention is supported by the authority of cases relating to partition suits in which it is the value of the share of the plaintiff that has been held to matter (Vide *Kalander* v. *Kunhipakki*)[1]. The second contention is supported by the analogy of cases relating to temple properties or such other trust properties which have been held to be not capable of valuation (vide *Rajagopala Naidu* v. *Ramasubramania Aiyar*[2] and *Manickam Pillai* v. *Nagasami Aiyar*[3]). The difficulty, however, in the way of Mr. Kesava Aiyangar suggested by the learned advocates for the respondents is that items 6 to 8 were valued as at Rs. 2,700 with reference to the trees thereon, which by themselves are capable of being valued. But if the case of the trees is to be judged as not dissociable from the land on which they stood and if the land itself being impartible and communal property not capable of valuation it follows that the value of the trees cannot affect the question of valuation of the suit. It follows that this revision petition must be allowed with costs, here and in the Courts below.

R.M. *Petition allowed.*

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1. (1947) 1 M.L.J. 112.
2. (1923) 45 M.L.J. 274 : I.L.R. 46 Mad. 782 (F.B.).
3. (1934) 67 M.L.J. 688.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

M. Kanniappan .. *Petitioner**

v.

Akilandammal .. *Respondent.*

Criminal Procedure Code (V of 1898), *section* 488—*Scope—Right of wife to maintenance—" Living in adultery "—Interpretation.*

Continuous adulterous conduct is what is meant by ' living in adultery " in section 488 of the Criminal Procedure Code. When an application for maintenance is made against a husband the Magistrate has to decide whether there has been such an adulterous conduct on the part of the wife at or about the time of the application, that is to say, shortly before or shortly after the application was made, interpreting the word " shortly " in a reasonable and liberal manner. Mere past conduct and that too of an occasional lapse from virtue does not dissentitle the wife from getting maintenance. But the Magistrate may in his discretion refuse to grant an allowance where in spite of absence of proof of " living in adultery " there exist circumstances which justify such refusal. (Scope and object of Chapter XXXVI of the Code of Criminal Procedure elaborately reviewed.)

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Chief Presidency Magistrate, dated 10th May, 1952, in M. P. No. 1099 of 1951.

T. R. Kesavalu for Petitioner.

The State Prosecutor (*S. Govind Swaminathan*) for Respondent.

The Court made the following

ORDER.—This is a Criminal Revision Case filed against the order made by the learned Chief Presidency Magistrate, Egmore, in an application preferred under section 488, Criminal Procedure Code, in M. P. No. 1099 of 1951, involving an important question of interpretation of the words " living in adultery."

The facts are : The petitioner Akilandammal is the lawfully wedded wife of the respondent M. Kanniappan. They belong to the scheduled caste. This Kanniappan was a member of the previous Legislative Assembly. In the recent elections also he tried but failed. This Kanniappan was a detenu during the Civil disobedience movement. While he was in detention this Kanniappan had directed his wife Akilandammal to live with his mother at No. 68, Kalathi Appu Mudali Street, Choolai, Madras. The dependents of these detenues were being supported by Government. In this case under the instructions of this Kanniappan the wife Akilandammal was being given a maintenance of Rs. 15 per month for two years. On this respondent coming back from jail in 1944 he found that his wife had not been living with his mother. On enquiries he found that this Akilandammal had been living in adultery with Kapali and Venkatesa Raju alternatively. Therefore, this Kanniappan has not been maintaining her though there is evidence that he is possessed of sufficient means to do so. He is not exactly employed now but owns a house bearing No. 78, Kalathi Appu Mudali Street, fetching a rent of Rs. 50 per month. This Kanniappan also as a political sufferer was allotted 10 acres of land of which he has got possession of 2½ acres of wet lands in Ponneri. He has also invested Rs. 500 in a hotel at Saidapet, which has a daily sale of Rs. 40. He had also received a purse of Rs. 6,000 from the handloom weavers whose Satyagraha, he organised and led. It is in these circumstances that the petitioner Akilandammal filed this petition for maintenance under section 488, Criminal Procedure Code. The defence of Kanniappan for not being liable to maintain his wife was that she has been living in adultery.

The learned Chief Presidency Magistrate made a proper approach to the appreciation of the evidence regarding adultery. As pointed out by Pandrang Row, J., in *Kista Pillai* v. *Amirthammal*[1], followed by Somasundaram, J., in *Subbayyamma* v. *Venkatarao*[2], where the husband made allegations, as in this case, that the wife was living in adultery and made that his defence to refuse the claim of the wife for

*Crl.R.C. No. 713 of 1952. 3rd September, 1952.
(Crl.R.P. No. 600 of 1952.).

1. (1938) 2 M.L.J. 407. 2. (1952) 2 M.L.J. 183.

maintenance the husband was made to begin the case and let in evidence of unchastity and the wife was allowed to rebut it. Then in regard to proof of adultery the learned Magistrate has rightly insisted that there must be clear proof of adultery and that it is not rested upon mere suspicion as laid down in *Sheigh Issake* v. *Biyamunni Ummah*[1], *Empress* v. *Nandan*[2] and *Jodhan Sahu* v. *Kulwanti Kuer*[3]. The learned Magistrate should however bear in mind in regard to the quantum of evidence to prove adultery that though tittle-tattle and bazaar gossip will not do, direct evidence will not often be possible and that the proof which he requires is that which is set down in section 3, Indian Evidence Act, *viz.*, that after considering the matters before it the Court either believes that adultery had been committed or considers that its factum was so probable that a prudent man ought under the circumstances of the instant case could act upon the supposition that adultery existed. The learned Chief Presidency Magistrate has in the instant case set up a standard of proof which is far in excess of the requirements of section 3 of the Indian Evidence Act and which standard of proof is incapable of normal adduction. I do not further develop this point as I am remanding the case and I do not wish to embarrass the Chief Presidency Magistrate in his reappraisal of the evidence in disposing of the case beyond hoping that he would bear in mind these observations. The learned Magistrate has really rested his conclusion for granting maintenance in this case on an interpretation of the words " living in adultery " which requires careful examination and which will be my endeavour in the next succeeding paragraphs.

In order to construe the term " living in adultery " properly and apply it to the facts of each case we must bear in mind the following factors :

Chapter XXXVI of the Criminal Procedure Code relating to maintenance of wives and children is out of place in the Criminal Procedure Code and it is here inserted because corresponding provisions were placed in the Codes of 1861 and 1872. Sir James Fitzsjames Stephen thinks that this Chapter should be placed in Part IV relating to prevention of offences, as he says it is a mode of preventing *vagrancy* or at least preventing its consequences. Unfortunately, though vagrancy is an offence in England, it is not and never has been an offence in India : Whitley Stroke's Anglo Indian Codes, Vol. II, page 29. But it is clear however from the decision in *Parrapath Chinna* v. *Sankunni Menon*[4], that the object of including the maintenance section in the Code would only have been the prevention of destitution on public grounds ; that it should only be applied in cases where in the absence of these provisions or the more cumbersome process of civil law the wife or children would be destitute. The object is not to punish a husband or a parent for his past neglect but to prevent vagrancy by compelling those who could do so to support those who are themselves unable to do so and have a moral claim to be supported. *See* In re *The petition of Shaik Fadruddin*[5] and In re *Gulabdas Bhaidas*[6]. That is why the fact that the wife has separate or independent means of support has always been considered to be an element which might be taken into consideration in fixing the quantum of maintenance paid to the wife : *Narasimha* v. *Rangathayammal*[7]. That is why also a healthy and ablebodied husband has always been construed to have the means to support his wife or child which includes capacity to earn money as has been laid down in *Emperor* v. *Sardar Muhammad*[8] ; *Metha* v. *Nagasane*[9] and In re *Kandaswami Chetti*[10], notwithstanding the fact that the husband is an insolvent, *Mahomed Hussain Abdul Kadir* v. *Emperor*[11]; *Shyama Charan* v. *Anguri Devi*[12]; In re *Mohamedali Mithabai*[13], or that he is a professional beggar, *Boya Kondamma* v. *Boya Kondaiya*[14] or that he is still young (19 years old) and unemployed, In re *Kandaswami Chetti*[15],

1. (1885) 2 Weir 647.
2. (1881) 1 A.W.N. 37.
3. A.I.R. 1948 Pat. 285.
4. (1919) 37 M.L.J. 361 at 362.
5. (1884) I.L.R. 9 Bom. 40.
6. (1891) I.L.R. 16 Bom. 269.
7. (1946) 2 M.L.J. 479.
8. (1936) 37 Cr. L.J. 207.
9. (1912) 13 Cr.L.J. 162 : 13 I.C. 914.
10. A.I.R. 1926 Mad. 346.
11. A.I.R. 1940 Bom. 344.
12. I.L.R. (1938) All. 486 : A.I.R. 1938 All. 253.
13. A.I.R. 1930 Bom. 144.
14. (1885) 2 Weir 616.
15. (1926) 50 M.L.J. 44.

or he is yet a minor and at school or that he is indebted, *Valliammal Ammal* v. *Dharmalinga*[1], or that he has renounced the world and become a Sadhu or a Monk—*Munikanti Vijayaji* v. *Bail Lilawati*[2] and *Maungtin* v. *Mahmin*[3]. It is on this principle that Newsam, J., held in *Lakshmi Ambalam* v. *Andiammal*[4], that a husband is absolved from the obligation to maintain his wife when his wife has a *de facto* protector, *i.e.*, with whom she lives and by whom she is being maintained as if she were his wife. The obligation of an husbnd to maintain his wife arose from the anxiety of the Legislature to protect deserted wives from the bitter necessity of earning a living by trading on their sex. That obligation however ceases when it has been voluntarily assumed by some man other than the woman's husband. No woman can fairly claim a right to be kept by two men. Thus, the approach to section 488, Criminal Procedure Code, is the relieving of destitution.

The term " living in adultery " has been the subject-matter of several decisions. The word " adultery " in section 488 was sought to be used in *Queen Empress* v. *Mannatha Achari*[5], by Muttuswami Aiyar, J., in the sense of section 497, Indian Penal Code, by virtue of section 4 of the Criminal Procedure Code which directs that

" all words and expression used herein and defined in the Indian Penal Code and not hereinbefore defined shall be deemed to have the meanings respectively attributed to them by that Code."

Best, J., who sat with Muttuswami Aiyar, J., doubted the propriety of this interpretation but held that in the face of section 4 he had no option but to concur with Muttuswami Aiyar, J. This decision was overruled by he Full Bench of the Madras High Court in *Gandapalli Appalamma* v. *Gandapalli Yellayya*[6], and it was held that it would be wrong to limit the meaning of the word " adultery " to the very limited definition of that word in section 497, Indian Penal Code and that the term " adultery " should be understood in the light of the social idea of the community as being a serious breach of matrimonial tie. In order to understand the term " living in adultery " which is used in this section it has to be borne in mind that the section does not speak of an act of adultery but of living in adultery. This term has been held in a consensus of decision as connoting more than a solitary lapse from virtue. In *Kista Pillai* v. *Amirthammal*[7], it was held that the clear implication of the words " living in adultery " used by the Legislature in section 488, Criminal Procedure Code, was that unless the wife was actually living in adultery at or about the time of the application she was not disentitled to obtain maintenance. It was nowhere stated in this section and there is no need to introduce additional words therein that living in adultery must be in the house of the adulterer. The words " living in adultery " are merely indication of the principle that occasional lapses from virtue are not sufficient reason for refusing maintenance. Continuous adulterous conduct is what is meant by living in adultery. The question therefore for the Magistrate to decide in such a case is whether there had been such an adulterous conduct on the part of the wife at or about the time of the application, that is to say, shortly before or shortly after the application was made interpreting the word " shortly " in a reasonable and liberal manner. In *Mathein* v. *Maung Mya Khin*[8], the word " live " in the term " living in adultery " was said to convey the idea of continuance and consequently the phrase " living in adultery " referred to a course of guilty conduct and not a single lapse from virtue. This was also the ratio in *Ma Mya Khin* v. *M. L. Godenho*[9], where the words " living in adultery " in section 488 (5) were held to denote a continuous course of conduct and not isolated acts of immorality. One or two lapses from virtue would be acts of adultery but would be quite insufficient to show that the woman was living in adultery, which means that she must be living in a state of quasi-permanent union with the man with whom she is committing adultery. The words used are not " committing adultery " and there is clearly a great dis-

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1. A.I.R. 1941 Mad. 762.
2. (1932) I.L.R. 56 Bom. 260 : A.I.R. 1932 Bom. 285.
3. A.I.R. 1933 Rang. 138 (F.B.).
4. (1937) 2 M.L.J. 885.
5. (1894) 4 M.L.J. 83 : I.L.R. 17 Mad. 260.
6. (1897) I.L.R. 20 Mad. 470.
7. (1938) 2 M.L.J. 407.
8. A.I.R. 1937 Rang. 67.
9. A.I.R. 1936 Rang. 446.

tinction between committing adultery and living in adultery. In other words the ratio of all these cases is that s solitary lapse from virtue as distinguished from contumacious immoral conduct should not be the ground for denying maintenance. That is why in *Ma Thein* v. *Maung Mya Khin*[1], it was held that the fact that a child was begotten when the husband could not get access to the wife showed that the wife must have been guilty of adultery on more than one occasion and therefore she was not entitled to maintenance apparently on the presumption that it is extremely rare that conception happens after one solitary intercourse. In *Kallu* v. *Kaunsillia*[2], wherein the entire case law has been discussed, the earlier decision *Empress* v. *Nandan*[3], *Petition of Kashi Shodiala*[4], *Empress* v. *Dault*[5], are referred to and relied upon it was held that giving birth to an illegitimate child two years prior to the wife's application does not deprive her of a right if at the time of application she was leading a chaste and respectable life. This decision was followed and approved by Benson and Wallis, JJ., in *Patala Atchamma* v. *Patala Mahalakshmi*[6]. Similar ratio is to be found in *Jatindra Mohan Banerjee* v. *Gouri Bala Devi*[7], in In re *Fulchand Maganlal*[8] ; *Mt. Paiki* v. *Vishvanatha*[9] and *Gopal Deo* v. *Ratni*[10]. In a case reported in In re *Shivram*[10-a], where a wife was found to have deserted her husband many years prior and led a life of adultery and had not attempted to seek her husband's pardon for her past misconduct, it was held that the wife was not entitled to maintenance merely because she was not living in adultery at the time of making an application f r maintenance. In fact even in Hindu Law, the wife's right of maintenance is governed by the same considerations. Thus when a wife leaves her home for the purpose of unchastity and persists in following a vicious course of life, she cannot claim to be maintained or to be taken back, *Debi Saran Shukul* v. *Daulata Shuklain*[11] ; *Subbayya* v. *Bhavani*[12], (per Sankaran Nair and Miller, JJ., following *Kandaswami Pillai* v. *Murugammal*[13] and *Prami* v. *Mahadevi*[14], *Jeeva Ammal* v. *Ranganatha Mudaliar*[15], following *Nagalakshmamma* v. *Viswanatha Sastri*[16]; *Kuppammal* v. *Thangamuthu Pandaram*[17] ; *Mt. Zuli* v. *Gopia Tukaram*[18]. But if the facts found are that she was guilty of a single act of infidelity but subsequently she has maintained a pure and unsullied life for 20 years before suit, the wife is entitled to reduced maintenance from her husband, *Ananthanarayana* v. *Sharadamma*[19]. Thus, mere past misconduct and that too of an occasional lapse from virtue does not disentitle the wife from getting maintenance.

But it does not follow that whenever the case of a wife does not strictly fall within the meaning of the words "is living in adultery" she will be entitled to maintenance. The section in the opening clause uses the word "may" as distinguished from "shall" which shows that the Magistrate has discretion to decide in what cases the award of maintenance may properly be made. No doubt the discretion must be exercised judicially and reasonably and not capriciously, *Ponnayee* v. *Peria Moopan*[20]. See also *Appalamma* v. *Yellayya*[21] and *Yesu Bai* v. *Parasram*[22]. The Magistrate therefore may in his discretion refuse to grant an allowance where in spite of absence of proof of living in adultery as construed above there exists circumstances which justify such refusal. The following illustrations may be pertinent. A wife is proved guilty of adultery with a low caste man which adultery has led to her expulsion from caste. It is therefore rendered impossible for the husband to take the wife without himself losing caste. Though this may not be a case of the wife "living in adultery" yet under the circumstances an order refusing maintenance will not be wrong as laid down in *Ponnayee* v. *Peria Moopan*[20]. See also

1. A.I.R. 1937 Rang. 67.
2. (1904) I.L.R. 26 All. 326.
3. (1881) 1 A.W.N. 37.
4. (1881) 1 A.W.N. 62.
5. (1881) 1 A.W.N. 113.
6. (1907) I.L.R. 30 Mad. 332.
7. (1925) 29 C.W.N. 647.
8. A.I.R. 1928 Bom. 59.
9. (1938) 9 Cr. L.J. 390 : 5 Nag. L.R. 9.
10. A.I.R. 1929 Nag. 238.
10-a. (1890) Rat. 506.
11. (1916) I.L.R. 39 All. 234.
12. (1914) 24 I.C. 390.
13. (1895) I.L.R. 19 Mad. 6.
14. (1909) I.L.R. 34 Bom. 278.
15. (1939) 2 M.L.J. 294.
16. (1912) 23 M.L.J. 289.
17. (1944) 1 M.L.J. 327.
18. A.I.R. 1946 Nag. 375.
19. (1944) 49 Mys. H.C.R. 235.
20. (1908) 17 M.L.J. 240 : I.L.R. 34 I.A. 93 : I.L.R. 31 Mad. 185 (P.C.).
21. (1897) 7 M.L.J. 303 : I.L.R. 20 Mad. 470.
22. (1932) 34 B.L.R. 1449.

Ram Autar v. *Mt. Raghurai*[1], where the wife had deserted her husband and at the time of her application was pr gnant by adulterous intercourse with a low caste man, maintenance was refused. But different would be the case where for instance a wife had been excommunicated for rape on her by a low caste man and in such a case maintenance could not be refused as was the case in *Yesubai* v. *Parasaram Daji*[2] Then if the wife deserts her husband for several years and is also guilty of adultery and she ma es no attempt to obtain the pardon of her husband for her misconduct the Court can refuse to grant maintenance to such a wife, even though at the time of her application she may not be living in adultery. In re *Shivram.*[3] There may be cases where by reason of infidelity the wife might have contracted venereal disease and not caught it from her husband. In such a case it would not be unreasonable to refuse maintenance because it will be noti ed that under section 488 maintenance can be granted only if it is found that the offer of the husband to maintain his wife is not found to be *bona fide*. It is only when that offer is found to be not *bona fide* maintenance can be granted. See *Sama Jetha* v. *Baiwali*[4], *Airu* v. *Mt. Mahon*[5]; *Baloch Khan* v. *Zainab Bibi*[6]; *Pritam Sing* v. *Basant Kuar*[7]; *Kadia Kalian Pittambar* v. *Kaiani Shamoo Ramji*[8]; *Decruz* v. *Decruz*;[9] *Kaluram* v. *Emperor*[10], and *Sundarammal* v. *Palaniandi*[11]. It is obvious that in such a case a wife, being infected with venereal disease by reason of her immorality, could not be foisted upon the husband and he be made to share his bed with her. It has been held by Panchapakesa Aiyar, J., in *Appayamma* v. *Subbarao*,[12] that it is cruel on the part of the husband, who has venereal disease, to insist upon his wife to share his bed and it is a good ground for the wife's refusal to live with her husband and by the same token it would be just ground for the husband not to take back his wife or maintain her. Other instances of like nature may easily occur to one's mind and it is unnecessary to multiply such instances. It is enough to point out that the Court may in its discretion refuse to grant an allowance in case where, apart from the fact that living in adultery in the sense of course of continuous adulterous conduct has not been proved, there may exist circumstances which would justify such refusal.

On an analysis of the case law and the propositions deducible therefrom the conclusion of the learned Chief Presidency Magistrate granting maintenance on the ground that though the adulterous conduct on the part of the petitioner has been proved it has not been further proved that she was living in adultery at the time of the petition, cannot be upheld.

On this conclusion, I do not wish to proceed further and dispose of the matter myself because it is very possible that on account of the view of the law which the learned Chief Presidency Magistrate had taken both parties had not come to grips on the points which have got to be proved and rebutted in regard to the award of and withholding of maintenance and that they may also like to adduce some more evidence on this point to clinch their contentions one way or the other.

Therefore the order of the lower Court is set aside and the learned Chief Presidency Magistrate is directed to proceed with further enquiry of this case in the light of the observations made above and dispose of it according to law.

K.S. *Case remanded.*

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1. A.I.R. 1926 Oudh 604.
2. A.I.R. 1933 Bom. 21.
3. (1890) Rat. 506.
4. (1830) I.L.R. 54 Bom. 548.
5. A.I.R. 1925 Lah. 142.
6. A.I.R. 1931 Lah. 561.
7. A.I.R. 1926 Lah. 353.
8. (1905) 2 Cr. L.J. 249.
9. A.I.R. 1938 Rang. 25.
10. A.I.R. 1932 Nag. 183.
11. (1940) 1 M.L.J. 171 : A.I.R. 1940 Mad. 292.
12. (1947) 2 M.L.J. 288 : A.I.R. 1948 Mad. 101 (1).

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT :—MEHRCHAND MAHAJAN AND S. R. DAS, JJ.

Lakshmana Nadar and others .. *Appellants**

v.

R. Ramier .. *Respondent.*

Hindu Law—Will—Construction—Estate granted to wife—If confers a full woman's estate under Hindu Law or merely a limited life estate—Construction of will by analogy—Propriety.

A Hindu by his will gave the following directions : " After my lifetime you, the aforesaid *R*, my wife, *shall till your lifetime*, enjoy the aforesaid entire properties, the outstandings due to me, the debts payable by me, and the chit amounts payable by me. After your lifetime *L*, our daughter and wife of *M* and her heirs shall enjoy them with absolute rights and powers of alienation such as gift, exchange, and sale from son to grandson and so on for generations, ..."

R entered into possession on the death of her husband. But *L* (none of whose children survived her) died during the lifetime of *R* who subsequently describing herself as absolute owner sold one of the properties. *M* thereupon instituted the suit as sole heirs of *L* for a declaration that the sale would not be binding on him beyond the lifetime of the widow. In spite of an injunction *R* made other settlements of the property. Construing the will,

Held : The Court's primary duty in such cases is to ascertain from the language employed by the testator " what were his intentions ", keeping in view the surrounding circumstances, his ordinary notions as a Hindu in respect to devolution of his property, his family relationship, etc. Considering the will in the light of these principles it seems that the testator intended by his will that his entire properties should be enjoyed by his widow during her lifetime but her interest in these properties should come to an end on her death, that all these properties in their entirety should thereafter be enjoyed as absolute owners by his daughter and her heirs with powers of alienation, gift, exchange and sale from generation to generation. He wished to make his daughter a fresh stock of descent. The estate conferred on *R* the widow was more like the limited estate in the English sense of the term than like a full Hindu widow's estate. Though the daughter was not entitled to immediate possession of the property it was indicated with certainty that she should get the entire estate at the proper time and she thus got an interest in it on the testator's death. She was given a present right of future enjoyment in the property. The daughter got a vested interest on the testator's death and *M* was entitled to maintain the suit. The rule of construction by analogy (in the manner as more or less similar words were construed by the Courts in the wills dealt with in those decisions) is a dangerous one to follow in construing wills differently worded and executed in different surroundings.

Case-law considered.

On Appeal from the Judgment and Decree dated the 27th February, 1950, of the High Court of Judicature at Madras (Subba Rao and Panchapakesa Ayyar, JJ.) in Appeal No. 635 of 1946 arising out of Judgment and Decree dated the 13th August, 1946, of the Court of the Subordinate Judge of Tinnevelly in Original Suit No. 50 of 1945.

K. S. Krishnaswamy Iyengar, Senior Advocate, (*S. Ramachandra Iyer*, Advocate, with him), for Appellants.

K. Rajah Aiyar, Senior Advocate (*R. Ganapathy Iyer*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Mahajan, J.—One Lakshminarayana Iyer, a Hindu Brahmin, who owned considerable properties in the Tirunelveli district, died on 13th December, 1924, leaving him surviving a widow Ranganayaki, and a married daughter Ramalakshmi. Ramalakshmi had married the plaintiff and had a number of children from him. They were all alive in December 1924 when Lakshminarayana died. Before his death he executed a will on 16th November, 1924, the construction of which is in controversy in this appeal. By this will he gave the following directions:—

" After my lifetime, you, the aforesaid Ranganayaki Ammal, my wife, *shall till your lifetime*, enjoy the aforesaid entire properties, the outstandings due to me, the debts payable by me, and the chit amounts payable by me. After your lifetime Ramalakshmi Ammal, our daughter and wife of Rama Ayyar Avergal of Melagaram village, and her heirs shall enjoy them with absolute rights and powers

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* Civil Appeal No. 95 of 1952. 14th April, 1953.

of alienation such as gift, exchange, and sale from son to grandson and so on for generations. As regards the payment of maintenance to be made to Chinnammal *alias* Lakshmi Ammal, wife of my late son Hariharamayyan, my wife Ranganayaki Ammal shall pay the same as she pleases, and obtain a release deed."

Ranganayaki entered into possession of the properties on the death of her husband. On 21st February, 1928, she settled the maintenance claim of Lakshmi Ammal and obtained a deed of release from her by paying her a sum of Rs. 3,350 in cash and by executing in her favour an agreement stipulating to pay her a sum of Rs. 240 per annum.

Ramalakshmi died on 25th April, 1938, during the lifetime of the widow. None of her children survived her. On the 24th July, 1945, the widow describing herself as an absolute owner of the properties of her husband, sold one of the items of the property to the 2nd defendant for Rs. 500. On the 18th September, 1945, the suit out of which this appeal arises was instituted by the plaintiff, the husband and the sole heir of Ramalakshmi for a declaration that the said sale would not be binding on him beyond the lifetime of the widow. A prayer was made that the widow be restrained from alienating the other properties in her possession. On the 19th September, 1945, an *ad interim* injunction was issued by the High Court restraining the widow from alienating the properties in her possession and forming part of her husband's estate. In spite of this injunction, on the 27th September, 1945, she executed two deeds of settlement in favour of the other defendants comprising a number of properties. The plaintiff was allowed to amend his plaint and include therein a prayer for a declaration in respect of the invalidity of these alienations as well. It was averred in the plaint that Ramalakshmi obtained a vested interest in the suit properties under the will of her father and plaintiff was thus entitled to maintain the suit.

The defendants pleaded that the plaintiff had no title to maintain the suit, that the widow was entitled under the will to an absolute estate or at least to an estate analogous to and not less than a widow's estate, that the estate given to Ramalakshmi under the will was but a contingent one and she having predeceased the widow, no interest in the suit properties devolved on the plaintiff. The main issue in the suit was whether, the widow took under the will an absolute estate or an estate like the Hindu widow's estate and whether the daughter's interest therein was in the nature of a contingent remainder, or whether she got in the properties a vested interest.

The subordinate judge held that the widow took under the will a limited life interest, and not an absolute estate or even a widow's estate under Hindu Law, and that the daughter got thereunder a vested interest in the properties to which the plaintiff succeeded on her death. In view of this finding he granted the plaintiff a declaratory decree to the effect that the first defendant had only an estate for life in the suit properties and that the alienations made by her would not enure beyond her lifetime. The question as to the validity of the alienations was left undetermined. The unsuccessful defendants preferred an appeal against this decree to the High Court of Judicature at Madras. During the pendency of the appeal the widow died on 14th February, 1948. The High Court by its judgment under appeal affirmed the decision of the trial judge and maintained his view on the construction of the will. Leave to appeal to the Supreme Court was granted and the appeal was admitted on the 27th November, 1951.

The substantial question to decide in the appeal is whether the estate granted by the testator to his widow was a full woman's estate under Hindu Law or merely a limited life estate in the English sense of that expression. It was not contested before us that a Hindu can by will create a life estate, or successive life estates, or any other estate for a limited term, provided the donee or the persons taking under it are capable of taking under a deed or will. The decision of the appeal thus turns upon the question whether the testator's intention was to give to his widow an ordinary life estate or an estate analogous to that of a Hindu widow. At one time it was a moot point whether a Hindu widow's estate could be created by

will, it being an estate created by law, but it is now settled that a Hindu can confer by means of a will on his widow the same estate which she would get by inheritance. The widow in such a case takes as a devisee and not as an heir. The court's primary duty in such cases is to ascertain from the language employed by the testator "what were his intentions", keeping in view the surrounding circumstances, his ordinary notions as a Hindu in respect to devolution of his property, his family relationships, etc.; in other words, to ascertain his wishes by putting itself, so to say, in his armchair.

Considering the will in the light of these principles, it seems to us that Lakshminarayana Iyer intended by his will to direct that his entire properties should be enjoyed by his widow during her lifetime but her interest in these properties should come to an end on her death, that all these properties in their entirety should thereafter be enjoyed as absolute owners by his daughter and her heirs with powers of alienation, gift, exchange and sale from generation to generation. He wished to make his daughter a fresh stock of descent so that her issue, male or female, may have the benefit of his property. They were the real persons whom he earmarked with certainty as the ultimate recipients of his bounty. In express terms he conferred on his daughter powers of alienation by way of gift, exchange, sale, but in sharp contrast to this, on his widow he conferred no such powers. The direction to her was that she should enjoy the entire properties including the outstandings, etc., and these shall thereafter pass to her daughters. Though no restraint in express terms was put on her powers of alienation in case of necessity, even that limited power was not given to her in express terms. If the testator had before his mind's eye his daughter and her heirs as the ultimate beneficiaries of his bounty, that intention could only be achieved by giving to the widow a limited estate, because by conferring a full Hindu widow's estate on her the daughter will only have a mere *spes successionis* under the Hindu Law which may or may not mature and under the will her interest would only be a contingent one in what was left undisposed of by the widow. It is significant that the testator did not say in the will that the daughter will enjoy only the properties left undisposed of by the widow. The extent of the grant so far as the properties mentioned in the schedule are concerned, to the daughter and the widow is the same. Just as the widow was directed to enjoy the entire properties mentioned in the schedule during her lifetime, in like manner the daughter and her heirs were also directed to enjoy the same properties with absolute rights from generation to generation. They could not enjoy the same properties in the manner directed if the widow had a full Hindu widow's estate and had the power for any purpose to dispose of them and did so. If that was the intention, the testator would clearly have said that the daughter would only take the properties remaining after the death of the widow.

The widow cannot be held to have been given a full Hindu widow's estate under the will unless it can be said that under its terms she was given the power of alienation for necessary purposes, whether in express terms or by necessary implication. As above pointed out, admittedly power of alienation in express terms was not conferred on her. It was argued that such a power was implicit within the acts she was authorized to do, that is to say, when she was directed to pay the debts and settle the maintenance of Ramalakshmi it was implicit within these directions that for these purposes, if necessity arose, she could alienate the properties. This suggestion in the surrounding circumstances attending the execution of this will cannot be sustained. The properties disposed of by the will and mentioned in the schedule were considerable in extent and it seems that they fetched sufficient income to enable the widow to fulfil the obligations under the will. Indeed we find that within four years of the death of the testator the widow was able to pay a lump sum of Rs. 3,350 in cash to the daughter-in-law without alienating any part of the immovable properties and presumably by this time she had discharged all the debts. It is not shown that she alienated a single item of immovable property till the year 1945, a period of over 21 years after the death of her husband, excepting one, which she alienated in the year 1937 to raise a sum of Rs. 1,000 in order to buy some land. By this transaction she substituted one

property by another. For the purpose of her maintenance, for payment of debts, etc., and for settling the claim of the daughter-in-law she does not appear to have felt any necessity to make any alienation of any part of the estate mentioned in the schedule and the testator in all likelihood knew that she could fulfil these obligations without having recourse to alienations and hence he did not give her any power to do so. In this situation the inference that the testator must have of necessity intended to confer on the widow power of alienation for those limited purposes cannot be raised. In our opinion, even if that suggestion is accepted that for the limited purposes mentioned in the will the widow could alienate, this power would fall far short of the powers that a Hindu widow enjoys under Hindu law. Under that law she has the power to alienate the estate for the benefit of the soul of the husband, for pilgrimage and for the benefit of the estate and for other authorized purposes. It cannot be said that a Hindu widow can only alienate her husband's estate for payment of debts, to meet maintenance charges and for her own maintenance. She represents the estate in all respects and enjoys very wide power except that she cannot alienate except for necessity and her necessities have to be judged on a variety of considerations. We therefore hold that the estate conferred on Ranganayaki Ammal was more like the limited estate in the English sense of the term than like a full Hindu widow's estate in spite of the directions abovementioned. She had complete control over the income of the property during her lifetime but she had no power to deal with the corpus of the estate and it had to be kept intact for the enjoyment of the daughter. Though the daughter was not entitled to immediate possession of the property it was indicated with certainty that she should get the entire estate at the proper time and she thus got an interest in it on the testator's death. She was given a present right of future enjoyment in the property. According to Jarman (Jarman on Wills), the law leans in favour of vesting of estates and the property disposed of belongs to the object of the gift when the will takes effect and we think the daughter got under this will a vested interest in the testator's properties on his death.

It was strenuously argued by Mr. K. S. Krishnaswami Iyengar that Lakshminarayana Iyer was a Brahmin gentleman presumably versed in the sastras living in a village in the southernmost part of the Madras State, that his idea of a restricted estate was more likely to be one analogous to a Hindu woman's estate than a life estate as understood in English law wherein the estate is measured by use and not by duration, and that if this will was construed in the light of the notions of Lakshminarayana Iyer it should be held that the widow got under it a Hindu widow's estate and the daughter got under it a contingent remainder in the nature of *spes* and on her death there was nothing which could devolve on the plaintiff and he thus had no *locus standi* to question the alienations made by the widow. The learned counsel in support of his contention drew our attention to a number of decisions of different High Courts and contended that the words of this will should be construed in the manner as more or less similar words were construed by the courts in the wills dealt with in those decisions. This rule of construction by analogy is a dangerous one to follow in construing wills differently worded and executed in different surroundings. [Vide *Sasiman* v. *Shib Narain*[1].] However, out of respect for learned counsel on both sides who adopted the same method of approach we proceed to examine some of the important cases referred to by them.

Mr. Krishnaswami Iyengar sought to derive the greatest support for his contention from the decision in *Ram Bahadur* v. *Jager Nath Prasad*[2]. The will there recited that if a daughter or son was born to the testator during his lifetime, such son or daughter would be the owner of all his properties but if there was no son or daughter, his niece *S* would get a bequest of a lakh of rupees, and the rest of the movable and immovable properties would remain in possession of his wife until her death and after her these would remain in possession of his niece. The remainder was disposed of in the following words :—

1. (1921) 42 M.L.J. 492 : L.R. 49 I.A. 35 : I.L.R. 1 Pat. 305 (P.C.).

2. (1918) 3 Pat. L.J. 199 (F.B.).

"If on the death of my wife and my niece there be living a son and a daughter born of the womb of my said brother's daughter, then two-thirds of the movable property will belong to the son and one-third to the daughter. But as regards the immovable property none shall have the least right of alienation. They will of course be entitled to enjoy the balance left after payment of rent."

This will was construed as conveying an absolute estate to the son and the daughter of the niece. It was remarked that in spite of an express restriction against alienation, the estate taken by *S* (the niece) was an estate such as a woman ordinarily acquires by inheritance under the Hindu Law which she holds in a completely representative character but is unable to alienate except in case of legal necessity and that such a construction was in accordance with the ordinary notions that a Hindu has in regard to devolution of his property. The provisions contained in this will bear no analogy to those we have to construe. The restraint against alienation was repugnant to both a life estate and a widow's estate and was not, therefore, taken into account. But there were other indications in that will showing that a widow's estate had been given. The fact that the gift over was a contingent bequest was by itself taken as a sure indication that the preceding bequest was that of a widow's estate. There is no such indication in the will before us.

Reliance was next placed on the decision in *Pavani Subbamma* v. *Ammala Rama Naidu*[1]. Under the will there dealt with, the widow *S* was to enjoy the properties and after her lifetime the properties were to be taken in the ratio of three to five by the son's daughter and the daughter's son respectively. A suit was instituted by the son's daughter for recovery of possession of her share in one item of property forming part of the estate which had been sold by *S*. The question for decision in that case was whether *S* was at all entitled to sell anything more than her life interest, even for purposes of meeting a necessity binding upon the estate. Varadachari, J., held that since in the will the gift over to the grandchildren was of the *entire properties*, and not a mere gift by way of defeasance, it had to be held that it indicated that the prior gift in favour of the widow was only of a limited interest. This decision therefore goes against the contention of the learned counsel but he placed reliance on the observations made in the judgment when the learned Judge proceeded to say

"In deference to the view taken in *Maharaja of Kolhapur* v. *Sundaram Aiyar*[2], it may be possible to create an interest analogous to a woman's estate in Hindu Law notwithstanding the addition of a gift over and that the estate taken by *S*, need not necessarily be only a life estate in the English law sense of the term."

We do not understand how such passing observations can be helpful in deciding the present case. Assuming that it is possible to create a Hindu woman's estate notwithstanding the addition of a gift over, the question nevertheless whether that had been done in a given case must depend on the terms of the particular instrument under consideration.

The following remarks in the Privy Council decision in *Nathu Ramu Mahajan* v. *Gangabai*[3], were next cited :—

"As the will gave her the right to 'enjoy' the income of the estate during her lifetime, it was evidently contemplated that she should, as provided by the Hindu Law in the case of a widow, be in possession of the estate."

Such casual observation made in respect of a will couched in entirely different terms cannot afford much assistance in the decision of the case.

In *Vasantharao Ammannamma* v. *Venkata Kodanda Rao Pantulu*[4], the next case cited, a Hindu testator who was a retired subordinate judge provided by his will as follows :—

"Out of the aforestated ancestral lands, the one-ninth share to which I am entitled shall be enjoyed after my death by my wife till her death, and after her death it shall pass to *S*, son of my second elder brother deceased. My self-acquired properties shall on my death be enjoyed by my wife till her death and after her death, they shall pass to my daughter. Thereafter they shall pass to my grandson through my daughter."

1. (1937) 1 M.L.J. 268.
2. (1924) I.L.R. 48 Mad. 1.
3. (1938) 2 M.L.J. 562.
4. (1940) 1 M.L.J. 188 : I.L.R. (1940) Mad. 223.

The will was construed as giving the self-acquired properties ultimately to the grandsons, and the estate of the daughter was likened to an estate which she would take under the law of inheritance, that is a limited estate analogous to a widow's estate. At page 193 of the report it was observed as follows :—

"The question therefore arises, did he intend to confer only a life estate or a daughter's estate? It seems to us that he meant to give a daughter's estate rather than a life estate. *He omits the words 'during her life' with reference to the disposition in favour of the daughter.* The words 'pass to my daughter' would rather indicate that in the ordinary course of devolution the estate should pass to her, that is, the daughter and then to the grandsons. The words used in favour of the grandsons seem to indicate that the estate conferred on the daughter was not a life estate because there is no direct gift in favour of the grandsons, but on the other hand, what he says is that through his daughter the estate shall pass to his grandsons. Either he must have intended that the daughter should convey the property either by will or *inter vivos* to the grandsons or she having taken the estate, through her it should pass to the grandsons in the ordinary course of devolution. If it was the daughter's estate that was intended to be conferred, there can be no question that the estate taken by the grandsons is not a vested interest."

This line of reasoning which appealed to the learned judges is not of much help to us here as the language in this will is quite different. If the same line of reasoning is adopted here, the decision of the case would go against the client of Mr. K. S. K. Iyengar because in the will in this case the widow's estate is delimited by the words " till your lifetime ".

Reliance was next placed on *Maharaja of Kolhapur* v. *Sundaram Iyer*[1]. That was a case of a government grant on the special terms set out therein and the question arose as to the nature of the grant. There it was said that

" the widows of Sivaji Raja got the gift of a life estate very much resembling the ordinary estate of a Hindu widow and with all the incidents of a widow's estate except the liability to be divested, but nevertheless a life estate rather than an estate of inheritance."

These remarks do not throw much light on the point before us.

The last decision referred to was the decision of the Privy Council in *Mahomed Shumsool* v. *Shewukram*[2]. There a Hindu inhabitant of Bihar by a document of a testamentary character declared his daughter who had two daughters, as his heir, and after her, her two daughters together with their children were declared heirs and malik. One daughter of the daughter predeceased the testator without issue and the other daughter died after the death of the testator leaving an only son, the respondent in that case. In a suit by the respondent against this grandmother, the daughter of the testator for a declaratory order preserving unmolested his future right and title to the said lands, it was held that the daughter took an estate subject to her daughters succeeding her. In this judgment the following observatons were emphasized as relevant to this enquiry :—

" It has been contended that these latter expressions qualify the generality of the former expressions, and that the will, taken as a whole, must be construed as intimating the intention of the testator that Mst. Rani Dhun Kaur should not take an absolute estate, but that she should be succeeded in her estate by her two daughters. In other words, that she should take an estate very much like the ordinary estate of a Hindu widow. In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family ; and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate."

These observations are unexceptionable but it may also be pointed out that it is open to a Hindu to confer a limited life estate on his widow or even a larger estate than a widow takes as an heir and that in every case he may not confer upon her by will a Hindu widow's estate which she would otherwise get by inheritance. Generally speaking, there will be no point in making a will if what is to be given to a widow is what she would get on intestacy and cases do arise where a Hindu wishes to give to his widow a more restricted estate than she would get on intestacy or a much larger estate than that. The question in every case cannot be determined merely on the theory that every Hindu thinks only about a Hindu widow's estate and no more. What is given must be gathered from the language of the will in the light of the surrounding circumstances.

1. (1924) I.L.R. 48 Mad. 1.
2. (1874) L.R. 2 I.A. 7.

The learned counsel for the respondent followed the line adopted by Mr. Krishnaswami Iyengar. He also on the analogy of other wills, and the decisions given on their terms wanted a decision on the construction of this will in his favour. In the first instance, he placed reliance on a decision on the Madras High Court in *Ratna Chetti* v. *Narayanaswami Chettiar*[1]. There the testator made a will in favour of his wife providing *inter alia*,

> " all my properties shall after my death be in possession of my wife herself and she herself should be heir to everything and Mutha Arunachala Chetty (nephew) and my wife should live together amicably as of one family. If the two could not agree and live together amicably, my wife would pay Rs. 4,000 and separate him and then my wife would enjoy all the remaining properties with absolute rights. If both of them would live together amicably, Muthu Arunachala Chetty himself would enjoy the properties which remain after the death of the widow ".

It was held upon the construction of the will that the nephew who lived amicably with the widow till his death, had a vested interest at testator's death which could not be defeated by a testamentary disposition by the widow in favour of a stranger. This decision only decides that case and is not very relevant in this enquiry.

Reference was also made to the decision of their Lordships of the Privy Council in *Mst. Bhagwati Devi* v. *Chowdry Bholanath Thakur*[2]. This was a case of a gift *inter vivos*. The gift to Mst. Chunderbutti, his wife, was in these terms :—

> " The remaining ' milkiut ' and ' minhai ' estates, together with the amount of ready money, articles, slaves, and all household furniture I have placed in the possession of Mst. Chunderbutti Thakurain, my wife, to be enjoyed during her lifetime, in order that she may hold possession of all the properties and milkiut possessed by me, the declarant, during her lifetime, and by the payment of Government revenue, appropriate the profits derived therefrom, but that she should not by any means transfer the milkiut estates and the slaves ; that after the death of my aforesaid wife the milkiut and household furniture shall devolve on Girdhari Thakur, my karta (adopted son)."

The subordinate judge held that Chunderbutti got an estate for life with the power to appropriate profits and Girdhari got a vested remainder on her death. The High Court took a different view and held that Chunderbutti took the estate in her character as a Hindu widow. The Privy Council on this will held as follows :—

> " Their Lordships do not feel justified, upon mere conjecture of what might probably have been intended, in so interpreting it as materially to change the nature of the estate taken by Chunderbutti. If she took the estate only of a Hindu widow, one consequence, no doubt, would be that she would be unable to alienate the profits, or that at all events, whatever she purchased out of them would be an increment to her husband's estate, and the plaintiffs would be entitled to recover possession of all such property, real and personal. But, on the other hand, she would have certain rights as a Hindu widow ; for example, she would have the right under certain circumstances, if the estate were insufficient to defray the funeral expenses or her maintenance, to alienate it altogether. She certainly would have the power of selling her own estate ; and it would further follow that Girdhari would not be possessed in any sense of a vested remainder, but merely of a contingent one. It would also follow that that she would completely represent the estate, and under certain circumstances the statute of limitations might run against the heirs to the estate, whoever they might be.
>
> Their Lordships see no sufficient reason for importing into this document words which would carry with them all these consequences and they agree with the subordinate judge in construing it according to its plain meaning ".

These observations have to a certain extent relevance to the present case but on the facts this case is also distinguishable. This will was couched in different language than the will in the present case. There was a clear prohibition, forbidding the widow to make any transfers of the milkiut estates and the slaves.

Reference was also made to a decision of the Bombay High Court in *Lallu* v. *Jagmohan*[3]. The will there ran as follows :—

> " When I die, my wife named Suraj is owner of that property. And my wife has powers to do in the same way as I have absolute powers to do when I am present, and in case of my wife's death, my daughter Mahalaxmi is owner of the said property after that ".

It was held that Suraj took only a life estate under the will, with remainder over to Mahalaxmi after her death and the bequest to Mahalaxmi was not contingent

1. (1914) 26 M.L.J. 616. (P.C.).
2. (1874) L.R. 2 I.A. 256 : I.L.R. 1 Cal. 104
3. (1896) I.L.R. 22 Bom. 409.

on her surviving Suraj, but that she took a vested remainder which upon her death passed to her heirs.

After considering the rival contentions of the parties, we are of the opinion that no sufficient grounds have been made out for disturbing the unanimous opinion of the two courts below on the construction of this will. Both the learned counsel eventually conceded that the language used in the will was consistent with the testator's intention of conferring a life estate in the English sense as well as with the intention of conferring a Hindu widow's estate. It was, however, urged by Mr. Rajah Aiyar that as no express or implied power of alienation for purposes of all legal necessities was conferred on the widow, that circumstance negatived the view that the testator intended to confer upon his widow a Hindu widow's estate as she would get in case of intestacy. He also emphasized that the words of the gift over to the daughter as supporting his construction which was further reinforced by the words of the will limiting the widow's estate "till your lifetime" and of the omission from therein of words such as malik, etc., while describing the widow's estate. Mr. Krishnaswami Iyengar, on the other hand, contended that the absence of any words in the will restricting her powers of alienation and putting a restraint on them, suggested a contrary intention and that the daughter's estate was described as coming into being after the estate of the widow and was not conferred on her simultaneously with the widow, and this connoted according to the notions of Hindus a full Hindu widow's estate. In our judgment, there is force in the contention of Mr. Rajah Iyer for reasons already stated and in the result, therefore, we dismiss this appeal with costs.

Agent for Appellant: *M. S. K. Aiyangar.*

Agent for Respondent: *Ganpat Rai.*

G.R./K.S. ——— *Appeal dismissed.*

[THE SUPREME COURT OF INDIA.]

(CIVIL APPELLATE JURISDICTION.)

PRESENT:—MEHRCHAND MAHAJAN, VIVIAN BOSE AND B. JAGANNADHA DAS, JJ.

Kumbha Mawji .. *Appellant**

v.

The Dominion of India (Now the Union of India) .. *Respondent.*

Arbitration Act (X of 1940), sections 14 (2) and 31 (4)—Scope—Mere handing over of awards by the umpire to the parties—If implies authority of the umpire to file the award in court on his behalf—Sending of award by umpire by post to the Court—If "causing to be filed"—Section 31 (4)—Application after award—If within scope of—"In a reference"—Meaning.

Where the originals of the award are said to have been handed over to both the parties, it cannot be assumed that the mere handing over to the parties necessarily implies the authority of the umpire to file the same into court on his behalf. That authority has to be specifically alleged and proved. The actual filing by the umpire is not essential under section 14 (2) of the Arbitration Act; but it is sufficient if the umpire *causes* the award to be filed. Sending by post in compliance with the notice issued by Court is such "causing". The Court in which the award has been filed first alone has jurisdiction under section 31 (3) of the Act.

The phrase "in a reference" in section 31 (4) of the Act is comprehensive enough to cover also an application first made after the arbitration is completed and a final award is made. Section 31 (4) would vest exclusive jurisdiction in the Court in which application for the filing of an award has been first made under section 14 of the Act.

Appeals from the Judgment and Decree dated the 23rd February, 1951, of the High Court of Judicature at Calcutta (Harries, C.J. and Bannerjee, J.) in Appeal No. 44 of 1950 arising out of the Judgment and Decree dated the 16th day of December, 1949, of the said High Court (Sinha, J.) in its Ordinary Original Civil Jurisdiction in Award Case No. 208 of 1949.

*Civil Appeals Nos. 133 and 134 of 1952. 16th April, 1953.

N. C. Chatterjee, Senior Advocate (*Amiya Kumar Mukherjea*, Advocate, with him), for Appellant.

C. K. Daphtary, Solicitor-General for India (*G. N. Joshi* and *Jindra Lal*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Jagannadha Das, J.—On the 28th of January, 1948, the appellant, Kumbha Mawji, entered into an agreement with the respondent, the Dominion of India (as it then was) to manufacture and supply, to the Bengal Assam Railway, stone boulders and ballast from Chutiapara quarry. The agreement was entered into at Calcutta, though the work was to be carried out in Assam. It was a term of the agreement that if any differences arose between the parties, they were to be referred to the arbitration of two persons, one to be nominated by each side, and that if the arbitrators were not able to agree, the matter was to be decided by an umpire to be nominated by both the arbitrators. Differences having, in fact, arisen, the dispute was referred to two arbitrators and on their disagreement the matter went up to an umpire, one Mr. P. C. Chowdhury. The umpire made two awards on or about the 20th of July, 1949, in favour of the appellant. By one of them he directed a sum of Rs. 3,67,000 to be paid by the respondent to the appellant on or before the 19th of August, 1949, with interest thereafter at 6 per cent. per annum in case of default. By the other award he directed a sum of Rs. 83,000 to be similarly paid by the respondent to the appellant. The umpire is said to have made over each of the two awards, in original, to each of the parties. On the 10th of August, 1949, the respondent filed an application under section 14, sub-section (2) of the Indian Arbitration Act, 1940, before the Court of the Subordinate Judge of Gauhati in Assam praying that the umpire, Mr. Chowdhury, might be directed to file both the awards in Court so that the petitioner might get an opportunity for filing objections thereto. On this application notice was issued to the umpire to file the awards into that Court before the 24th of August, 1949. The umpire sent a letter dated 18th August, 1949, to the Subordinate Judge, which is as follows with copies of the awards :

"Dear Sir,

With reference to your notice in money Suit No. 63 of 1949 requiring me to submit the awards made by me in the above mentioned dispute on 20th July, 1949, I beg to submit that the two awards were made and signed by me in the presence of the parties and handed over to me on 20th July, 1949. As directed by you *I am sending herewith copies of the same signed by me.* On the back of each of these copies occurs the receipt of the parties to the awards."

On receipt thereof, the Subordinate Judge made an order on 24th August, 1949, in the following terms :

"Notice on the Umpire served. Seen his report forwarding copies of the award of which the originals are said to have been made over to the parties. Applicant to file his copy on 3rd September 1949."

On the 3rd of September, 1949, the respondent filed the awards which were handed over to it by the umpire, and the matter was being proceeded with, by issue of further notices and filing of objections in the Court of the Subordinate Judge, Gauhati.

Meanwhile on the 17th of August, 1949, *i.e.*, a week after the respondent made its first application in the Gauhati Court, the appellant's solicitors, Messrs. Mukherjee and Biswas, sent a letter to the Registrar of the High Court, Original Side, as follows :

"On behalf of our client Mr. Kumbha Mowjee we beg to enclose herewith two original awards duly stamped and both dated 20th July, 1949, for the respective sums of Rs. 3,67,000 and Rs. 83,000 duly signed by the Umpire Mr. P. C. Chaudhury for filing.

Please therefore direct the office to file the said two awards and to issue notices in respect thereof expeditiously."

After some correspondence between the Deputy Registrar and the solicitors calling for some further papers, the Deputy Registrar informed the solicitors by his letter

dated the 29th August, 1949, that the award had been filed and asked the solicitors to take out from the Court and serve on the parties concerned the statutory notice fixing a date for judgment upon the said award by the Commercial Judge of the Court. Notices were thereupon issued to both the parties in the following terms :

"To

1. Kumbha Mawji.

2. The Dominion of India represented by the Assam Railway.

Take notice that the *Award of the Umpire* appointed in the matter of the above Arbitration Agreement *had been filed on the 29th day of August*, 1949 and that the Court hearing the commercial causes will proceed to pronounce judgment on such award on the 7th day of November, 1949.

Dated the 29th day of August, 1949."

This notice was served on the respondent on the 2nd of September, 1949. Thus in respect of these awards, proceedings were initiated purporting to be under section 14 (2) of the Indian Arbitration Act simultaneously both in the Court of the Subordinate Judge of Gauhati in Assam as well as on the Original Side of the High Court at Calcutta.

The appellant in answer to the notice issued by the Gauhati Court on 3rd September, 1949, appeared before that Court on 28th October, 1949, and obtained adjournments from time to time until 10th December, 1949. On that date the Gauhati Court rejected his prayer for any further adjournment and fixed 20th January, 1950, for an *ex parte* hearing. Meanwhile, the respondent after receiving the notice issued to him by the Calcutta High Court filed, on the 24th of November, 1949, an affidavit dated the 15th of November, 1949, stating his objections to the jurisdiction of the Calcutta Court and to the validity of the awards. On the same date a counter affidavit thereto dated the 19th of November, 1949, was filed on behalf of the appellant. On these affidavits the matter was taken up for consideration by the Commercial Judge of the Calcutta High Court on the 16th of December, 1949. The learned Judge overruled the objections of the respondent, and passed judgments on the two awards. On appeal therefrom by the respondent to the Division Bench, the learned Judges reversed the judgment of the single Judge. They held that there had been no proper application under section 14 (2) of the Indian Arbitration Act before the High Court of Calcutta, and that consequently that Court had no jurisdiction to deal with the matter.

Before the learned single Judge of the High Court the main objection taken and set out in paragraph 14 of the respondent's affidavit dated the 15th of November, 1949, was as follows :

"I submit further that inasmuch as the application of the Dominion of India under section 14 (2) of the Indian Arbitration Act was made as aforesaid to the said Court at Gauhati before the award was filed in this Hon'ble Court by Kumbha Mawji, the Court at Gauhati alone has jurisdiction."

Under section 31 (1) of the Indian Arbitration Act an award may be filed in any Court having jurisdiction in the matter to which the reference relates. The reference in this case arose out of a contract which, as already stated, was entered into at Calcutta and had to be performed in Assam. Thus the Gauhati Court as well as the Calcutta High Court admittedly had jurisdiction over the subject-matter of the reference. The point taken, however, on behalf of the respondent in their objections was that, having regard to section 31, sub-section (4) of the Act and to the fact that an application under section 14, sub-section (2) for a direction to the umpire to file the award was made to the Gauhati Court as early as the 10th August, that Court was seized of the matter from that date, and that therefore any application under section 14 on a later date to another Court, though otherwise competent, was barred under section 31, sub-section (4). This was the main question that was seriously pressed before the learned single Judge. But the learned Judge was of the opinion that section 31 (4) related only to applications made during the pendency of a reference to arbitration and not to applications made subsequent to the making of an award. He thought that in respect of applications for filing an award the exclusive jurisdiction was determined with

reference to the question as to which was the competent Court in which the award was, in fact, first filed under section 14, sub-section (2) (as distinct from when the application for the filing of the award was first presented). In this view, the learned Judge held on the facts that the award must be taken to have been filed earlier in the Calcutta Court and not in the Gauhati Court. He accordingly held that the Calcutta High Court had exclusive jurisdiction having regard to section 31 (3), and hence proceeded to judgment on the award, the respondent not having filed any objections before him in time.

On appeal, the learned Judges considered it unnecessary for them to dispose of the case on either of the above grounds considered by the single Judge, and held that on the facts it was quite clear that there had been no due filing of the award at all in the Calcutta Court under section 14 (2) inasmuch as the awards which were claimed to have been duly filed were, in fact, not filed by the umpire; nor was it shown that they were filed under his authority. On this limited ground they reversed the decision of the learned single Judge and vacated the judgment given in favour of the appellant on the basis of the two awards. Hence these two appeals to us.

On the facts stated above three questions arise for consideration:

(1) Whether the appellant had the authority of the umpire to file the awards on his behalf into Court in terms of section 14 (2) of the Arbitration Act;

(2) Whether in view of sub-section (3) of section 31 of the Act can it be said that the awards were filed in the Calcutta High Court earlier than in the Gauhati Court; and

(3) Whether the scope of section 31, sub-section (4) of the Act is limited to applications under the Act during the pendency of the arbitration proceedings only.

As regards the first question, section 14, sub-section (2) provides that,

"the arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, *cause* the award or *a signed copy of it*, together with any depositions or documents which may have been taken and proved before them, *to be filed in Court*, and the Court shall thereupon give notice to the parties of the filing of the award."

This section clearly implies that where the award or a signed copy thereof is in fact filed into Court by a party he should have the authority of the umpire for doing so. This is, at any rate, the assumption on which the question has been dealt with in the High Court, and it has not been contended before us that the filing of the award into Court by a party himself though without the authority of the umpire to do so on his behalf, is sufficient compliance with the terms of this section. The learned Judges of the High Court were of the opinion that the authority of the umpire empowering the appellant to file the original awards into Court on his behalf has not been made out on the evidence in the case. The argument stressed before us is that in para. 7 of the affidavit dated the 19th of November, 1949, filed on behalf of the appellant in the High Court on the 24th of November, 1949, it is stated that

"On or about the 21st July, 1949, the said umpire made over the said original award to this deponent for filing."

It is urged that this is an averment of the requisite authority from the umpire, and it is pointed out that this assertion has not been contradicted on the other side by any reply affidavit. It is contended therefore that the filing was valid. The learned Judges in coming to the contrary conclusion relied on two facts, namely, that the umpire in his letter to the Gauhati Court dated 18th August, 1949, when, sending copies of the awards in compliance with the notice issued to him by that Court merely stated that he handed over the awards to both the parties, but did not say that he authorised any of them to file the same into Court on his behalf. The learned Judges were also of the opinion that the umpire as a person of commonsense could not be supposed to have authorised both the parties to file the awards into Court on his behalf. We are inclined to agree with this reasoning. Where, as in this case,

the originals are said to have been handed over to both the parties, it cannot be assumed that the mere handing over of the awards to the parties necessarily implies the authority of the umpire to file the same into Court on his behalf. That authority has to be specifically alleged and proved. In the present case the statement in the affidavit relied on by learned counsel before us is no more than an assertion that the umpire handed over the original awards to the appellant for filing, but there is no allegation that they were so handed over to him for filing on behalf of the umpire. The umpire may not have been aware that the awards should be filed into Court only by himself or under his authority.

Learned counsel for the appellant urged that the question of the authorisation of the umpire for the filing of the award by the appellant was one that was not raised at all as an objection before the learned single Judge of the High Court, and that such an objection should not have been taken notice of for the first time on appeal. It is no doubt true that neither the affidavit filed on behalf of the respondent nor the judgment of the learned single Judge gives any indication of this question having been raised in the first Court. Indeed, the learned Judges on appeal recognise it when they say towards the concluding portion of their judgment as follows:

> "It does not appear that the point on which the appeal succeeds was argued in the court below. But it is a point of law and *no objection was taken before us by the respondent to the appellant taking the point before us.*"

Though it is somewhat difficult to see how the question raised can be said to be a pure question of law, it is quite clear from the above extract that no objection was taken by the respondent to the point being raised. It has not been suggested before us that this statement in the judgment was in any way erroneous. Appellant's counsel argued that if the learned Judges on appeal felt inclined to dispose of the case on this point alone, they should have called upon the umpire to clarify whether or not the appellant had his authority, or given an opportunity for production of his affidavit in support of the authority. Learned counsel presses that an opportunity should now be allowed. It does not appear, however, that it is either necessary or desirable at this stage and after this lapse of time to allow this matter to go back for that purpose. Because, apart from the question of mere want of proof of authority, it is clear that in a case of this kind and on the facts above stated, it was incumbent on the appellant to allege categorically that, in terms of sub-section (2) of section 14, he had the requisite authority of the umpire. That allegation is wanting not only in the affidavit dated the 19th of November, 1949, but what is more important is that when the awards were filed into Court on the 17th of August, 1949, by the solicitors on behalf of the appellant with a letter which might be treated as the initial application to the Court, there is not a word to suggest that the awards were being filed under the authority of the umpire. The letter contained only a bald statement that the two original awards duly signed by the umpire were enclosed therewith for filing, with a request to direct the office to file the two awards and to issue notices in respect thereof expeditiously. In those circumstances, there has been clearly no sufficient compliance with the terms of section 14, sub-section (2) of the Act to constitute the filing of the awards by the appellant's solicitors the filing thereof by the umpire.

As regards the second question, namely, as to whether with reference to the terms of section 31, sub-section (3), the awards should be held to have been filed earlier in the Calcutta Court or in the Gauhati Court, the view taken by the learned Commercial Judge was that the filing in the Calcutta Court must be taken to have been earlier. For the purpose of the consideration of this question it may be assumed that that filing was under the authority of the umpire. The learned Judge was of the opinion that the filing of the awards in the Gauhati Court must be taken to have been made on the 3rd September when in pursuance of the prior order of the Subordinate Judge dated 24th August, 1949, the present respondent filed into Court the original awards with him. In coming to this conclusion the learned Judge ignored the fact that on 18th August, 1949, the umpire in response

to the notice previously issued to him forwarded to the Court signed copies of the awards and that the same were in that Court on or before 24th August, 1949. This seems, in terms, to be sufficient compliance with the provisions of section 14, sub-section (2) which only requires that on the directions of the Court the original award or the copy thereof should be caused by the umpire to be filed into it. The learned Judge stated that he was not aware whether the copies sent to the Subordinate Judge were signed copies or not. The learned Judge failed unfortunately to notice that the umpire himself in his letter dated 18th August, 1949, stated clearly as follows:

"As directed by you I am sending herewith *copies* of the same (awards) *signed by me.*"

The learned Judge was also inclined to think that the mere forwarding of the awards does not amount to the filing of them. Here again, the learned Judge has overlooked that under section 14, sub-section (2), the actual filing by the umpire is not essential, but that it is sufficient if the umpire *causes* the awards to be filed. It is not suggested that sending by post in compliance with the notice is not such "causing."

It appears to us therefore clear that the filing of the awards in the Gauhati Court must be taken to be on the 24th of August, 1949. So far as the Calcutta Court is concerned, though no doubt the awards were put into that Court by the appellant's solicitors on the 17th of August, 1949, it appears clearly from the notice issued by the Registrar dated the 30th of August, 1949, that the awards were treated as filed only on the 29th day of August, 1949. Paragraphs 8 and 9 of the respondent's affidavit filed in the Calcutta Court on 24th November, 1949, contain categorical assertions that so far as the Gauhati Court is concerned, the copies of the awards were filed by the umpire on the 24th of August, 1949, while as regards the Calcutta High Court the awards were filed on the 29th of August, 1949. These assertions have not been contradicted on behalf of the appellant in the counter-affidavit filed on the same day. From these facts, it is clear that the earlier filing for the purposes of section 31 (3) is in the Gauhati Court and not in the Calcutta Court as held by the learned single Judge under an erroneous impression as to the facts. We may as well mention at this stage that it was not suggested before us that for legal purposes the filing of the awards in the Calcutta High Court (on the assumption of existence of authority in the appellant for such filing on behalf of the umpire) is not the 29th of August, 1949, but only the 10th of August when the letter was sent by the solicitors to the Registrar enclosing the awards. We mention this because it appears from the judgment of the Division Bench of the Calcutta High Court that some such point was raised there, but before us the contrary was assumed. We are accordingly of the opinion that even if the authority of the umpire for the filing of the award into Court on his behalf by the appellant is to be taken for granted, it was in the Gauhati Court that the awards must be taken to have been filed earlier. On this ground, therefore, we are inclined to hold that the Gauhati Court alone has jurisdiction under section 31 (3) of the Act.

The third question which remains for consideration is whether sub-section (4) of section 31 of the Indian Arbitration Act of 1940 applies only where the first application under the Act was made during the course of pendency of a reference to arbitration or also to a case like the present one where such first application is made after the completion of the arbitration and on the making of an award. As already stated, the learned Judges on appeal did not deal with this question. The trial Judge, however, considered the matter, and held that the above provision related only to an application made during the pendency of a reference to arbitration. In the view of the learned Judge,

"In order to attract sub-section (4) an application must have been made during the pendency of the reference, and if such an application had been made, all other applications arising out of that reference (whether made in the reference or not) must be made in that Court".

Apparently, the learned Judge construed the phrase "in a reference" in section 31, sub-section (4) as meaning "in the course of a reference," and that is also the contention before us of the counsel for the appellant, which requires closer examination.

Section 31 of the Indian Arbitration Act of 1940 is in the following terms :

> "(1) Subject to the provisions of this Act, an award may be filed in any Court having jurisdiction in the matter to which the reference relates.
>
> (2) Notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award under the agreement has been, or may be, filed, and by no other Court.
>
> (3) All applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings shall be made to the Court where the award has been, or may be, filed, and to no other Court.
>
> (4) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference an application under the Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference and the arbitration proceedings shall be made in that Court and in no other Court."

Sub-section (1) relates to the question as to where a completed award has to be filed, and prescribes the local jurisdiction for that purpose. Sub-section (2) deals with the ambit of the exercise of that jurisdiction, and declares it to be exclusive by saying that

> "all questions regarding the validity, effect or existence of an award or arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award under the agreement has been, or may be, filed and by no other Court."

Sub-section (3) is intended to provide that all applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings are to be made only in one Court, and lays on the concerned party the obligation to do so. Then comes sub-section (4), the object of which apparently is to go further than sub-section (3) that is, not merely casting on the party concerned an obligation to file all applications in one Court but vesting exclusive jurisdiction for such applications in the Court in which the first application has been already made.

Thus it will be seen on a comprehensive view of section 31 that while the first sub-section determines the jurisdiction of the Court in which an award can be filed, sub-sections (2), (3) and (4) are intended to make that jurisdiction effective in three different ways, (1) by vesting in one Court the authority to deal with all questions regarding the validity, effect or existence of an award or an arbitration agreement, (2) by casting on the persons concerned the obligation to file all applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings in one Court, and (3) by vesting exclusive jurisdiction in the Court in which the first application relating to the matter is filed. The context, therefore, of sub-section (4) would seem to indicate that the sub-section was not meant to be confined to applications made during the pendency of an arbitration. The necessity for clothing a single Court with effective and exclusive jurisdiction, and to bring about by the combined operation of these three provisions the avoidance of conflict and scramble is equally essential whether the question arises during the pendency of the arbitration or after the arbitration is completed or before the arbitration is commenced. There is no conceivable reason why the Legislature should have intended to confine the operation of sub-section (4) only to applications made during the pendency of an arbitration, if as is contended, the phrase " in any reference" is to be taken as meaning " in the course of a reference."

It may be noticed that the Arbitration Act deals with arbitrations of three different categories : (1) arbitration without intervention of the Court dealt with in sections 3 to 19 comprising Chapter II ; (2) arbitration with the intervention of a Court where there is no suit pending provided in section 20 which is a separate Chapter III ; and (3) arbitration in suits dealt with in sections 21 to 25 comprising Chapter IV. The jurisdiction as regards the later two classes of arbitrations in respect of certain matters is provided in the very provisions relating to those two classes of arbitrations, that is, section 20, sub-section (1) and section 21. Sub-section (1) of section 31 appears to refer only to the first class. It may, there-

fore, have been, plausibly, suggested that sub-sections (2), (3) and (4) refer only to this class. But no such position was taken up before us. Indeed, having regard to the wide language employed in these sub-sections it has been assumed that sub-sections (2) and (3) cover all three classes in all their stages. If so, is there any sufficient reason to think that sub-section (4) was meant to have a very restricted operation? On the view of this sub-section suggested for the appellant, not only would an application made after the award was pronounced be excluded from sub-section (4) but also an application made before the commencement of the arbitration, *i.e.*, for the filing of an agreement of reference and for a direction thereupon. It must be remembered that section 31 is one of the group of sections headed "General" which by virtue of section 26 are applicable to all arbitrations. Unless therefore the wording in sub-section (4) of section 31 is so compelling as to confine the scope thereof to applications during the pendency of an arbitration, such a limited construction must be rejected.

As already stated, the entire basis of the limited construction is the meaning of the phrase "*in* any reference" used in sub-section (4) as meaning "in the course of any reference". But such a connotation thereof is not in any ordinary sense compelling. The preposition "in" is used in various contexts and is capable of conveying various shades of meaning. In the Oxford English Dictionary one of the shades of meaning of this preposition is:

> "Expressing reference or relation to something; in reference or regard to; in the case of, in the matter, affair, or province of.
>
> Used especially with the sphere or department in relation or reference to which an attribute or quality is predicated."

In the context of section 31, sub-section (4), it is reasonable to think that the phrase "in any reference" means "in the matter of a reference." The word "reference" having been defined in the Act as "reference to arbitration," the phrase "in a reference" would mean "in the matter of a reference to arbitration." The phrase "in a reference" is, therefore, comprehensive enough to cover also an application first made after the arbitration is completed and a final award is made and in our opinion that is the correct construction thereof in the context. We are, therefore, of the opinion that section 31 (4) would vest exclusive jurisdiction in the Court in which an application for the filing of an award has been first made under section 14 of the Act.

It is undisputed that the application by the respondent Union of India was made before the Gauhati Court on the 10th August, 1949, and the earliest move by the appellant before the Calcutta Court was on the 17th August, 1949. On these facts and on the view of the interpretation of section 31, sub-section (4) which we are inclined to take, it is clear that the Gauhati Court only has the jurisdiction and not the Calcutta High Court as regards the present dispute.

In the result, the two appeals must be dismissed with costs.

Agent for Appellant: *Sukumar Ghose.*

Agent for Respondent: *G. H. Rajadhyaksha.*

G.R./K.S. *Appeals dismissed.*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT :—M. PATANJALI SASTRI, *Chief Justice*, B. K. MUKHERJEA, S. R. DAS AND GHULAM HASAN, JJ.

The Commissioner of Income-tax, West Bengal .. *Appellant**

v.

H. Hirjee .. *Respondent.*

Income-tax Act (XI of 1922), section 10 (2) (xv)—Expenses incurred in defending a criminal prosecution under Hoarding and Profiteering Ordinance, section 13—If expenditure laid out wholly or exclusively for purposes of business.

The deductibility of legal expenses under section 10 (2) (*xv*) of the Income-tax Act must depend on the nature and purpose of the legal proceeding in relation to the business whose profits are under computation, and cannot be affected by the final outcome of that proceeding. Income-tax assessments have to be made for every year and cannot be held up until the final result of a legal proceeding which may pass through several Courts, is announced. Amount spent in defending a criminal prosecution under section 13 of the Hoarding and Profiteering Ordinance, 1943 (No. XXXV of 1943) (on a charge of selling goods at prices higher than were reasonable) cannot be said to be an expenditure laid out or expended wholly or exclusively for the purpose of business as contemplated by section 10 (2) (xv) of the Indian Income-tax Act.

On Appeal from the Judgment and Order, dated the 16th January, 1951, of the High Court of Judicature at Calcutta (Harries, C.J. and Banerjee, J.)[1] in Income-tax Reference No. 46 of 1950.

C. K. Daphtary, Solicitor-General for India (*G. N. Joshi*, Advocate, with him), for Appellant.

N. C. Chatterjee, Senior Advocate (*P. K. Sen Gupta*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Patanjali Sastri, C.J.—This is an appeal from a judgment of the High Court of Judicature at Calcutta[1] answering a reference under section 66-A of the Indian Income-tax Act, 1922 (hereinafter referred to as the Act) in favour of the respondent herein.

The respondent carries on business as selling agents of the Bengal Potteries, Ltd., and he was prosecuted under section 13 of the Hoarding and Profiteering Ordinance, 1943 (Ordinance No. XXXV of 1943) on a charge of selling goods at prices higher than were reasonable in contravention of the provisions of section 6 thereof. It appears that before the prosecution was launched in August 1944, respondent's business premises were searched and a part of his stock was seized and taken away. The respondent defended the case, spending a sum of Rs. 10,895, and the prosecution ended in an acquittal on 16th February, 1945. In his assessment to income-tax for the year 1945-46, the respondent claimed the deduction of the said sum of Rs. 10,895 from the profits of his business under section 10 (2) (*xv*) of the Act. The Income-tax Officer disallowed the claim but the Appellate Assistant Commissioner allowed it, and his decision was confirmed by the Income-tax Appellate Tribunal, Calcutta Bench. Thereupon, the Commissioner of Income-tax, West Bengal, applied to the Tribunal to state a case for decision by the High Court under section 66-A of the Act, and the Tribunal accordingly referred the following question to that Court for its decision :

"Whether in the circumstances of this case the Tribunal was right in holding that the sum of Rs. 10,895, spent in defending the criminal proceeding was an expenditure laid out or expended wholly and exclusively for the purpose of business as contemplated by section 10 (2) (*xv*) of the Indian Income-tax Act?"

In dismissing the appeal preferred by the Income-tax Officer, the Tribunal observed :

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* Civil Appeal No. 75 of 1952. 17th April, 1953.

1. (1951) 55 C.W.N. 415.

" It may be stated straight off that it has not been established by any material that the conviction in cases like this may end in imprisonment. The question that personal liberty was likely to be jeopardised therefore will not be considered by us. . . . . . In any case, in the absence of any material in this particular case that personal liberty was likely to be jeopardised, all that we can say is that there was a chance of conviction in which the respondent might have been fined. No doubt, the element of saving himself from the fine, if any, might be there, but it is so inextricably mixed up with the main purpose for the defence that we are prepared to ignore that little element. In our opinion, the defence was solely for the purpose of maintaining his name as a good businessman and also to save his stock from being under-sold if the Court held that the prices charged by the respondent were unreasonable."

In the order made on the reference Harries, C.J. (with whom Banerjee, J., concurred) remarked :

" In every criminal prosecution where the matter is defended to protect the good name of a business or a professional man, the fear of possible fine or imprisonment must always be there. But the Tribunal have pointed out that this was so inextricably mixed up with the protection of the good name of the business that it can well be found that the money spent in defence in the criminal prosecution was spent solely and exclusively for the purpose of the business. The finding is a finding of fact and is binding upon us."

The learned Judges proceeded to refer to a ruling of the Bombay High Court—*J. B. Advani* v. *Commissioner of Income-tax*[1]—and held that the respondent satisfied both the tests laid down there as applicable in such cases : He was charged with regard to a transaction which took place in the ordinary course of business and he was charged in his capacity as a trader.

" If these two tests were satisfied and the Court came to the conclusion that the primary object of incurring the expenditure was to protect the good name of business, then it could be said that the expenditure was wholly and exclusively for the purposes of the business."

The learned Judges accordingly answered the question referred to them in the affirmative. They, however, granted a certificate under section 66-A (2) of the Act that the case is a fit one for appeal to this Court.

We are unable to agree that the finding of the Tribunal, to which reference has been made, is binding on the Court as a finding of fact and is decisive of the reference. The finding of the Tribunal is vitiated by its refusal to consider the possibility of the criminal proceeding terminating in the conviction and imprisonment of the respondent. As has been stated, the respondent was prosecuted under section 13 which provides :

" Whoever contravenes the provisions of this Ordinance shall be punishable with imprisonment for a term which may extend to five years or with fine or with both."

The respondent was charged with contravention of section 6, which by sub-section (1) prohibits the sale by a dealer or producer of an article for a consideration which is unreasonable and sub-section (2) defines " unreasonable consideration ". The framers of the Ordinance thus appear to have regarded the offence as one calling for a deterrent punishment in view of its anti-social character, and it is idle to suggest that it is for the Income-tax authorities to prove in such cases that the conviction might result in a sentence of imprisonment and that, in the absence of such proof, there was, at the most, only a chance of conviction and fine. We cannot appreciate the remark that " even this chance of conviction and fine was so inextricably mixed up with the main purpose of the defence that it could be ignored ". A finding arrived at on this line of reasoning is obviously vitiated by a serious misapprehension regarding the risk involved in a prosecution under the Ordinance and it cannot be regarded as binding on the Court in dealing with the reference. If, as the High Court realised, in every criminal prosecution where the matter is defended to protect the good name of a business or a professional man, the fear of possible fine or imprisonment must always be there, it must ordinarily be difficult for any court to say, that the expenses incurred for the defence, even if they are not to be regarded as the " personal expenses " of the person accused, constituted " expenditure laid out or expended wholly and exclusively for the purposes of the business ". Learned counsel for the respondent frankly admitted

1. (1950) I.L.R. (1951) Bom. 158 : A.I.R. 1950 Bom. 297 : 18 I.T.R. 557.

that he was not able to find a single case in the books where the expenses incurred by a person exercising a trade or profession in defending a criminal prosecution, which arises out of his business or professional activities, were allowed to be deducted in the assessment of his profits or gains for income-tax purposes.

Reference was made in the course of argument to numerous cases where legal expenses incurred in civil litigation, arising out of matters incidental to the carrying on of a business, were allowed as a deduction in the computation of its profits, *e.g.*, *Commissioner of Income-tax* v. *Maharajadhiraj of Darbhanga*[1], where the Privy Council held that law charges incurred in defending an action brought against a money-lender for damages for conspiracy, misrepresentation and breach of contract to advance sufficient funds to finance a company were allowable as business expenditure. In that class of case, no question could arise as to the primary or secondary purpose for which the legal expenses could be said to have been incurred as in the case of a criminal prosecution where the defence cannot easily by dissociated from the purpose of saving the accused person from a possible conviction and imposition of the prescribed penalty. Nor are we satisfied, as at present advised, that a distinction drawn in the Bombay case between the legal expenses of a successful and unsuccessful defence is sound. The deductibility of such expenses under section 10 (2) (*xv*) must depend on the nature and purpose of the legal proceeding in relation to the business whose profits are under computation, and cannot be affected by the final outcome of that proceeding. Income-tax assessments have to be made for every year and cannot be held up until the final result of a legal proceeding, which may pass through several courts, is announced.

For the reasons indicated we allow the appeal and answer the question referred in the negative. The appellant will be entitled to his costs both here and in the Court below.

Agent for Appellant: *G. H. Rajadhyaksha.*

Agent for Respondent: *S. C. Banerjee.*

G.R./K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMASWAMI.

Venukuri Danda Reddi .. *Petitioner**

v.

Vajrala Ramireddi .. *Respondent.*

Madras Agriculturists' Relief Act (IV of 1938), sections 19 and 25-A—Application for scaling down—Order by Court of Small Causes—If appealable.

An order on an application under section 19 of the Madras Act IV of 1938 to a Court of Small Causes is not appealable under section 25-A of the said Act inasmuch as the scaling down is of a decree passed by a Small Cause Court and any decree passed by a Small Cause Court is only revisable by the High Court and cannot be appealed against to the Court having appellate jurisdiction ordinarily.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge, Guntur, in A.S. No. 141 of 1950, dated 2nd November, 1950, preferred against the order of the Court of the District Munsif, Guntur, in I.A. No. 71 of 1950 in S.C. No. 1566 of 1929.

Messrs. O. Chinnappa Reddy and *P. R. Ramakrishna* for Petitioner.

A. V. Krishna Rao for Respondent.

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1. (1942) 2 M.L.J. 261 : L.R. 69 I.A. 15 : I.L.R. 23 Pat. 491 (P.C.).

* C.R.P. No. 121 of 1951. 24th March, 1953.

The Court delivered the following

JUDGMENT.—The short point for determination in this Civil Revision Petition is whether the order of the District Munsif of Guntur in I.A. No. 71 of 1950 in S.C. No. 1566 of 1929 an application under section 19 of Madras Act IV of 1938 is appealable under section 25-A of the said Act, as has been held by the learned Subordinate Judge of Guntur against the contentions of the learned advocate for the respondent in the lower Court that no appeal lay in such cases inasmuch as the scaling down was of a decree passed by the Small Causes Court and that any decree made by the Small Causes Court is only revisable by the High Court and cannot be appealed against to the Court having appellate jurisdiction ordinarily. The point is concluded by authority, *see* A.A.O. No. 222 of 1945,[1] wherein Wadsworth, J., held that against the orders of a Court of Small Causes appeals are excluded by the provisions of section 27 of the Provincial Small Cause Courts Act. Therefore the order of the lower Appellate Court is set aside and that of the learned District Munsif will stand confirmed. This Civil Revision Petition is allowed with costs.

R.M. *Revision allowed.*

END OF VOLUME (1953) I M.L.J. (REPORTS).

1. (1946) 1 M.L.J. (N.R.C.) 33.

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PRINTED AND PUBLISHED BY N. RAMARATNAM, M.A., B.L.,
AT THE MADRAS LAW JOURNAL PRESS, MYLAPORE, MADRAS.